STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0260

Jeffrey Lynn Nielsen, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 5, 2013
Affirmed
Halbrooks, Judge

Washington County District Court
File No. 82-CR-10-4424

Charles L. Hawkins, Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Francis J. Rondoni, Jeffrey D. Bores, Becky L. Erickson, Chestnut Cambronne PA, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges the district court's denial of his petition for postconviction relief, arguing that he is entitled to a new trial on three grounds: (1) the suppression of *Brady* material by the prosecution, (2) intentional prosecutorial misconduct, and (3) denial of due process of law and a fair trial. Appellant also contends that the district court erred by denying his motion for an evidentiary hearing on these issues. We affirm.

FACTS

On October 4, 2010, K.M. contacted the Washington County Sheriff's Office and reported observing a vehicle with campaign signs for Stephen Bohnen tied to its top. K.M. followed the vehicle because he believed that a supporter of Bohnen's opponent had stolen the signs. Both vehicles pulled to the side of the road, and K.M. stated that a man, later identified as appellant Jeffrey Lynn Nielsen, got out of his vehicle and approached K.M.'s vehicle. K.M. reported that Nielsen's demeanor was aggressive and threatening and that Nielsen asked "what the f--k he wanted." K.M. said that he was lost, and the encounter ended.

Nielsen was charged with disorderly conduct in violation of Minn. Stat. § 609.72, subd. 1(3) (2010), theft in violation of Minn. Stat. § 609.52, subd. 2(1) (2010), and two traffic offenses. Four days later, he filed a civil complaint against K.M., Bohnen, and Washington County, alleging fraud, conspiracy, and malicious prosecution.

The city dropped the traffic charges prior to trial, and the district court granted Nielsen's motion to dismiss the theft charge for lack of probable cause. The district court

also granted Nielsen's motion to exclude all evidence about the civil case in the trial on the disorderly conduct charge. The city did not oppose either motion. Following a two-day jury trial, the jury returned a verdict of guilty on the disorderly conduct charge, and Nielsen was sentenced to a $1,000 fine and 90 days in jail, with $700 and 89 days suspended for one year. In lieu of the day in jail, he was authorized to perform eight hours of community service.

In the course of discovery in the civil lawsuit, Nielsen obtained a copy of the prosecutor's file from the criminal case. The file contained three e-mails sent from K.M. to the prosecutor in the two weeks before trial. The prosecutor reviewed these e-mails, but did not disclose them to Nielsen. In a March 17 e-mail, K.M., a certified investment-management analyst, repeated the details of the October 4, 2010 incident, discussed the civil suit and his resulting "extreme stress" and "financial hardship," and stated that his "license is at stake if [he's] found guilty of fraud."

A March 18 e-mail contained an attachment with a "summary of the facts and [K.M.'s] state of mind" and a letter from Nielsen's attorney in the civil case. The e-mail concluded, "As I understand it, if he's convicted on [disorderly conduct], his suits against me are dismissed. Therefore, I urge you to do what you can to get a conviction even though I know in the grand scheme of things how trivial this charge might seem." In one of the attachments, K.M. stated that "[t]here are deeper implications here, my industry is highly regulated and if I am somehow found guilty of Malicious Prosecution or Fraud my license could be in jeopardy." A March 22 e-mail contained a copy of the text of the attachments to the March 18 e-mail.

Nielsen petitioned for postconviction relief, arguing that he is entitled to a new trial because (1) he was denied due process of law and a fair trial when the prosecution failed to disclose the e-mails; (2) the e-mails were newly discovered evidence; (3) the failure to disclose the e-mails along with certain statements to the jury regarding K.M.'s credibility constituted intentional prosecutorial misconduct; and (4) the cumulative effect of the errors denied him a fair trial. He moved for an evidentiary hearing on these issues.

The district court denied the petition and the motion. It concluded that the e-mails should have been disclosed under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), but determined that Nielsen is not entitled to a new trial because "there is not a reasonable probability that the result of the jury trial would have been different if the evidence had been disclosed to the defense." The district court further concluded that because the prosecutorial-misconduct and due-process violations both depended on the resolution of the *Brady* issue, and because the newly discovered evidence standard is less favorable than the *Brady* standard, the petition could not be granted on those grounds. This appeal follows.

D E C I S I O N

We review the denial of postconviction relief for an abuse of discretion. *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010). We will reverse only if "the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Id.* We review questions of law de novo. *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006).

I.

Suppression of evidence that is favorable to a criminal defendant violates due process when the evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97; *see also* Minn. R. Crim. P. 9.01 (requiring disclosure of material exculpatory evidence). A *Brady* violation exists if (1) the evidence is favorable to the accused, being either exculpatory or impeaching; (2) the state suppressed the evidence, either intentionally or unintentionally; and (3) the defendant was prejudiced by the suppression. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005).

In order to be prejudicial, the evidence must be material. *Id.* at 460. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Id.* (citation and quotations omitted). Materiality is a mixed question of fact and law, which we review de novo. *Id.*

Minn. R. Crim. P. 9.04 provides that in misdemeanor cases and upon request the state must "disclose any material or information within the prosecutor's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged." Although Minnesota courts have not discussed the scope of rule 9.04, its language is nearly identical with that of rule 9.01, which the supreme court has concluded imposes a narrower disclosure requirement than *Brady*. *See State v. Miller*, 754 N.W.2d 686, 706 (Minn. 2008).

