STATE OF MINNESOTA
IN COURT OF APPEALS
A10-84

Tou Lu Yang, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 21, 2010
Affirmed in part, reversed in part, and remanded
Lansing, Judge

Hennepin County District Court
File No. 27-CR-99-69223

David W. Merchant, Chief Appellate Public Defender, Renée Bergeron, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Wright, Judge; and Connolly, Judge.

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

LANSING, Judge

In this appeal from the partial denial of a petition for an evidentiary hearing in a postconviction proceeding, Tou Lu Yang asserts that the postconviction court erred in ordering an evidentiary hearing on only two of the multiple issues raised in his petition. We agree with Yang's claim that the state's failure to disclose a St. Paul police officer's statement that Yang was not the shooter satisfies the evidentiary-hearing threshold for a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). Consequently, we reverse and remand that issue for inclusion in the evidentiary hearing, but we affirm the district court's order on all other issues.

F A C T S

Following a December 1999 jury trial, Tou Lu Yang was convicted of three charges that stemmed from the shooting of Curtis Campbell and the shooting death of Miguel McElroy, Campbell's son. In a direct appeal, Yang challenged his convictions of aiding and abetting second-degree murder, aiding and abetting second-degree attempted murder, and aiding and abetting second-degree assault. We affirmed his convictions in an opinion that addressed the sufficiency of the evidence, the district court's evidentiary rulings, the district court's refusal to reopen the testimonial phase of the trial when a claim of recanted eye-witness testimony arose after the jury began deliberations, the denial of a new trial based on claims of prosecutorial misconduct, and the denial of a new trial to allow evidence of the recanted testimony. *State v. Yang*, 627 N.W.2d 666, 671-72 (Minn. App. 2001), *review denied* (Minn. July 24, 2001).

Yang filed a pro se postconviction appeal in 2007, and, following the appointment of counsel, an amended postconviction petition in 2009. Yang raised multiple claims in his postconviction petition. The postconviction court ordered an evidentiary hearing on only two of the claims: the credibility of a posttrial recanting witness's exonerating statements and whether Yang's trial counsel was ineffective when he told the jury in his opening statement that Yang would testify without consulting Yang. Yang now appeals the denial of an evidentiary hearing on five of his claims. The facts underlying Yang's conviction and the evidence presented at trial are set forth in this court's opinion in Yang's direct appeal. *See Yang*, 627 N.W.2d 666. We briefly summarize the facts that are relevant to Yang's current claims.

In July 1999 four Asian men in a green Tahoe, a Chevrolet sports utility vehicle (SUV), approached McElroy's brother, DM, outside a convenience store and asked him to purchase marijuana for them. DM agreed and got into the SUV and rode with the men to several locations to try to buy the drugs. Eventually, DM got out of the car and took with him $60 that the men had given him to purchase drugs. DM did not return to the SUV. Later that day, two of the men who had been in the SUV went to the convenience store and confronted McElroy about the money that his brother had taken. Campbell, DM's and McElroy's father, saw the confrontation as he was driving past the store and pulled over to see what was happening. After speaking with the two Asian men, Campbell and McElroy walked toward the entrance of the convenience store and the other men shot them. McElroy died on the street in front of the store.

Campbell and two other eye-witnesses identified Yang as one of the shooters from a photographic display. They also identified Yang at trial as one of the shooters. A fourth witness testified that he saw Yang near the convenience store shortly before the shooting. From a photographic display, DM identified Yang as the driver of the SUV that he rode in before the shooting and testified that Yang had asked him to buy marijuana in the past. DM also testified about the detailed description of the SUV's interior he provided the police after the shooting and his later identification of the SUV. Police witnesses testified that the SUV that DM identified was registered to Yang's father and seized at Yang's residence.

