

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP790-CR

Cir. Ct. No. 2012CF71

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALTER W. WESSEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN and DAVID WAMBACH, Judges.

Affirmed.

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Walter Wessel appeals a judgment of conviction and an order denying postconviction relief.¹ Wessel contends that the State violated his constitutional due process rights when the State failed to provide Wessel with impeachment evidence in the form of audio recordings of police interviews of the State’s witnesses. We conclude that Wessel was not denied due process. We affirm.

¶2 In March 2012, Wessel was charged with felony criminal damage to property as a party to a crime. The criminal complaint alleged that, on March 15, 2011, Wessel and two juveniles—D.B. and A.H.—damaged a house previously rented by D.B.’s family. Wessel filed a discovery demand for all relevant written or recorded statements of witnesses. The State provided Wessel with the police reports of the investigating officer, Detective Leah Meyer, detailing Meyer’s interviews of D.B. and A.H. The police reports revealed that, in the interviews, D.B. and A.H. admitted their involvement in damaging the property and implicated Wessel as well. However, the State failed to provide Wessel with the audio recordings of the interviews.

¶3 At trial, defense counsel argued that Wessel was not with D.B. and A.H. when they damaged the house, and that D.B. and A.H. were lying when they said Wessel was with them. Counsel argued that D.B. and A.H. had lied repeatedly to the police, and that they lacked any credibility at all. Additionally,

¹ The Honorable Jacqueline Erwin presided over trial and the original sentencing, and the Honorable David Wambach presided over the sentencing after revocation and postconviction proceedings. Wessel’s appellate counsel has informed us that Wessel passed away while this appeal was pending. The appeal continues despite Wessel’s death. See *State v. McDonald*, 144 Wis. 2d 531, 536, 424 N.W.2d 411 (1988) (right to an appeal continues despite the appellant’s death).

defense counsel attempted to impeach D.B. and A.H. during cross-examination by questioning them about specific lies they had told to the police, and their closer friendship with one another than with Wessel. The jury returned a guilty verdict, and the circuit court entered a judgment of conviction imposing three years of probation, sentence withheld.

¶4 Wessel filed a postconviction motion seeking a new trial on grounds that his due process rights were violated when the State failed to provide him with impeachment evidence, in the form of the audio recordings of the interviews of D.B. and A.H. The circuit court denied the motion, finding that the difference between the impeachment evidence in the police reports that were disclosed to the defense, and in the audio recordings that the State failed to disclose, was not “material” for purposes of Wessel’s constitutional claim. Wessel appeals the judgment of conviction and the order denying postconviction relief.

¶5 “[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *State v. Harris*, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737 (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). To establish a *Brady* violation, “the defendant must show that ... the evidence was favorable to the defendant and that the evidence was ‘material’ to the determination of the defendant’s guilt.” *State v. Rockette*, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 718 N.W.2d 269.

¶6 A claimed *Brady* violation may be premised upon the State’s failure to disclose impeachment evidence that was favorable to the defense and material to a determination of guilt. *Harris*, 272 Wis. 2d 80, ¶12. “Evidence is material

for *Brady* purposes 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.” *Rockette*, 294 Wis. 2d 611, ¶40. We review de novo whether the facts of a case establish a *Brady* violation. *Rockette*, 294 Wis. 2d 611, ¶39.

¶7 Wessel argues that the audio recordings were material impeachment evidence because they directly related to the sole issue at trial, that is, whether Wessel was involved in damaging the property. Wessel points out that there was no physical evidence tying Wessel to the scene of the crime and that Wessel made no inculpatory statements to police. Wessel argues that the State’s entire case rested on the credibility of D.B. and A.H. and that the audio recordings contained additional impeachment evidence that went to the heart of Wessel’s defense. Specifically, Wessel contends that “[w]hat is not revealed in the police reports ... is *how* Detective Meyer got [D.B.] and [A.H.] to confess.” Wessel argues that the State’s case was already weak, and that there is a reasonable probability of a different result had the defense been able to cross-examine the State’s witnesses using that additional information for impeachment purposes. We disagree.

