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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0183**

State of Minnesota,
Respondent,

vs.

Trevor Joseph Steven Kottke,
Appellant.

**Filed June 5, 2017
Affirmed in part, reversed in part, and remanded
Kirk, Judge**

Dakota County District Court
File No. 19HA-CR-14-2409

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

James C. Backstrom, Dakota County Attorney, Jessica A. Bierwerth, Assistant County Attorney, Hastings, Minnesota (for respondent)

Adam T. Johnson, David R. Lundgren, Lundgren & Johnson, PSC, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Rodenberg, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

This matter came before us as both a direct appeal from appellant's convictions of fourth- and fifth-degree criminal sexual conduct and an appeal from the district court's denial of appellant's postconviction petition. In his direct appeal, appellant alleged

evidentiary errors and argued that he was deprived of his right to a fair trial because he was not given a meaningful opportunity to present a complete defense and the state failed to disclose exculpatory information. In his postconviction petition, appellant alleged that the state had committed a *Brady*¹ violation and that newly discovered evidence justified a new trial. We affirm in part, reverse in part, and remand for a postconviction evidentiary hearing.

FACTS

According to her trial testimony, on July 7, 2014, S.P. met appellant Trevor Joseph Steven Kottke in the hallway of their apartment building. The two began to discuss the apartment building. Appellant had recently moved in and was dissatisfied with his apartment. S.P. was happy with her apartment and offered to show it to him. S.P. noticed that appellant was wearing ragged clothing and she offered to give him some of her late husband's clothes.

Appellant followed S.P. into the bedroom as she got the clothes out of the closet. When she turned around, his pants were around his ankles. She asked him to go into the bathroom to try on the clothes, but he refused. Appellant began touching her breasts and her back. Appellant had an erection and asked S.P. to perform oral sex. At one point, appellant shoved S.P. onto the bed. S.P. told appellant that she was going to go to the kitchen to get some water; she yelled at him and was able to push him out the door. She also threw his clothes into the hallway. S.P. was very upset and frightened; she called her

¹ *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963) (holding that suppression of exculpatory evidence by the state is a due-process violation, regardless of the good faith or bad faith of the prosecution).

sister and texted her daughter. She contacted her doctor, who was treating her for an anxiety disorder, for medication. She also told the building caretaker, J.P., that her neighbor just tried to rape her. S.P. did not contact the police, but J.P. called them on her behalf.

S.P. was impeached at trial with a conviction of fraudulently obtaining a prescription drug, oxycodone, in 2010. There were no witnesses to the alleged assault and no physical evidence was collected. Appellant, who testified on his own behalf, denied ever talking to S.P., forcing himself on her, or exposing his penis. The jury found appellant guilty of both fourth- and fifth-degree criminal sexual conduct.

Appellant filed a direct appeal to this court, but then requested a stay of the appeal in order to bring a postconviction petition in the district court. This court granted that request. Appellant asserted two grounds for postconviction relief, a *Brady* violation and newly discovered evidence.

Appellant alleged in his postconviction petition that the state had committed a *Brady* violation by failing to disclose that S.P. recanted accusations of domestic abuse she made against her then-husband, W.L., at a hearing held less than two weeks before this trial. According to a Hastings Police Department report made on October 10, 2015, S.P. accused W.L. of hitting her and told police that she was afraid that W.L. was going to kill her. W.L. was arrested and charged with domestic assault. On October 21, 2015, S.P. appeared in court with W.L. Under oath, S.P. told the court that she had been on a three-day drinking binge, had been falling down because she was inebriated, which caused bruising, and on the third day of the binge, “snapped back into [her] first marriage,” and thought W.L. was

trying to kill her. She testified that W.L. had never touched her. The district court lifted the no-contact order and advised S.P. not to drink. At appellant's trial, S.P. testified that she had been through treatment in 2010 and 2012, she was proud she had done so, and she was sober.

Appellant did not realize that S.P. was using a different name until the day of trial; in the domestic-abuse proceeding, she used her married name, S.L. The domestic-abuse matter was investigated by the Hastings police department, who also investigated the allegations against appellant, and was heard in the Dakota County Courthouse, where appellant's trial was held, by a different district court judge. At the domestic-abuse matter, the state was represented by a Hastings city attorney, rather than a Dakota County attorney.

Appellant also alleged that there was newly discovered evidence that "casts substantial doubt on the veracity of [S.P.]." Appellant cited several items, including: (1) the domestic-abuse matter described above; (2) W.L.'s allegations that S.P. was highly intoxicated the night before she testified at appellant's trial; (3) statements of J.K. and B.K., friends of S.P. and W.L., that S.P. was drinking heavily the night before testifying; (4) W.L.'s statement that, after the jury verdict, S.P. "was on top of the world laughing and giggling, saying that she finally got [appellant] who f**ked her over the pills"; and (5) statements by S.P.'s cousin, J.T., who lived with S.P. after the alleged assault. Appellant learned about the domestic-abuse matter and the other allegations from J.T., who contacted defense counsel in August 2016, and stated that S.P. was a "severe alcoholic and drug addict"; S.P. threatened W.L. "by saying 'you saw what I did to [appellant] I can do the same to you'; and S.P. attempted to seduce another man to get out of trouble.

