COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP93 **Cir. Ct. No. 2006CF2750**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADRIAN A. STARKS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 LUNDSTEN, J. Adrian Starks was convicted in 2008 of two counts of first-degree reckless homicide and one count of conspiracy to manufacture or deliver more than 50 grams of heroin. The charges stemmed from two heroin overdose deaths occurring in 2005. After his direct appeal process was complete,

Starks, acting pro se, filed motions with the circuit court seeking a new trial. He now appeals the circuit court's order denying that request. Starks argues that he should receive a new trial because (1) there is newly discovered evidence, (2) the real controversy was not fully tried, (3) the State committed a ***Brady***[1] violation, and (4) the combined effect of the asserted errors in his case prejudiced his defense. He argues, in the alternative, that the circuit court erred in denying him an evidentiary hearing. All of Starks' arguments are primarily based on new information about a police officer's apparent misconduct which, according to Starks, undermines that officer's pivotal testimony at Starks' trial. We reject Starks' arguments, and affirm.

Background

¶2 This case has a lengthy procedural history. We limit our background facts to those that are most pertinent or helpful for context.

¶3 The prosecution's theory at Starks' 2008 trial, in short, was that Starks regularly supplied significant amounts of heroin to a woman named Lavinia Mull, who, in turn, sold the heroin to others, and some of that heroin was a substantial causal factor in the two charged overdose deaths. Starks' arguments on appeal relate to his defense that he was not Mull's heroin supplier. There is no dispute, for purposes here, that Mull sold the heroin that was a substantial causal factor in the overdose deaths.

¶4 The evidence at trial included testimony by several witnesses, including Mull, that Starks was Mull's heroin supplier, and that Starks also

[1] ***Brady v. Maryland***, 373 U.S. 83 (1963).

supplied heroin for resale to Mull's then-live-in boyfriend, Dennis Dickinson. There was also circumstantial evidence, including phone records, linking Starks to drug trafficking and to Mull and Dickinson.

¶5 Additionally, the jury had before it an audio recording and transcript of a two- or three-minute phone call that Starks made to Dickinson from jail. The call occurred shortly after Starks was taken into custody after being stopped by a police officer named Denise Markham. In the call, Starks seemed to tell Dickinson that the police, and in particular Markham, were saying that Dickinson implicated Starks in criminal activity involving both men.[2]

¶6 Markham testified, and told the jury that she did not tell Starks that Dickinson implicated Starks in heroin trafficking. Thus, her testimony contradicted part of what Starks said in the jail phone call.

¶7 During closing argument, the prosecutor used the jail phone call in combination with Markham's testimony to show that Starks had knowledge of heroin trafficking with Mull and Dickinson. The jury found Starks guilty on all three of the charges.

¶8 In 2012, Starks filed motions for a new trial and, in the alternative, requested an evidentiary hearing. Starks claimed that he had new information about Markham that constituted newly discovered evidence and that showed the

[2] Starks and Dickinson refer only to "Denise" in the phone call, but there is no dispute that this is a reference to Markham.

State committed a ***Brady*** violation.[3] The information pertained to apparent professional misconduct by Markham, including violations of police department policies in Starks' case.

¶9 The circuit court denied Starks' motions. Applying the criteria for newly discovered evidence, the circuit court concluded that the information regarding Markham was not material and was partially cumulative. The court also concluded that, even if a jury heard the new information, there was not a reasonable probability of a different result. The court reasoned that none of the new information directly undermined Markham's trial testimony, and the court pointed out that there was a considerable amount of other evidence implicating Starks. The circuit court rejected Starks' ***Brady*** violation claim based on similar reasoning. Starks appealed.

¶10 We allowed Starks to stay the appeal so that he could file a third motion in the circuit court alleging additional information about Markham. The circuit court also denied that motion, concluding that the additional information did not change the court's analysis. The circuit court's rulings addressing Starks' motions are all now before us.

Discussion

¶11 To repeat, Starks argues that he should receive a new trial because (1) there is newly discovered evidence, (2) the real controversy was not fully tried,

[3] "In ***Brady v. Maryland***, 373 U.S. 83 (1963), the United States Supreme Court held that under the Due Process Clause of the Fourteenth Amendment, a defendant has a constitutional right to evidence favorable to the accused and that a defendant's due process right is violated when favorable evidence is suppressed by the State either willfully or inadvertently, and when prejudice has ensued." ***State v. Harris***, 2008 WI 15, ¶61, 307 Wis. 2d 555, 745 N.W.2d 397.