The five claims on which the postconviction court denied an evidentiary hearing that Yang raises in this appeal are: (1) that the state failed to disclose exculpatory evidence that members of the St. Paul police department knew the identity of the shooters, who did not include Yang; (2) that the state failed to disclose the fact that one of the eye-witnesses identified another person as one of the shooters from a second photographic display; (3) that the evidence that St. Paul police officers knew Yang was not one of the shooters constituted newly discovered, exculpatory evidence; (4) that DM's statement to a defense investigator that he was told his DNA and fingerprints were discovered in the SUV and that he was shown pictures of the SUV before identifying it constituted newly discovered, exculpatory evidence; and (5) that another potential suspect with gang ties was a block away from the shooting at the time and may have been involved constituted newly discovered, exculpatory evidence. Yang raises several other arguments for relief in his reply brief and supplemental pro se brief.

D E C I S I O N

A petitioner for postconviction relief "has the burden of establishing, by a fair preponderance of the evidence, facts [that] warrant a reopening of the case." *State v. Rainer*, 502 N.W.2d 784, 787 (Minn. 1993). Denial of a petition without a hearing is appropriate if "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2008). To receive an evidentiary hearing, a "petitioner must allege facts that would, if proved by a fair preponderance of the evidence, entitle him to relief." *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002). The allegations must consist of more than "conclusory, argumentative assertions, without factual support." *State v. Turnage*, 729 N.W.2d 593, 599 (Minn. 2007). If material facts are in dispute, the postconviction court must grant an evidentiary hearing. *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995).

I

The first two claims that Yang contends were erroneously excluded from the district court's order for an evidentiary hearing allege failure to disclose exculpatory evidence. "[S]uppression by the prosecution of evidence favorable to an accused. . . violates due process [when] the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97. This obligation extends to anyone who has participated in the investigation or evaluation of the case. Minn. R. Crim. P. 9.01, subd. 1(7); *State v. Williams*, 593 N.W.2d 227, 235 (Minn. 1999) (stating "individual prosecutor has a duty

to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police" (quotation omitted)).

To constitute a *Brady* violation, the evidence must be favorable to the accused, either because it is exculpatory or impeaching; it must have been suppressed by the state, willfully or inadvertently; and the nondisclosure must have resulted in prejudice. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005). The determination of prejudice, or materiality, requires "consideration of whether the evidence would have been admissible at trial and whether there is a 'reasonable probability' that it would have made a difference in the result at trial." *Gorman v. State*, 619 N.W.2d 802, 806 (Minn. App. 2000), *review denied* (Minn. Feb. 21, 2001). Reasonable probability means that the state's nondisclosure of evidence "undermines confidence in the outcome of the trial." *Id.* at 807 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566 (1995)). We review the question of materiality de novo. *Pederson*, 692 N.W.2d at 460.

Yang submitted a notarized affidavit from the defense investigator that he hired. In his affidavit the investigator stated that a St. Paul police officer, who had provided the initial information linking the shooting to Yang's green Tahoe, told the investigator that he knew the names of the shooters, who were Yang's cousins; that this information had been offered to the prosecution or investigating officers but was not accepted because it would "mess up the appeals;" that the investigator arranged an interview to find out more information; and that the officer called the investigator to cancel the interview stating that his boss did not approve the meeting and that he would only provide additional information if he were subpoenaed.

Yang argues that the evidence of a St. Paul police officer's knowledge of the shooters' identities and knowledge that Yang was not one of the shooters should have been disclosed, and the failure to disclose constitutes a *Brady* violation, requiring a new trial.

The police officer told the defense investigator that Yang's cousins, and not Yang, were the shooters. This is exculpatory evidence favorable to Yang. The officer who made these statements had also contributed to the initial investigation of the shooting. Consequently, the state was obligated to disclose to Yang this information about the possible identity of shooters other than Yang. Because the state had an obligation to provide this information to Yang, the failure to provide it results in a *Brady* violation if the evidence was material to the determination of Yang's guilt. The postconviction court concluded that the officer's statement to the investigator was merely an opinion about the identity of the shooters and not evidence that should have been disclosed. The officer, however, indicated to the investigator that he could provide additional details but later refused to provide the details without a subpoena. Under these circumstances, the absence of more detailed facts is not sufficient to deny Yang an evidentiary hearing if the evidence is material.

