COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1331 **Cir. Ct. No. 2006CF901**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN J. LELINSKI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Steven J. Lelinski, *pro se*, appeals from an order of the circuit court that denied his motion for postconviction relief. Lelinski sought a new trial, claiming that the State had failed to disclose exculpatory evidence. The

circuit court found that the evidence was neither exculpatory nor newly discovered[1] and denied Lelinski's motion. We affirm the order.

¶2 In February 2007, a jury convicted former police officer Lelinski on second-degree sexual assault with the threat or use of force, attempted second-degree sexual assault with the threat or use of force, and lewd and lascivious behavior for conduct in 2005 involving Amanda R.[2] Included among the allegations were claims that Lelinski essentially used his position as a police officer to manipulate or coerce his victims. Lelinski appealed, raising five arguments. We affirmed the convictions. *See* ***State v. Lelinski***, No. 2008AP2379-CR, unpublished slip op. (WI App June 2, 2009).

¶3 After Lelinski was convicted, Amanda R. filed a civil rights claim against him. She was deposed in the matter on February 14, 2012. In her deposition, Amanda R. described an incident with Lelinski that supposedly occurred on August 26, 2005. Amanda R. claimed that, when City of Milwaukee police responded to investigate her mother's sudden death, she saw Lelinski on the scene. Amanda R. further indicated that she had informed both a sergeant investigating the sexual assault claims and the assistant district attorney handling the criminal matter of this encounter. Lelinski contends that official payroll records indicate he was not on duty at that time.

[1] Lelinski does not present a newly discovered evidence argument on appeal. We therefore do not address that aspect of the circuit court's decision.

[2] A fourth conviction, for fourth-degree sexual assault, involved Josephine G. and is not before us. At the original trial, Lelinski was also acquitted of two counts of third-degree sexual assault involving Myrtle M.

¶4 In February 2013, Lelinski filed the postconviction motion underlying this appeal. He wrote:

> During a deposition for a civil matter, the accuser and State's primary witness, Amanda R., gave testimony inconsistent with her testimony at trial. Specifically, she testified to contact between her and me which never occurred. Thus, she had misidentified me. She also testified that she had told [the assistant district attorney] about this information; however, [the State] never disclosed this information to my attorney.

¶5 Lelinski thus claimed that the State had violated both due process and the discovery statute, WIS. STAT. § 971.23(1)(h) (2011-12),[3] by failing to disclose the "exculpatory" evidence that Amanda R. had misidentified him as someone at her house on August 26, 2005. He also asserted that the failure to disclose was prejudicial because the lack of the information hampered his ability to impeach Amanda R.'s credibility. Further, when viewed cumulatively with his prior ineffective-assistance claims regarding counsel's failure to call witnesses to testify about Amanda R.'s truthfulness, this omitted information warrants a new trial.

¶6 The circuit court denied the motion. It concluded that the non-disclosed evidence was not exculpatory "even in the broadest sense." Further, in Lelinski's first appeal, this court described trial counsel's attack on Amanda R.'s credibility as "strong" when it concluded that additional cross-examination about Amanda R. providing a false name to police would not have altered the verdict. The circuit court here thus determined that questioning Amanda R. about her

[3] The 2005-06 and 2007-08 versions of WIS. STAT. § 971.23(1)(h) are identical to the 2011-12 version. Therefore, all references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

possible sighting of Lelinski at her mother's home would have been "'additional cross examination' which would not have made a singular difference in the outcome of the trial." Lelinski appeals.

¶7 "'[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 so-called ***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 (citation omitted; emphasis added).

¶8 Favorable evidence includes both exculpatory and impeachment evidence. ***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 independently apply these constitutional standards to undisputed facts. ***Id.***, ¶39.

¶9 Lelinski's postconviction motion complains about the State's purported failure to disclose Amanda R.'s claims, made in her deposition,[4] that she saw him at her mother's home on August 26, 2005. Lelinski characterizes this as

[4] As an initial matter, we note that if Lelinski's complaint is that no one disclosed Amanda R.'s *deposition* testimony to him, we would end our analysis. It is obvious that, at the time the charges were filed in 2006, the State could not disclose testimony that would not be given until six years later.

a misidentification. In his appellate brief, he argues that the "information that Amanda R. had misidentified Lelinski was favorable to [his] defense" as a means of impeaching her credibility. He contends that Amanda R.'s trial testimony amounts to perjury because she neglected to mention the August 26, 2005 contact.[5] He also broadly contends that with this information, there is a reasonable probability that the results of the proceeding would have been different.

¶10 Whether or not Amanda R. saw Lelinski on August 26, 2005, this information is neither favorable nor material. Favorable evidence includes exculpatory evidence, but the "misidentification" is not exculpatory. Exculpatory evidence is evidence which tends to establish a defendant's innocence. *See* ***Harris***, 272 Wis. 2d 80, ¶12 n.9. Whether Amanda R. saw Lelinski on August 26, 2005, makes it neither more nor less likely that he assaulted her in October 2005.

