COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2431-CR **Cir. Ct. No. 2014CF1195**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK V. BLONDA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LINDSEY CANONIE GRADY, Judge. *Reversed and cause remanded with directions*.

Before Brennan, P.J., Brash, and Dugan, JJ.

¶1 DUGAN, J. Frank V. Blonda appeals a judgment of conviction for substantial battery with intent to do bodily harm in violation of WIS. STAT. § 940.19(2)(2015-16)[1] and disorderly conduct in violation of WIS. STAT. § 947.01(1), with both crimes being subject to the domestic abuse enhancer of WIS. STAT. § 968.075(1)(a), and the order denying his motion for postconviction relief.

¶2 Blonda sought post-conviction relief, seeking a new trial on the grounds that: (1) prior to trial the State failed to disclose exculpatory ***Brady***[2] evidence of statements that the victim, M.L., made—the first an oral statement to a victim advocate from the district attorney's office victim advocate unit, and the second, her own subsequently written victim impact statement[3]; (2) his trial counsel was ineffective in not impeaching M.L.'s hearsay statements with the two statements referenced above and statements she made to others; and, (3) the real controversy was not tried. Alternatively, Blonda asserts that this court should remand this case for an evidentiary hearing on his postconviction motion. The trial court rejected Blonda's arguments concluding that no prejudice was shown. Both sides concede a ***Brady*** violation and we cannot say on this record that there was no prejudice to Blonda, especially given that trial counsel did not have the

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

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

[3] The postconviction motion states that a postconviction investigation disclosed that during an April 10 contact between the victim advocate and M.L., the victim advocate told M.L. that she could draft a written statement to the District Attorney conveying her thoughts about the incident and that M.L. "was then provided with a blank copy of the Crime Victim Impact Statement." M.L. typed a statement in response to those questions and mailed the statement to the victim witness unit. This statement was not disclosed to Blonda until after he was convicted.

victim's written statement recanting any wrongdoing by Blonda. Accordingly, we reverse and remand for a new trial based on the State's failure to disclose M.L.'s two recanting statements in a timely manner.

¶3 This appeal followed. We disagree with the trial court's conclusion that no prejudice was shown.

BACKGROUND

¶4 The charges against Blonda stemmed from an incident in which his fiancée, M.L., was injured. Blonda and M.L. operated a small auto shop. At trial M.L.'s sister, Vincenza,[4] testified that on March 19, 2014, M.L. called her and said she was bleeding from her head. Vincenza called 911. She also testified that M.L. told her that Blonda had thrown a phone at her and that the phone hit her in the head. Blonda was not at the shop when M.L. called Vincenza. Police arrived and took M.L. to the hospital where she received stitches near her eye and on her nose. The State charged Blonda with substantial battery and disorderly conduct.

¶5 On April 10, M.L. was in the courthouse hallway waiting for Blonda's initial court appearance and a member of the district attorney's victim witness unit spoke to her. During that contact, M.L. stated that she did "not want to press charges because she started the fight and [Blonda] did not hit her or throw a phone at her." M.L. also stated that "she and [Blonda] were drinking and she [was] not sure what happened." The victim advocate memorialized their interaction including M.L.'s statements in a contact log. This statement was not

[4] M.L. and Vincenza L. have the same surname; therefore, to keep M.L.'s identity confidential the court refers to Vincenza solely by her given name.

disclosed to Blonda until the first day of trial and a copy was provided to trial counsel on the second day.

¶6 M.L. also wrote her own separate undated victim impact statement, identified as having been prepared following the initial appearance, stating that she recalled having an argument with Blonda,

> and then we were playing tug of war with a phone, he left and walked out, and the next thing I knew, I was braced by the car sitting in the bay, and when I picked up my head, I felt strange, as I put my hands down I saw blood, and I started calling [Blonda], he was not there, I was all alone. I had no clue what happened, how it happened, I didn't know if I tripped or fell, I never said, I was hit, I never said the phone hit me.