Whether evidence is material requires consideration of both its admissibility and the likelihood that it would have changed the outcome at trial. *Gorman*, 619 N.W.2d at 806. The evidence submitted in support of a petition for postconviction relief need not be admissible if it could lead to admissible evidence at an evidentiary hearing. *See Ferguson*, 645 N.W.2d at 443, 446 (reversing and remanding for evidentiary hearing

despite inadmissibility of supporting affidavit because evidentiary hearing could lead to admissible evidence through subpoenaed testimony or hearsay exceptions).

The officer stated to the investigator that he would cooperate with a subpoena. And the record suggests that the officer may be able to testify to sufficient facts based on personal knowledge to show that a different outcome at trial was reasonably probable if Yang had evidence of the identity of alternative shooters. In assessing materiality, we may also consider "any adverse effect that the prosecutor's failure to disclose [evidence] might have had on the preparation or presentation of the defendant's case." *State v. Williams*, 593 N.W.2d at 235 (quoting *United State v. Bagley*, 473 U.S. 667, 683, 105 S. Ct. 3375, 3384 (1985)). Even if an evidentiary hearing does not lead to admissible evidence from the officer, the officer's testimony may show that Yang's preparation or presentation of his defense was prejudiced by not knowing what police knew about the identities of the shooters.

We recognize that the weight of the other evidence at trial can be sufficient to show that the undisclosed evidence is not material and that an evidentiary hearing is not warranted. *See Williams*, 593 N.W.2d at 235-36. Although three eye-witnesses identified Yang as the shooter, one of these witnesses recanted during jury deliberations. Even though the recantation was later determined not to be genuine, the district court questioned the credibility of the witness generally. Two other witnesses who spoke with the shooters at the scene shortly before the shooting took place did not identify Yang as a shooter and the postconviction court granted an evidentiary hearing to evaluate the credibility of the statement by one of these witnesses that she is ninety to ninety-five

percent certain Yang was not one of the shooters. We also note that the test for prejudice, or materiality, in a *Brady* violation is not as stringent as the test for prejudice that is applied to newly discovered evidence, and it is the less-stringent standard that we apply to determine whether an evidentiary hearing is required. *Walen v. State*, 777 N.W.2d 213, 217 (Minn. 2010); *Gorman*, 619 N.W.2d at 806. We conclude that Yang has met the evidentiary-hearing threshold on the state's failure to disclose the St. Paul police officer's statement that Yang was not the shooter.

Yang's second *Brady* claim relies on the fact that witness RH identified another suspect from a second photographic display. Yang submitted an affidavit from RH and the transcript of the defense investigator's interview with RH in support of his postconviction petition. It demonstrates that RH identified Yang as one of the shooters from one photographic display and identified the person he believed to be the other shooter from the second photographic display. The fact that RH identified the person he believed was the second shooter is not exculpatory and not material because it is unlikely to have any impact on a jury's verdict of Yang's guilt. Thus, the postconviction court did not err in denying an evidentiary hearing on this ground.

II

Yang advances the remaining three claims for an evidentiary hearing under the claim of newly discovered evidence. One of these claims, the statements of the St. Paul police officer, has already been addressed in our analysis of Yang's *Brady* argument and we remand it for inclusion in the evidentiary hearing. Thus it is unnecessary to address it as newly discovered evidence.

To receive a new trial based on newly discovered evidence, a petitioner must show: "(1) that the evidence was not known [by] the defendant or his counsel at the time of [] trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or more favorable result." *Rainer*, 566 N.W.2d at 695.