(3) the State committed a ***Brady*** violation, and (4) the combined effect of the asserted errors in his case prejudiced his defense. He argues, in the alternative, that the circuit court erred in denying him an evidentiary hearing. As we have said, Starks' arguments are primarily based on the new information pertaining to Markham. Broadly speaking, Starks asserts that this information undermines Markham's testimony, which, according to Starks, was pivotal evidence against him at trial. We address and reject Starks' five main arguments in the five sections that follow.

1. Newly Discovered Evidence

¶12 Starks argues that the new information about Markham's apparent misconduct is newly discovered evidence entitling him to a new trial. To establish such a claim, the defendant has to prove that: "'(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (quoting ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997)).

¶13 If the defendant satisfies these four criteria, the question becomes "whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***Id.*** "'A reasonable probability of a different outcome exists if there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***Id.***, ¶33 (quoted source and internal quotation marks omitted). This reasonable-probability issue presents a question of law for de novo review. *See* ***id.***

¶14 We conclude that Starks is not entitled to a new trial based on newly discovered evidence because, regardless of the first four criteria, we agree with the circuit court that there is not a reasonable probability of a different result. As we explain, we are confident that any reasonable jury would reach the same verdict if it had both the old evidence and the new evidence about Markham.

¶15 The new information on which Starks relies consists of the following allegations and factual submissions:

- Markham resigned after an internal police department investigation showed that she violated numerous police department policies, including that she filed incomplete or inaccurate reports. Starks asserts that the investigation showed that Markham committed a total of 177 violations, and we will assume that this is true for purposes of Starks' appeal.

- Markham violated three policies in Starks' case relating to (1) the seizure of Starks' phone and vehicle and (2) Markham's failure to mention the seizure of Starks' phone in a report.

- Markham admitted to omitting "crucial case information" from her arrest report relating to Starks, namely, information that she knew when she arrested Starks that Starks was a suspect in drug-related crimes and homicides.

¶16 As a preliminary matter, we note that the parties dispute whether the new information about Markham is inadmissible other acts evidence. We assume, without deciding, that the information would be admissible at a new trial.

¶17 Starks argues, as he did in the circuit court, that all of this new information about Markham undermines Markham's credibility and calls into question whether Markham lied when she testified at Starks' trial that she did not inform Starks that Dickinson implicated Starks in heroin trafficking. According to Starks, Markham's testimony was pivotal evidence because that testimony allowed

the prosecutor to use the jail phone call to show that Starks had "guilty knowledge."

¶18 We understand Starks' more specific argument to be this: If Markham's testimony was true, then the jail phone call tended to show Starks' guilt by showing that Starks had independent knowledge of heroin trafficking involving Dickinson and, by extension, Mull; if, instead, Markham's testimony was false and Markham told Starks that Dickinson implicated Starks in heroin trafficking, then the jail phone call was nothing more than Starks confronting Dickinson with something Starks had heard from Markham. Starks' argument does not persuade us.

¶19 First, even if the new information about Markham would lead a jury to find Markham unreliable generally and, therefore, to decide that Markham was lying when she denied telling Starks about Dickinson, the jail phone call is not affirmatively exculpatory. At best, Starks' jail phone conversation with Dickinson is just less inculpatory. For example, Starks did not, as would be expected of an innocent person, clearly indicate during the call that, if Dickinson did implicate Starks, Dickinson was lying. Also, toward the end of the call, Starks asked Dickinson if Dickinson was near "Aaron's" house, and there was evidence at trial suggesting that this was a reference to a place where Mull and Dickinson stored drugs. Thus, as the prosecutor asserted to the jury at trial, this reference to "Aaron's" house incriminated Starks in drug trafficking with Mull and Dickinson, regardless of Markham's testimony.