The statement further states:

> I wouldn't say that I am a victim in this case! The true victim is my fiancé. Yes I was injured, however it was not him!!! *IT WAS AN ACCIDENT THAT HAPPENED WHEN HE WAS GONE*!! ... I didn't press charges, there are no charges to press, and I am frantically worried over how the system is going to hurt me, and impact my fiancé. My family respects and understands … that I am not hiding anything…. Yes it has impacted my life, because no one is helping, [they're] making this out to be something that it is not.
>
> … He would NEVER, NEVER, NEVER HURT ME AND I TRUST HIM more than I trust this system. He is not guilty, there is no proof of anything, he is the true victim, being accused of an accident, an incident he had no clue that transpired, and I will not stop until I clear his name.

(Bullet points, extra periods, and one comma removed.)

¶7 Three months later on July 16, the first day of trial but before the jury had been selected, the State informed the court that M.L. had not yet appeared for trial although she was subject to a trial subpoena. The prosecutor stated that,

earlier that day, he told Blonda's attorney that M.L. made a "recanting type statement to [the State's] witness advocate ... at the beginning of the case, saying that she and [Blonda] were drinking and she's not sure what happened, she started the fight, [Blonda] did not hit her." The prosecutor also noted that trial counsel had been unaware that the statement had been made. The trial court suggested that the State provide a written copy of the statement to the defense.

¶8 The court then conducted a hearing on Blonda's motion in limine to exclude the testimony of M.L.'s sister, Vincenza, regarding alleged statements of M.L. on the grounds that the statements were hearsay and their admission would violate the confrontation clause. The State opposed the motion contending that the statements were excited utterances and, therefore, admissible. After counsel questioned Vincenza about M.L.'s statements and the circumstances under which they were made, the court held they did not present a confrontation clause issue and were excited utterances and, therefore, would be admissible.

¶9 M.L. did not appear at Blonda's trial on July 16. The jury was selected and counsel presented their opening statements. On the morning of July 17, the State provided defense counsel with a copy of M.L.'s April 10 statement to the victim advocate.

¶10 The State called Vincenza and Officer Scott Sadowski. Vincenza testified that she is M.L.'s sister and a registered nurse. She stated that M.L. and Blonda had dated for a couple years, had been engaged for about a year, and owned an auto mechanic business in Oak Creek.

¶11 Vincenza testified that, in the late afternoon on the day of the charged incident, she received a phone call from M.L. who was "speaking panicky, fast, crying," and said "I need your help. I'm bleeding." In response to

Vincenza's questions, M.L. said the blood was coming from her head and Blonda was not at the shop. Vincenza also testified that M.L. said that "[Blonda] threw a phone at her and it hit her in the head." M.L. indicated that she and Blonda were having an argument but did not say anything else about the situation. M.L. wanted Vincenza's help. When the State again asked Vincenza "exactly" what M.L. told her, Vincenza testified that M.L. said that: "they had an argument and he threw the phone and it hit her and she was bleeding."

¶12 Vincenza testified that she called 911 and told the operator that M.L. had an argument with Blonda, he threw a phone at her, and that M.L. was bleeding. She testified that she called 911 because she was coloring her hair, and 911 could get to M.L.'s location more quickly than she could and the personnel would have medical equipment with them for use if the injury was serious—avoiding additional potential delay in M.L.'s medical care. M.L. did not ask Vincenza to call 911 or the police.

¶13 After making sure that her children would be okay, Vincenza drove to the auto shop. Upon arriving, Vincenza saw an officer and M.L., who had blood on her face that was coming from her eye. M.L. was taken to the closest hospital so medical staff could treat her. They cleansed her face and sutured her injuries; M.L. received six stitches above her left eyebrow and one or two on her nose.