¶11 Favorable evidence also includes impeachment evidence—that evidence which can undermine a witness's credibility, *see* ***id.***, ¶12 n.10—but the misidentification is also not really impeachment evidence. In claiming that Amanda R.'s misrepresentation could be used to challenge her credibility, Lelinski treats Amanda R.'s deposition testimony as though she was unwaveringly claiming he was at her mother's on August 26, 2005, and he treats the payroll records as definitive proof that he was not there. However, according to her deposition testimony, Amanda R. *thought* she saw Lelinski in the crowd of people at her mother's house and she had no direct contact with him. Further, in response to his *pro se* cross-examination of her, Amanda R. admitted only a seventy-five-

[5] *See* ***State v. Harris***, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737 ("A ***Brady*** violation may occur … if the prosecutor fails to disclose that the defendant was convicted on the basis of perjured testimony.").

percent certainty that she had seen him. Moreover, she also testified that she did not think Lelinski was there in his official capacity, because his presence did not coincide with what he told her his schedule was. In other words, the payroll records at best establish that he was not officially on duty when Amanda R. thought she saw him; they do not prove he was not at her mother's home in an unofficial capacity.

¶12 Nor do we think that Amanda R.'s trial testimony amounts to perjury for the omission of the August 26, 2005 incident. The relevant portion of her testimony is as follows:

> Q How long was Officer Lelinski and his partner at your mom's house on August 25th of 2005?[6]
>
> A I'd say for about 45 minutes.
>
> Q Now, the date of August 25th of 2005, why does that date stand out? Why do you remember that particular day?
>
> A Because my mom passed away the next day.
>
> Q After your mom passed away, how long did you stay living in that same house?
>
> A I stayed for about a week and then I went to stay with my sister.
>
> Q And how long did you stay with your sister?
>
> A Until the end of September and then that's when I moved into the house on 21st and Lincoln.
>
> Q So you stayed with your sister for a month?

[6] Lelinski and his partner were dispatched to Amanda R.'s mother's home on August 25, 2005, in response to "Trouble with subject." Lelinski's partner explained at trial that this is "when a caller calls us and is having trouble with someone and they want us to try to negotiate the troubles." Evidently, there was a disagreement between the mother and the mother's boyfriend regarding money, and the officers stayed long enough to diffuse the situation.

A Yes, ma'am.

Q Okay. In that time, from the point that your mother passed away until you moved to your house on Lincoln, did you see Officer Lelinski?

A No, ma'am.

….

Q When next did you see Officer Lelinski?

A In October.

Lelinski contends this testimony, in which Amanda R. did not mention August 26, 2005, as the next time she saw Lelinski, is perjury in light of her subsequent deposition testimony.

¶13 Perjury requires a witness to willfully make a "false material statement which the person does not believe to be true." *See* WIS. STAT. § 946.31(1)(a); ***State v. Munz***, 198 Wis. 2d 379, 382, 541 N.W.2d 821 (Ct. App. 1995). But if Lelinski was not at Amanda R.'s mother's house as he claimed, then Amanda R.'s omission of any reference to it in the criminal trial cannot possibly be false. Further, Amanda R. was not specifically or clearly asked if she saw Lelinski on August 26, 2005. Rather, she was asked whether she saw him from the time her mother passed away until she moved to the house on Lincoln. That question, though, does not necessarily encompass the possibility she saw him on the day of her mother's death. In addition, Lelinski offers no evidence to suggest that Amanda R., by omitting mention of the August 26, 2005 event in her trial testimony, was willfully making false material statements that she did not believe to be true.

¶14 We are also not convinced that evidence of Amanda R.'s August 26, 2005 encounter or non-encounter would be material, and this determination is

relevant to both the due process and perjury discussions. Evidence is only material if there is a reasonable probability that its disclosure to the defense is likely to have yielded a different result. ***Harris***, 272 Wis. 2d 80, ¶14. A reasonable probability is one that undermines confidence in the outcome. *See* ***id.***

¶15 Impeachment evidence is not material where it "'merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.'" *See* ***Rockette***, 294 Wis. 2d 611, ¶41 (citation omitted). As we described in Lelinski's original appeal, there was already a strong attack on Amanda R.'s credibility. *See* ***Lelinski***, No. 2008AP2379-CR, ¶¶36-38. Thus, even assuming the omitted information had been disclosed, it would be merely a cumulative attempt at impeaching Amanda R.'s credibility and, thus, not material. *See* ***Rockette***, 294 Wis. 2d 611, ¶41.

¶16 More importantly, while Lelinski's assertions that the August 26, 2005 information is useful for impeachment, it necessarily hinges on his claims that he was never at Amanda R.'s mother's home. He does not appear to have considered the possibility that the jury, had it been told of the supposed August 26, 2005 encounter, would have believed that Amanda R. saw him at her mother's. If the jury had believed that Lelinski was there, then it certainly would not have changed its verdict in Lelinski's favor. Thus, we discern no ***Brady*** due process

violation from the State's alleged failure to disclose that Amanda R. reported seeing Lelinski on August 26, 2005.[7]

¶17 Given the above analysis, we also conclude there is no violation of WIS. STAT. § 971.23(1)(h). That statute requires the State to disclose any exculpatory evidence. As explained herein, however, Amanda R.'s possible misidentification of Lelinski on August 26, 2005, is not exculpatory. The circuit court properly denied the motion for a new trial.

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[7] On appeal, the State contends that there is no indication *when* Amanda R. supposedly told the assistant district attorney about the August 26 encounter. This is not accurate because the State, in its circuit court brief, noted that Amanda R. believed she had provided the information when the case was reviewed in 2005. We note, however, that if Amanda R. did not provide this information to the State until *after* Lelinski's trial, the State could not be obligated to include it in discovery materials.