¶20 Second, even if a jury concluded that the jail phone call was not incriminating, we are confident that any reasonable jury would find Starks guilty based on all of the other evidence at trial. The prosecution presented extensive

evidence implicating Starks that had no connection to the jail phone call or to Markham, the most prominent being the testimony by Mull, Dickinson, and three other witnesses that Starks was Mull's and Dickinson's heroin supplier. Some of that testimony included descriptions of particular drug buys that Mull or Dickinson made from Starks. As the prosecutor repeatedly emphasized during closing arguments, these witnesses all corroborated each other on the critical question of whether Starks was Mull's heroin supplier, and other circumstantial evidence further linked Starks to heroin trafficking and to Mull and Dickinson.

¶21 In an apparent attempt to demonstrate that the "old evidence" in his case is weak without Markham's testimony, Starks asserts that the witnesses who testified that Starks was Mull's heroin supplier were not credible. Starks points out that most or all of these witnesses had conviction records and were involved in heroin trafficking, and Starks asserts that the witnesses may have received leniency for cooperating in Starks' prosecution.[4] However, as the prosecutor persuasively argued to the jury, it is highly improbable that all five of the witnesses agreed to falsely implicate Starks. In short, we see no reason why a jury would have disbelieved all of these witnesses even if their testimony was not further corroborated by the jail phone call and Markham's testimony.

¶22 In another apparent attempt to show the weakness of the "old evidence" in his case, Starks asserts that phone records contradict Mull's testimony that she called Starks around the time of one of the heroin overdose deaths. We have already explained in Starks' prior appeal, however, that this

[4] Starks asserts that each of the witnesses "received significant sentence reductions," apparently meaning that they received reductions in exchange for testimony against Starks, but Starks does not provide record support to back up this assertion.

particular contradiction was not significant in the broader context of Starks' trial. As the State points out, Starks unsuccessfully litigated this topic in that appeal as part of an ineffective assistance of counsel claim. *See* ***State v. Starks***, No. 2009AP2995-CR, unpublished slip op. ¶¶10-14 (WI App Apr. 14, 2011). We explained then that the State did not need to prove that Starks sold heroin to Mull on a particular date, and that counsel's failure to take advantage of the contradiction between the phone records and one aspect of Mull's testimony was not prejudicial given Mull's other testimony that Starks was Mull's heroin supplier. ***Id.***, ¶¶10-11, 14.

¶23 To sum up so far, we conclude that Starks' newly discovered evidence claim fails because there is not a reasonable probability that a jury considering all of the old and new evidence together would reach a different verdict.

2. Real Controversy Not Fully Tried

¶24 Starks argues that we should exercise our discretion to reverse and order a new trial in the interest of justice because the real controversy was not fully tried. *See* WIS. STAT. § 752.35 (2011-12) (explaining that one ground for exercise of discretionary reversal power is when "it appears from the record that the real controversy has not been fully tried"). When we address this ground for discretionary reversal, our analysis does not include determining whether a different result is likely on retrial. ***State v. Jeffrey A.W.***, 2010 WI App 29, ¶14, 323 Wis. 2d 541, 780 N.W.2d 231.

¶25 As we understand it, Starks' interest of justice argument is largely a repeat of his newly discovered evidence argument bolstered by two additional

assertions. We limit our analysis to those two assertions, and conclude that neither is persuasive.

¶26 First, Starks asserts that the prosecutor relied heavily on the jail phone call during closing arguments, and that this demonstrates that the call was central to the jury's verdict. We disagree. We acknowledge that the prosecutor emphasized the call and used Markham's testimony to increase the call's inculpatory value. However, the prosecutor relied much more heavily on all of the other evidence against Starks. And, as we have said, the call was inculpatory even if Markham testified falsely. Starks unpersuasively downplays the significant role of all of the evidence against him that did not depend on the jail phone call or Markham's testimony.

¶27 Second, Starks asserts that Markham was the only witness in a position to directly contradict Starks and that Markham's testimony "destroyed" Starks' credibility, which Starks portrays as a central issue at trial. More specifically, as we understand it, Starks asserts that the jury was faced with determining whether Markham lied on the witness stand or whether instead Starks lied during the jail phone call; Markham's testimony and Starks' comment about Markham during the call could not both be true. We agree that both could not be true, but we disagree with Starks that *his* credibility was a central issue at trial. Starks did not testify at trial, and he did not clearly deny involvement in criminal activity during the jail phone call.