¶14 On cross-examination, Blonda's attorney asked Vincenza questions about whether she was younger or older than her siblings; about M.L.'s phone call to her including how she sounded; and whether M.L. said Blonda threw the phone and it hit M.L. or whether she said that Blonda threw the phone at her, since Vincenza had explained it a couple ways. He also asked her whether she was in

the garage the day of the argument or knew who started it, whether her primary concern was that M.L. received medical treatment, and whether M.L. asked her to call the police.

¶15 On redirect, after asking some other questions, the prosecutor asked Vincenza to identify the recording of her 911 call, and played that recording. The jury heard the recording, during which Vincenza told the operator that Blonda "threw the phone which smacked her sister in the head."

¶16 Sadowski, the State's other witness, testified that he was dispatched at about 4:00 p.m. to respond to the 911 call and he arrived at the shop in less than five minutes. He opened the entrance door and identified himself. M.L. responded and he saw that she was sitting on a wooden makeshift step and holding a bloody towel on her head. When M.L. removed the towel, Sadowski saw that M.L. had a laceration above her left eye brow, a small laceration on her nose, and that her left cheek and nose were swollen and red. Blonda was not present.

¶17 Sadowski also testified that he saw a large unplugged work-style phone and its battery, an overturned metal stool under a large blue pickup, and numerous blood spots on the floor close to M.L. He also observed blood spots on a blue Pontiac vehicle near M.L. Additionally, he saw numerous pieces of green glass fragments that looked like a shattered Heineken beer bottle with some type of splattered liquid on the ground near the sliding garage door.

¶18 After M.L. was transported to the hospital, Sadowski interviewed her for about twenty to thirty minutes. At the hospital, Sadowski was informed that M.L. had received six stitches above her left eyebrow and one stitch on her nose.

¶19 Blonda waived his right to remain silent and testified. He was the only defense witness. Blonda testified that, about 3:00 or 4:00 p.m. on the day of the incident, he was sitting on a stool at his work station in the middle of the shop where he had been filling out some repair orders, and drinking a beer. While he was talking to a friend on his cordless phone, M.L. came from his right side, walking around his body, to his left side in "a very aggravated, emotional way." She was yelling and swearing at him about the person he was talking to on the phone. She was also concerned that he was drinking the beer. Blonda testified that, at one point, M.L. took the bottle of beer from him and threw it across the shop.

¶20 Blonda testified that M.L. grabbed the phone and its receptacle off his tool box and he asked, "What are you doing?," and they had a "little struggle with the phone." After a few seconds, he said, "Forget this, I ain't doing this," and he let go of the phone.

¶21 Blonda testified that he got off his stool, grabbed the keys to the shop, closed his tool box and his drawer, and turned around and walked out quickly. He said that M.L.'s temper was running hot and he reacted the opposite way. He did not fuel it; he left. M.L. was still yelling, but he did not hear her yelling for help. Blonda testified that he left the shop immediately because he had enough of M.L. that day.

¶22 Blonda testified that he did not throw the phone at M.L., hit her with the phone, or lay a hand on her, and that he did not know what happened to her. He also testified that he never intentionally threw the phone at M.L., never intended to harm her or to cause a disturbance, and feels badly that M.L. was hurt.

¶23 The case went to the jury the afternoon of the second day of trial and the jury returned guilty verdicts on the substantial battery and disorderly conduct charges against Blonda that day.

¶24 On October 3, 2014, Blonda was sentenced on both counts. Blonda filed a postconviction motion which the court denied, without a hearing. This appeal followed.

ANALYSIS

1. The State's Undisputed Failure to Disclose Exculpatory *Brady* Material Deprived the Jury of Relevant Evidence and Blonda of a Fair Trial.

¶25 We first address the issue of the State's failure to disclose exculpatory material. Blonda argues that the State's failure to disclose M.L.'s recanting type statement to the victim advocate until the second day of trial and its total failure to disclose the undated victim impact statement violated his rights under ***Brady***, 373 U.S. at 83 and WIS. STAT. § 971.23(1)(h).