The district court denied appellant's postconviction petition without a hearing, concluding that there was no *Brady* violation and that appellant was not entitled to a new trial based on newly discovered evidence.

DECISION

I.

In his direct appeal, appellant alleged that the district court erred by permitting (1) the prosecutor to ask S.P. a leading question about appellant's tattoo; (2) the investigating officer to offer opinion testimony; and (3) two police witnesses to refer to S.P. as a "victim." Appellant also argues that the district court abused its discretion by refusing to admit evidence of two commitment petitions filed with regard to the building caretaker, J.P.

We review a district court's evidentiary rulings for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "[T]he appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *Id.* Defense counsel objected to or sought rulings on each of the alleged errors and, therefore, this court reviews for harmless error. See Minn. R. Crim. P. 31.01; *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (stating that an objected-to error is reviewed under the harmless-error standard). "[A]n appellant who alleges an error in the admission of evidence that does not implicate a constitutional right must prove that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id.* (quotation omitted). A reviewing court can consider (1) the manner in which the evidence was presented by the state; (2) the persuasive quality of the evidence; (3) whether the

evidence was used in closing; and (4) whether defense counsel effectively countered the evidence. *Id.* Errors that standing alone may not have affected the verdict may still cumulatively deprive a defendant of his right to a fair trial. *State v. Penkaty*, 708 N.W.2d 185, 206 (Minn. 2006). “Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant’s prejudice by producing a biased jury.” *Id.* (quotation omitted).

(1) Defense counsel objected to the prosecutor’s question to S.P., “Do you recall telling police that that was a skull and crossbones on his chest?” as leading. The style and placement of appellant’s tattoo was an issue because S.P. mentioned a distinctive tattoo during her interviews with police, but at trial S.P. was unable to recall the tattoo or its placement.

The use of leading questions is discouraged because they have “the effect of unsworn testimony” by substituting the attorney’s statement for the witness’s testimony. *State v. Brown*, 348 N.W.2d 743, 746 (Minn. 1984), *abrogated on other grounds by State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). But reversal is required only upon a showing of prejudice. *See State v. Ellert*, 301 N.W.2d 320, 323 (Minn. 1981). Here, defense counsel cross-examined S.P. extensively about her conflicting statements and about a meeting she had with the prosecutor to review her prior statements. This cross-examination mitigated any prejudice to appellant, and reversal is not required.

(2) Although the district court granted appellant’s motion to prohibit testimony about “typical rape victim behavior or post-rape symptoms,” the investigating officer,

Sergeant Amber Wiech, testified that S.P.'s conduct when she gave her statement was consistent with that of crime victims.

A lay witness may offer an opinion if it is “rationally based on the perception of the witness [and] helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” Minn. R. Evid. 701. Wiech offered a limited explanation of why S.P.’s chronology of events in her statement was inaccurate, commenting that crime victims “are not a witness to a crime, they are actually involved in it. . . . They may not get the time right of the event but the event that happened can still be correct and consistent throughout a statement, even if it’s not in a chronological order.” This general statement about a crime victim’s behavior did not violate the district court’s order limiting testimony about rape victims. Wiech’s testimony was based on her own observations and was helpful to the jury. The district court did not abuse its discretion by permitting this testimony.

(3) The district court also granted appellant’s motion to prohibit reference to S.P. as a “victim.” Wiech and another police officer each referred to S.P. once as a “victim.” Although it should not have happened, on both occasions the use of the word “victim” appeared to be a mistake, rather than a deliberate attempt to flout the court’s ruling.

“Any error that does not affect substantial rights must be disregarded [as harmless error].” Minn. R. Crim. P. 31.01. An error that does not implicate a constitutional right is harmless unless the error “substantially influenced the jury’s verdict.” *State v. Expose*, 872 N.W.2d 252, 260 (Minn. 2015) (quotation omitted). Two such limited references to S.P. as a “victim” did not substantially influence the jury’s verdict.

(4) Appellant argues that the district court abused its discretion by refusing to admit evidence of two petitions to civilly commit the witness J.P. on grounds of mental illness. J.P. was not actually committed. The district court concluded that the potential prejudicial effect of testimony regarding the commitment petitions outweighed its probative value and could confuse the jury.