The state argues that the prosecutor was not required under *Brady* or the Minnesota Rules of Criminal Procedure to provide the e-mails because the information they contain is not exculpatory or impeaching. The state contends that the information in the e-mails is duplicative and would not have "significantly impaired [K.M.'s] credibility." But these arguments speak to the materiality of the evidence, not their favorability. We agree with the district court that the prosecutor should have disclosed the e-mails as potential impeachment evidence because they relate to an argument that K.M. was biased as a witness.

Nielsen argues that K.M.'s statements in the e-mails were material because they "clearly establish a motive to fabricate or lie" and could have been used on cross-examination to "impeach [K.M.] with [K.M.'s] prior inconsistent statement." But the e-mails do not provide any information that was not already possessed by Nielsen, who was uniquely aware of K.M.'s potential interest in the outcome of the criminal case.

Further, most of the information in the e-mails summarizes the events of October 4 and is consistent with K.M.'s statements to the police and his testimony at trial. The other statements concern the civil case, of which Nielsen was clearly aware, and K.M.'s concern that an unfavorable outcome in that case could result in the loss of his professional licenses and other personal and financial hardship. This information was all available to Nielson prior to trial and undoubtedly factored into his decision to ask the district court to exclude all mention of the civil case in the criminal trial.

Nielsen argues that his request to exclude evidence of the civil claim is immaterial because "counsel did not possess the *Brady* material when the request was made." He

argues that a "lawyer cannot make an informed tactical or strategic decision without being fully informed." But even without the information contained in the e-mails, Nielsen's knowledge, due to his decision to bring a lawsuit against K.M., was enough to allow him to make the strategic decision not to introduce evidence of that potential bias.

And even if disclosure of the e-mails had led Nielsen to introduce evidence of the civil case to impeach K.M.'s testimony, there is not a reasonable probability that the result of the jury trial would have been different. The civil case arose only after K.M.'s initial interview with the police and after Nielsen was charged with disorderly conduct. There is no indication that K.M.'s testimony deviated from his initial report in any way that would have had a material impact on the outcome of the case. And if K.M.'s testimony had deviated, Nielsen could have used that original statement for impeachment purposes.

Nielsen cites a number of cases, primarily from foreign jurisdictions, in support of the argument that suppressed evidence is material where it concerns the credibility of a sole or key witness. We agree that failure to disclose impeachment evidence may lead to a due-process violation, but it does not follow that evidence is material simply because a case turns on the testimony of a single witness. Evidence is material only when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Pederson*, 692 N.W.2d at 460 (quotation omitted).

The cases that Nielsen relies on involved impeachment evidence that contradicted the witness's testimony or showed prosecutorial conduct that could have induced the

witness to fabricate his testimony. *See Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 766 (1972) (government failed to disclose promise not to prosecute a key witness in exchange for his testimony); *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 560-61 (4th Cir. 1999) (prior inconsistent statements were material where they directly contradicted the witness's testimony relating to the central issue before the jury); *Crivins v. Roth*, 172 F.3d 991, 998 (7th Cir. 1999) (evidence withheld concerned witness's past dishonesty with police and judicial officers). Here, there is no suggestion that the prosecutor had any involvement in K.M.'s decision to testify and no indication that the so-called impeachment evidence would have contradicted any of his statements at trial concerning the October 4 incident. In the final analysis, the evidence was duplicative of information already known to Nielsen and to the district court.

II.

Nielsen argues that he is entitled to a new trial because the prosecutor committed intentional, harmful misconduct by suppressing K.M.'s e-mails and then implying that K.M. had no stake in the outcome of the case. We may reverse the district court based on prosecutorial misconduct only if the misconduct, "considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). "Misconduct is deemed harmful if it played a significant or substantial role in persuading the jury to convict. The more serious the misconduct, the more likely the misconduct was harmful. In any case, the test is whether the misconduct is harmless beyond a reasonable doubt." *State v. VanWagner*, 504 N.W.2d 746, 749 (Minn. 1993).

The alleged *Brady* violation is critical to the misconduct allegation. Because we conclude that there was no *Brady* violation, any misconduct that occurred is harmless beyond a reasonable doubt. The cumulative effect of several errors may require a new trial even where no individual error is sufficient. *See In re Welfare of D.D.R.*, 713 N.W.2d 891, 905 (Minn. App. 2006). But the errors alleged here collapse into the single act of nondisclosure, which we conclude is insufficient to meet the requirements of *Brady* or the less-stringent requirements of Minn. R. Crim. P. 9.04.

III.

"An evidentiary hearing is required only when the post-conviction pleadings place material facts in dispute." *Berg v. State*, 403 N.W.2d 316, 318 (Minn. App. 1987), *review denied* (Minn. May 18, 1987). An evidentiary hearing is not necessary where "the petitioner alleges facts that, if true, are legally insufficient to entitle him to the requested relief." *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). Nielsen argues that he seeks a hearing "to present evidence in support of the allegations contained in his petition." But he does not identify any material facts in dispute, and the facts that he does allege are legally insufficient to entitle him to his requested relief.

Affirmed.