¶26 Both the due process clause of the United States Constitution and WIS. STAT. § 971.23(1)(h) require a prosecutor to disclose exculpatory evidence to the defense. *See* ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. ***Brady*** holds that "suppression 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." 373 U.S. at 87. Moreover, as explained in ***Strickler v. Greene***, 527 U.S. 263, 280-81 (1999), the ***Brady*** rule has been extended to apply where no request is made and to impeachment evidence:

> We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, ***United States v. Agurs***, 427 U.S. 97, 107 (1976),

> and that the duty encompasses impeachment evidence as well as exculpatory evidence, ***United States v. Bagley***, 473 U.S. 667, 676 (1985).
>
> ….
>
> [T]he rule encompasses evidence "known only to police investigators and not to the prosecutor." [***Kyles v. Whitley***, 514 U.S. 419,] 438 [(1995).] In order to comply with ***Brady***, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." ***Kyles***, 514 U.S. at 437.

Strickler, 527 U.S. at 280-81.

¶27 However, only evidence "material" to the defendant's guilt or punishment needs to be disclosed. *See* ***Brady***, 373 U.S. at 87. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***United States v. Bagley***, 473 U.S. 667, 682 (1985). "A reasonable probability of a different result is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." ***State v. Chu***, 2002 WI App 98, ¶30, 253 Wis. 2d 666, 643 N.W.2d 878. On appeal, this court applies the ***Bagley*** standard to the undisputed facts of the case. *See* ***id.***

¶28 The trial court held that a discovery violation had occurred; however, it could not "find that the defendant's case was prejudiced … *even if* [M.L.'s subsequent statements] may have been admissible under sec. 908.06, WIS. STAT[S]., as the defendant argues." The trial court further stated that even if M.L.'s subsequent hearsay statements had been admitted for impeachment purposes under § 908.06, the jury would not have had an opportunity to assess her credibility because she did not appear to testify. Notably, because M.L. did not appear at trial the jury only heard Vincenza's testimony regarding what Vincenza

said M.L. told her. Therefore, the jury could not assess M.L.'s credibility regarding any of the statements attributed to her.

¶29 The trial court further reasoned:

> Had the jury read what she had written, it would have deduced that these materials sounded like a woman who didn't want to lose the man she loved and a woman who regretted having said anything to her sister about the incident after it occurred. …. [B]ut regardless of what she has written, she is unable to do so because the words she uttered immediately after the incident were simply incapable of being refuted. …. *There is not a reasonable probability that a reasonable jury would have believed her subsequent statements.*

(Emphasis added.)

¶30 Additionally, the trial court stated that:

> This court observed the victim's sister at trial who told the jury what transpired based on the phone call she had received from her sister immediately after she was injured. She appeared credible and believable. …. *The court is satisfied that no reasonable jury would have found other than it did even if the victim's statements disavowing what occurred had been presented.*

(Emphasis added). Thus, the trial court concluded that any discovery violation by the State did not prejudice Blonda.

¶31 Blonda contends that the State's failure to disclose two exculpatory statements that M.L made, one to the victim advocate and her own written statement, violates ***Brady***[5] because it pertains to two central issues in the case: whether Blonda intentionally hit M.L. and/or caused her injuries, and whether

[5] Blonda also argues that the non-disclosure violated WIS. STAT. § 971.23(1)(h). This court does not address the issue because we resolve the case on other grounds.

Blonda was prejudiced by the failure to disclose the statement. Blonda further asserts that, in assessing whether the non-disclosure caused prejudice, the trial court improperly "made its own credibility determination that the jury would not have believed the exculpatory statements." Citing ***State v. White***, 2004 WI App 78, ¶25, 271 Wis. 2d 742, 680 N.W.2d 362, Blonda argues that the "court's role in assessing this evidence was not to determine whether it found the new evidence convincing, but whether, assuming the jury found the new evidence credible," it would have affected the outcome.