Relevant evidence is generally admissible, while evidence that is not relevant is not admissible. Minn. R. Evid. 402. Relevant evidence may be excluded if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Minn. R. Evid. 403. “Generally, evidence is relevant and has probative value when it logically tends to prove or disprove a material fact in issue.” *State v. Mosley*, 853 N.W.2d 789, 797 (Minn. 2014).

J.P.’s trial testimony was limited to describing her interaction with S.P., an encounter she had with appellant, and her role in calling the police for S.P. The fact that J.P. was the subject of commitment petitions that were filed, stayed, and discharged before July 7, 2014, does not prove or disprove a material fact in issue.

None of the evidentiary errors alleged by appellant is sufficiently egregious to have substantially impacted the jury’s verdict, and even the cumulative impact of the alleged errors was not sufficient to improperly influence or bias a jury. Throughout the trial, appellant’s attorneys performed effectively and acted as skilled advocates for appellant. These relatively minor errors did not significantly impact the verdict.

II.

The district court permitted appellant to impeach S.P. with evidence of her 2010 conviction of forging a prescription, but refused to permit him to call witnesses to the criminal act. Minn. R. Evid. 609(a) provides that a witness may be impeached with evidence of a felony conviction if the probative value of admitting the evidence outweighs its prejudicial effect, or with evidence of a conviction for a crime of dishonesty or false statement, regardless of the term of punishment. The district court's decision is reviewed for an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

“[I]t is the general lack of respect for the law, rather than the specific nature of the conviction, that informs the fact-finder about a witness's credibility.” *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011). Appellant was permitted to impeach S.P. with the fact of her conviction; more specific details about her conduct were unnecessary. *See id.* at 651 (noting that rule 609(a) does not “require the impeaching party to offer evidence about the details or nature of the conviction at the time of impeachment,” so long as the conviction fits into one of the two categories listed in the rule). The district court did not abuse its discretion by limiting impeachment of S.P. to the fact of her conviction.

III.

Appellant alleged two discovery violations: (1) the state failed to disclose the details of S.P.'s interaction with the prosecutor during a trial recess while she reviewed the statements she made to police to refresh her recollection; and (2) the state failed to disclose J.P.'s two civil commitment petitions.

“Whether a discovery violation occurred is an issue of law which this court reviews de novo.” *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). “We review a trial court’s decision on whether to impose sanctions for discovery violations for an abuse of discretion.” *Id.* Minn. R. Crim. P. 9.01, subd. 1(2), requires the prosecution to disclose statements, including written, recorded, or oral statements made by witnesses. The prosecutor has a continuing duty to disclose “before and during trial.” Minn. R. Crim. P. 9.03, subd. 2(c). But a discovery violation will mandate a new trial only if the defendant can demonstrate prejudice. *Palubicki*, 700 N.W.2d at 489. A district court’s decision to deny a request for a new trial must be reversed if the prosecutorial misconduct, in light of the whole record, is so inexcusable, serious, and prejudicial that the defendant was denied a fair trial. *Id.* “But the misconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error.” *Id.*

Because the requirements of rule 9.01 are mandatory, and rule 9.03 states that the duty to disclose is continuing and includes statements made during trial, the state had a duty to provide defense counsel with a summary of S.P.’s statements made during the recess. But viewed in light of the entire record, appellant was not prejudiced by this discovery violation, particularly in light of defense counsel’s effective cross-examination of S.P.

Appellant also argues that the state’s failure to disclose J.P.’s commitment petitions was a *Brady* violation. *See Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97 (stating that suppression of exculpatory evidence by the state is a due-process violation, regardless of the good faith or bad faith of the prosecution); *Pederson v. State*, 692 N.W.2d 452, 459

(Minn. 2005). A *Brady* violation is defined by three elements: (1) the evidence must be favorable to the defendant, as either exculpatory or impeaching; (2) the state must have suppressed the evidence, either willfully or inadvertently; and (3) the defendant must have been prejudiced as a result. *Id.* In order for a new trial to be required, the evidence must be “material,” meaning that there must be a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *Id.* at 460.

Here, even if the prosecutor should have disclosed J.P.’s commitment petitions, appellant has not demonstrated that he was prejudiced. See *State v. Hunt*, 615 N.W.2d 294, 300-01 (Minn. 2000) (“Nondisclosure of evidence that is merely impeaching may not typically result in the kind of prejudice necessary to warrant a new trial.”).

IV.