¶8 Wessel points to the following communications from Detective Meyer to D.B. prior to D.B.’s admissions that were not documented in Meyer’s police report: reminding D.B. about problems D.B. was having at school, including fighting and drinking, as well as making racist comments that resulted in D.B.’s expulsion; asking D.B. about his plans for the future; noting that D.B. was still a juvenile and thus would be treated differently than an adult for the crime; stating that Meyer was giving D.B. an opportunity to make things right and get help; stating Meyer’s belief that D.B. was involved in the damage, that Wessel was also involved, and there would be evidence to prove it; stating that Meyer would have to make a recommendation to the district attorney’s office, and she

could either “make the lock ’em up and throw away the key” recommendation based on a lack of remorse, or “make the recommendation that, yeah, they screwed up. They know they screwed up. They feel bad about what they did”; and stating that D.B. had hurt his mother, and D.B. could only move forward by admitting his involvement and asking for forgiveness. Wessel contends that all of that information could have been used by defense counsel to attempt to further impeach D.B. Wessel argues that the additional impeachment evidence went not only to D.B.’s history of lying, which had been the subject of cross-examination, but also to the additional points of D.B.’s ability to recall based on alcohol use and his motive to falsify a story based on police pressure.

¶19 Wessel points to the following communications between Detective Meyer and A.H. prior to A.H.’s admissions that were not documented in Meyer’s police report: Meyer’s statement that Meyer knew A.H. was involved and that A.H. should be honest so that he would not be blamed as the mastermind of the group; A.H.’s statement to Meyer that “You’re making it seem like you’re trying to get me in trouble. I’m not going to lie”; Meyer’s statement to A.H. that A.H.’s version of the events did not line up with the information Meyer had, and A.H.’s response of, “Well of course they’d try to pin stuff on me. That just makes sense”; and A.H.’s statement that Wessel “didn’t seem like a good kid.” Wessel contends that the additional information could have been used by defense counsel to attempt to further impeach A.H. by showing that A.H. believed Wessel had blamed A.H. for the damage to the property, and that A.H. held animosity towards Wessel.²

² Wessel also contends that the unknown details as to the consequences for D.B. and A.H. based on their involvement were potential sources of further impeachment that were unavailable because the audio recordings were not disclosed to the defense. Wessel does not adequately explain how the issue of consequences for D.B. and A.H. was tied to the recordings.

(continued)

¶10 Wessel contends that there is a reasonable probability of a different outcome had the State disclosed the additional impeachment evidence contained in the police interview recordings. Wessel argues that this was a close case that rested entirely on the testimony of two inherently unreliable witnesses,³ and thus any type of impeachment evidence would have made a difference. Here, Wessel contends, the impeachment evidence would have been especially important because it went directly to Wessel’s theory of defense. Thus, Wessel contends, the evidence was material and established a *Brady* violation. We disagree.

¶11 Impeachment evidence is not material if it “merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.” *Rockette*, 294 Wis. 2d 611, ¶41 (quoted source omitted). Here, Wessel challenged the credibility of D.B. at trial by cross-examining him about repeatedly lying to the police, which D.B. admitted. Wessel also cross-examined D.B. as to his ability to recall the details of the events in this case due to D.B.’s alcohol use and the passage of time. Wessel challenged A.H.’s credibility by cross-examining him about lying to the police, which A.H. admitted, and about A.H.’s friendship with D.B. as opposed to having met Wessel only one time. Wessel also elicited testimony from Meyer as to the untruthfulness of both D.B. and A.H. Thus, Wessel used information available to him to impeach the

We decline to consider that argument further. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

³ Wessel argues that it is evident that this was an extremely close case because the circuit court “wasn’t immediately sure probable cause existed” at the preliminary hearing. Wessel does not explain why the court’s questioning of probable cause at the preliminary hearing equates to a close case following trial, and we do not consider that argument further. See *Pettit*, 171 Wis. 2d at 646-47.

credibility of both D.B. and A.H. The additional information in the audio recordings would have provided merely cumulative impeachment material.

¶12 Moreover, the additional impeachment information in the audio recordings would not have provided a significant additional attack on the credibility of D.B. and A.H. As set forth above, both D.B. and A.H. admitted at trial that they lied to police about their involvement, and the jury also heard that D.B. and A.H. were closer to each other than to Wessel. Accordingly, we conclude that the undisclosed impeachment evidence was not material. *See Rockette*, 294 Wis. 2d 611, ¶41. We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