¶28 Based on our reasoning in this section and the preceding section, we are satisfied that the real controversy was fully tried.

3. ***Brady***

¶29 Starks argues that he is entitled to a new trial based on a ***Brady*** violation relating to the new information about Markham. A ***Brady*** violation occurs when the State withholds evidence favorable to the defendant, whether willfully or inadvertently, resulting in prejudice. ***State v. Harris***, 2008 WI 15, ¶61, 307 Wis. 2d 555, 745 N.W.2d 397.

¶30 The defendant has the burden of demonstrating a ***Brady*** violation. *See* ***State v. Harris***, 2004 WI 64, ¶¶13-14, 272 Wis. 2d 80, 680 N.W.2d 737 (explaining the ***Brady*** violation standards, and stating that the defendant must demonstrate that the standards are met). The ultimate determination of whether a ***Brady*** violation occurred is a due process issue that presents a question of law for de novo review. *See* ***State v. Lock***, 2012 WI App 99, ¶94, 344 Wis. 2d 166, 823 N.W.2d 378.

¶31 Starks argues that the new information about Markham was favorable to Starks and that the State should have, but did not, disclose the information in a timely manner, or that the State did not exercise due diligence to discover information about Markham. We conclude that, regardless whether Starks is correct on these points, there is no ***Brady*** violation because Starks fails to show prejudice.

¶32 "Prejudice" in the context of ***Brady*** means that "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" ***Harris***, 307 Wis. 2d 555, ¶61 (quoted source omitted). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (quoted source and internal quotation marks omitted). "'[S]trictly speaking, there is never a real ***Brady***

violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" ***Id.*** (quoted source and internal quotation marks omitted).

¶33 Apart from Starks' arguments that we have already rejected in the context of Starks' other claims, we are uncertain why Starks believes that the State's asserted failure to discover and disclose information about Markham prejudiced Starks. As we have explained, the jail phone call remained incriminating even if Markham testified falsely, and the information about Markham does not affect the other, significant incriminating evidence against Starks.

¶34 Starks asserts that not having the information about Markham before his trial "undermine[d] the purpose of discovery and … deprived Starks [of] the opportunity to choose a strategy and prepare for trial in light of all the evidence that should have been provided, which consequently deprived Starks [of] his 6th amendment right to present a defense." However, Starks does not elaborate on what different defense he could have chosen if he had had the information about Markham, nor provide any persuasive explanation of why that defense might have succeeded.[5]

[5] It seems apparent that much of the information about Markham did not exist at the time of Starks' trial in 2008, but we will assume without deciding that at least some information implicating Markham in potential professional misconduct existed at the time of Starks' trial and that the State could have discovered and disclosed it. We emphasize that we *assume* this for the sake of argument without deciding whether the State had any obligation to discover and disclose such information.

4. Combined Effect Of Asserted Errors

¶35 Starks argues that we must consider the combined effect of the asserted errors in his case, and that there is a reasonable probability of a different result at a new trial based on the combined effect of all errors. This argument adds nothing new to Starks' arguments that we have already rejected. The "errors" to which Starks refers, as we understand it, consist of the asserted ***Brady*** violation along with trial counsel's failure to take advantage of phone records contradicting one aspect of Mull's testimony, as discussed above. It should by now be apparent that we disagree that these asserted errors merit a new trial, whether considered alone or in combination.

5. Evidentiary Hearing

¶36 Finally, Starks argues in the alternative that, even if the record so far does not show that he is entitled to a new trial, he should receive an evidentiary hearing. Starks' primary basis for requesting an evidentiary hearing appears to be an assertion that an evidentiary hearing could lead to evidence proving that Markham perjured herself at Starks' trial, such as an admission to that effect by Markham. However, we have assumed for purposes of our analysis that a jury hearing any new evidence would conclude that Markham's testimony was false. Thus, an evidentiary hearing further supporting our assumption adds nothing.

¶37 To the extent Starks offers other assertions in support of his request for an evidentiary hearing, they are undeveloped, and we do not address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments).

Conclusion

¶38 In sum, for all of the reasons stated above, we affirm the circuit court's order denying Starks' motions for a new trial or evidentiary hearing.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.