We review the district court’s decision to deny a postconviction petition, and its decision to deny an evidentiary hearing, for an abuse of discretion. *State v. Whitson*, 876 N.W.2d 297, 303 (Minn. 2016). The district court’s factual findings are reviewed for clear error and its legal conclusions are reviewed de novo. *Id.* The postconviction court must view the alleged facts in the light most favorable to the petitioner. *Id.* “A postconviction court may deny a petition without a hearing only if the record, the facts alleged by the petitioner, and the parties’ arguments conclusively show the petitioner is not entitled to relief.” *Id.*

Appellant alleged that the prosecutor’s failure to disclose S.P.’s abuse allegations against her husband and subsequent recantation was a *Brady* violation. The district court concluded that the state had no knowledge of the domestic-abuse proceeding and,

therefore, it did not suppress evidence. We agree. Although a prosecutor is charged with the knowledge of others working for the state, such as police officers, in this case there is no showing that the police officers investigating appellant were aware of the domestic-abuse allegations made by S.P. over one year later. *See State v. Williams*, 593 N.W.2d 227, 235 (Minn. 1999) (stating that prosecutor has a duty to disclose favorable evidence known to others who are acting on the government's behalf). Here, the charges against appellant and the domestic-abuse matter involved different prosecuting authorities, judges, and police officers, and the victim's name had changed.

A defendant is entitled to a new trial because of newly discovered evidence if he can prove that: (1) the evidence was not known to the defendant or defense counsel at the time of trial; (2) the evidence could not have been discovered through due diligence prior to trial; (3) the evidence is not “cumulative, impeaching, or doubtful”; and (4) “the evidence would probably produce an acquittal or a more favorable result.” *Bobo v. State*, 860 N.W.2d 681, 684 (Minn. 2015) (citing *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997)). “The quantum of proof required for each *Rainer* element is a fair preponderance of the evidence.” *Bobo*, 860 N.W.2d at 684. The district court concluded that appellant failed to demonstrate the last three *Rainer* elements. We disagree with the district court's decision as it applies to S.P.'s false allegations of abuse and recantation in the domestic-abuse proceeding.

If, as the district court concluded, the state could not be charged with a *Brady* violation because the prosecutor was wholly unaware of the domestic-abuse proceedings, appellant likewise should not be held to have acted with less than due diligence by failing

to uncover information about the domestic-abuse proceeding, which occurred less than three weeks before trial. J.T. was the source of appellant's knowledge about these events. It is unclear from this record whether appellant could have learned about S.P.'s false accusations from J.T. or if J.T. even knew about S.P.'s false accusation before appellant's trial. *Cf. State v. Mosley*, ___ N.W.2d ___, 2017 WL 1491005, at *3 (Minn. Apr. 26, 2017) (affirming rejection of defendant's claim of newly discovered evidence because it was known to defense counsel at the time of trial and was cumulative).

Second, although a new trial may not be based on newly discovered evidence that is merely "cumulative, impeaching, or doubtful," this court found "persuasive the rule of law established in several foreign jurisdictions whereby evidence of prior false accusations is admissible both to attack the credibility of the complainant and as substantive evidence tending to prove that the instant offense did not occur." *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). In *Goldenstein*, this court considered the district court's exclusion of evidence of prior accusations of sexual abuse made by child witnesses that were most likely false. *Id.* Because there was no conclusive physical evidence, "the veracity of the children when making those statements was critical to [the] defense." *Id.* This court also concluded that "the trial court's exclusion of evidence of the prior false allegations violated [the defendants'] constitutional right to present a defense." *Id.* Here, S.P.'s recantation in the domestic-abuse matter was not cumulative to the trial evidence nor were her statements doubtful because she made them under oath and in court. And, under *Goldenstein*, "evidence of prior false accusations" is admissible both to impeach and as substantive evidence. *Id.*

Finally, S.P. and appellant were the only witnesses to the alleged assault and no physical evidence was recovered that supported either version of events. Appellant's convictions rest entirely on S.P.'s credibility. Under these facts, there is a reasonable probability that the outcome of the trial would have been different had the jury known about S.P.'s false accusations of domestic abuse.

The district court did not hold an evidentiary hearing, which "is unnecessary if the substance of the affidavit purporting to contain newly discovered evidence, when taken at face value, is insufficient to entitle the petitioner to the relief requested." *Scherf v. State*, 788 N.W.2d 504, 508 (Minn. 2010). The district court stated in its postconviction order, "The petition, files, and records of this proceeding conclusively show that [appellant] is entitled to no relief." But because there was no postconviction evidentiary hearing, the record does not demonstrate whether appellant could have discovered this evidence with due diligence. And, in a close case, "any doubts about whether to conduct a postconviction hearing should be resolved in favor of the petitioner." *Dobbins v. State*, 788 N.W.2d 719, 736 (Minn. 2010). S.P.'s false accusations in the domestic-abuse proceeding raise an important enough issue to merit an evidentiary hearing, which would give the district court an additional opportunity to make credibility determinations. *See id.*

We conclude that the district court abused its discretion by denying appellant's postconviction petition as to the newly discovered evidence without holding an evidentiary hearing. We, therefore, reverse the district court's postconviction order and remand for a postconviction evidentiary hearing.

Affirmed in part, reversed in part, and remanded.