Yang argues that he should be granted an evidentiary hearing based on evidence that DM believed his DNA and fingerprints were found in the SUV, that DM was shown pictures of the green Tahoe before identifying it, and he possibly saw those pictures before describing it to police. In support of this claim, Yang only submitted copies of notes from the defense investigator's interview with DM. In his brief to this court, Yang asserts that DM refused to provide an affidavit to the investigator, but the investigator's notes do not address this refusal and the investigator did not submit an affidavit on this issue. In his notes, the investigator states that DM told him that he was shown pictures of a green Tahoe before he identified Yang's car at the impound lot and that DM cannot remember if he was shown the photographs before giving a detailed description of the SUV's interior to the police. The investigator's notes do not indicate whether DM was shown pictures of the SUV's interior, or only the exterior of a green Tahoe. The notes also state that DM told the investigator that police informed him that fingerprint and DNA evidence proved he had been in the car. The notes do not specify whether DM was told this before or after he identified the SUV.

Although Yang argues that this new evidence undermines the reliability of DM's identification of the SUV, and therefore his connection to the crimes, the record does not support his argument. From a photographic display DM identified Yang as the driver of the car and as someone who had previously approached him to buy drugs, independent from his description and identification of the SUV. Three eye-witnesses identified Yang as the shooter or as present outside the convenience store shortly before the shooting. And the district court record indicates the following timeline: DM gave a description of the SUV on July 11, investigators did not obtain pictures of the exterior of the SUV until July 12, and investigators did not obtain access to the interior until July 13—the same day DM identified it.

The notes from the investigator fail to establish grounds for postconviction relief based on newly discovered evidence. It is the petitioner's burden to allege facts that, if proven by a fair preponderance of the evidence, entitle him to relief. *Ferguson*, 645 N.W.2d at 446. And "allegation[s] must be more than just [] argumentative assertion[s] to warrant an evidentiary hearing." *Doppler v. State*, 771 N.W.2d 867, 873 n.2. Yang did not provide a factual basis for his allegations, and the facts alleged by Yang are not sufficient to undermine the reliability of DM's identification. Also, the evidence that DM was shown photographs of an SUV and told that his fingerprints and DNA were found in the Tahoe, if proved, would not likely lead to an acquittal in light of the other evidence at trial. The district court did not abuse its discretion in denying an evidentiary hearing to assess the evidence that DM was shown photographs of the SUV before identifying it,

but likely after describing it, and was told at some point that forensic evidence connected him to the car.

Yang also argues that the district court erred in denying an evidentiary hearing based on his claim that another potential suspect, KMY, was near the convenience store at the time of the shooting and was connected to the shooting. The district court granted an evidentiary hearing to assess the credibility of one witness's exonerating statements and her explanation that she did not tell police about the shooters' connection to KMY because KMY threatened her. Thus, much of the evidence that Yang discusses in his new-evidence claim will be evaluated in the evidentiary hearing. Evidence limited to KMY's presence at the scene and police records of his gang connections is speculative and collateral and unlikely to lead to a more favorable result at trial, on its own. *See Williams*, 593 N.W.2d at 235 (holding collateral and speculative evidence that third-party may have committed crime with which defendant is charged is not material under *Brady*). The district court did not abuse its discretion in denying a hearing to explore evidence that consists only of KMY's presence and criminal history.

III

Yang raises several additional arguments in his reply brief and supplemental pro se brief that were not raised directly in his 2009 amended petition. In his reply brief, Yang challenges the reliability of identifications from photographic displays and cross-racial identifications. These claims are *Knaffla*-barred. *See State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (holding all claims that have been raised or could

have been raised on direct appeal are procedurally barred from consideration in postconviction review).

In his pro se supplemental brief, Yang argues that the claims raised in his 2009 amended postconviction petition and his main appellate brief require us to reverse his convictions and release him from incarceration. Because the evidence submitted in support of his petition has not been shown to be admissible in a new trial, much less sufficient to prove Yang's innocence on its own, reversal and discharge are inappropriate. In the direct appeal we held that the evidence submitted at trial was sufficient to support Yang's convictions, and until Yang establishes new evidence that would call the trial evidence into question, he has not carried his burden to show he is entitled to relief. *See Rainer*, 502 N.W.2d at 787 (stating petitioner's burden).

Affirmed in part, reversed in part, and remanded.