¶32 The State contends that the trial court properly concluded that a jury would not have found M.L.'s recantation statements to be credible and, in essence, contends that Blonda misinterprets ***White***. The State asserts that ***White*** "does not say that in assessing a [witness's] undisclosed statement, the circuit court is to assume that the jury would find the statement credible."

¶33 The State's brief does not address the exculpatory nature of the evidence or its failure to disclose the evidence. Because the State has not refuted those arguments, it is deemed to have conceded them. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶34 In ***White***, 271 Wis. 2d 742, ¶¶1, 5, the trial court denied the defendant's post-conviction motion for a new trial based in part on the prosecutor's failure to disclose that the primary prosecution witness, Ehlers, was on probation under a deferred-judgment of conviction in another case. The trial court rejected the defendant's contention that Ehler's probationary status enhanced his motive to lie about what happened during the incident because it might jeopardize his probation and the deferred judgment. The trial court reasoned that

while the jury could draw that inference, it was equally plausible that the jury would conclude that it also gave him an incentive not to lie or obstruct an officer, which also might lead to revocation. ***Id.***, ¶24.

¶35 This court reversed ordering a new trial, in part, because it determined that the trial court did not apply the correct test in determining whether the evidence was relevant. *See* ***id.*** We held that "[t]he test … is whether the jury should have been permitted to consider the evidence so that the verdict was fair." ***Id.***, ¶24. We also said,

> Significantly, the non-disclosed evidence need not necessarily be of such force to result in an acquittal: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

Id., ¶25 (quoting ***Kyles v. Whitley***, 514 U.S. 419, 434 (1995)).

¶36 As in ***White***, the question in this case "'is not whether [Blonda] would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *See* ***id.*** (Citation omitted). Here, the jury was not able to make any determination regarding M.L.'s credibility because she did not testify at trial. Rather, the jury heard M.L.'s excited utterances as conveyed by Vincenza. If the jury was given the opportunity to hear M.L.'s recanting statement that she made to the victim advocate and her own written victim impact statement, the jury could have considered whether M.L. in fact made the statement that Vincenza attributes to M.L. and, if she made the statement to Vincenza, which of the statements the jury believed was truthful. Additionally, the jury had an additional option; that is, having heard all M.L.'s statements it could have

concluded there was a reasonable doubt whether Blonda committed the crimes charged.

¶37 Because the State failed to timely disclose the existence of M.L.'s statements denying that she ever told anyone that Blonda threw the phone at her or hurt her, the jury could not weigh M.L.'s hearsay statements against each other. As we said in ***White***, "[i]t may very well be that the jury would have adopted the trial court's analysis, but under our system, [the defendant] had the right to lay a foundation to present his theory to the jury and have the jury decide—every defendant is entitled to 'a meaningful opportunity to present a complete defense.'" *See* ***id.*** (Citation omitted.)

¶38 In summary, in the absence of the timely disclosure of M.L.'s statement to the victim advocate and her written victim impact statement until after Blonda had been convicted, we cannot say that Blonda received a fair trial, as understood as a trial resulting in a verdict worthy of confidence. *See* ***id.*** *See also* ***State v. DelReal***, 225 Wis. 2d 565, 570-71, 593 N.W.2d 461 (Ct. App. 1999). Therefore, we hold that Blonda is entitled to a new trial.

2. Because We Conclude That Blonda is Entitled to a New Trial, We Need Not Address Other Issues.

¶39 Blonda also argues that trial counsel was ineffective because he failed to impeach M.L.'s excited utterances with her inconsistent statements to others absolving Blonda of causing her injuries. He further argues that he is entitled to a new trial in the interest of justice because the real controversy was not tried. For the reasons stated above, we would otherwise remand the case for a

Machner hearing[6] on Blonda's claim of ineffective assistance of counsel. *See* ***White***, 271 Wis. 2d 742, ¶9 (stating only dispositive issue need be addressed.).

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[6] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).