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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0546**

Armando DeLaCruz, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 14, 2018
Affirmed
Bratvold, Judge**

Waseca County District Court
File No. 81-CR-13-771

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Brenda Miller, Waseca County Attorney, Waseca, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Larkin, Judge; and Florey, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

This is appellant Armando DeLaCruz Jr.'s second appeal from his conviction of multiple counts of criminal sexual conduct and other offenses. In the first appeal, we granted DeLaCruz relief, reversing the district court's decision that it lacked jurisdiction to hear his motion for a new trial. *State v. DeLaCruz*, 884 N.W.2d 878, 886-88 (Minn. App. 2016). On remand, the district court denied his motion for a new trial on the merits. DeLaCruz's second appeal challenges the district court's denial of his motion for a new trial. He also argues that he received ineffective assistance of counsel during the remand proceedings. We conclude that the district court did not err when it denied him a new trial for two reasons. First, the prosecutor did not commit a *Brady* violation because the allegedly suppressed evidence was not material. Second, the allegedly suppressed evidence was not newly discovered. We also deny DeLaCruz's ineffective-assistance-of-counsel claim on the merits. Thus, we affirm.

FACTS

The facts of this case are detailed in our opinion resolving DeLaCruz's first appeal. *See DeLaCruz*, 884 N.W.2d at 881-83. We summarize the facts that are relevant to the issues on this second appeal. According to trial testimony, on the evening of September 13, 2013, C.O. was at home watching television in her bedroom while her two children were sleeping. After hearing a noise, she looked around and found a man in the hallway, with clothing covering his face; he was later identified as DeLaCruz. C.O. retreated to a bedroom and closed the door, but DeLaCruz forced his way inside. Although C.O.

struggled with DeLaCruz, and bit him twice, DeLaCruz threatened to harm her children if she did not comply with his demands. He bound her arms and feet, touched her breasts and buttocks, and moved her to the bathroom. There, DeLaCruz continued to grope C.O. and forcefully penetrated her vagina three separate times. During the sexual assault, C.O. recognized DeLaCruz as someone she had met earlier through an acquaintance. C.O. eventually escaped and reported the assault to the police. When police arrested DeLaCruz, he had a bite mark on his left forearm, scratches on his nose, a mark on his right arm, a bloody scrape on his wrist, and a scratch on his right elbow.

The Waseca County Attorney's Office charged DeLaCruz with 30 counts, including 1 count of kidnapping, 2 counts of terroristic threats, 4 counts of first-degree burglary, 1 count of false imprisonment, 10 counts of first-degree criminal sexual conduct, 11 counts of second-degree criminal sexual conduct, and 1 count of fifth-degree assault. Following a ten-day trial, a jury found DeLaCruz guilty of 20 counts, and not guilty of 8 counts. Before trial, the state had dismissed 2 counts.

At a hearing to address posttrial motions, including DeLaCruz's pro se motion for a new trial, the district court informed the parties that it had received "an old court file containing a police report" in which an officer documented that C.O. had accused him of sexual assault ("the 2006 allegation"). The court file (No. 81-CR-06-223), which is part of our appellate record, includes the "tab" charges against C.O., along with two police reports. Both police reports described C.O. as intoxicated and upset about a custody dispute involving her son. The reports also stated that C.O. repeatedly yelled and refused to follow the officers' instructions. The reports noted that an officer and a deputy brought C.O. to

the ground to control her. In the deputy's report, he described handcuffing C.O. while she was on the ground and C.O.'s subsequent behavior, including kicking and screaming, as the deputy attempted to seat her in his squad car. After another struggle inside the squad car, C.O. remained in the back seat.

As the deputy began to drive away, C.O. began kicking at the partition and window and said the deputy had touched her "punanny" or "pussy." The deputy returned to the scene and asked that another officer transport C.O. As C.O. was moved to a different vehicle, she shouted that the deputy was "going down" for touching her inappropriately. The deputy denied C.O.'s accusations in his report. C.O. pleaded guilty and was convicted of criminal damage to property and obstruction of legal process. Nothing in this court file indicates that any further action was taken regarding C.O.'s assault allegations against the deputy.

After the district court told the parties about the allegation in C.O.'s 2006 court file, DeLaCruz amended his motion for a new trial. Although the prosecuting attorney had disclosed C.O.'s criminal history, including her 2006 convictions, he did not disclose the 2006 allegation. In his amended motion, DeLaCruz argued that failure to disclose the 2006 allegation was a violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). DeLaCruz also sought a new trial under Minn. R. Crim. P. 26.04, subd. 1(1), alleging that the 2006 allegation was newly discovered evidence, among other issues. The state argued that the motion was untimely and that no *Brady* violation had occurred, in part, because the 2006 allegation was not material evidence.

The district court denied DeLaCruz's new trial motion, reasoning that the motion was untimely and it lacked jurisdiction; therefore, it declined to address the merits. The district court imposed a sentence of 360 months for first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2012), along with concurrent sentences for first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(c) (2012), and kidnapping in violation of Minn. Stat. § 609.25, subd. 1(2) (2012).

DeLaCruz appealed the denial of his motion for a new trial. In the first appeal, this court held that the district court had jurisdiction over the new trial motion, reversed, and remanded the case for a hearing on the new-trial motion. *See DeLaCruz*, 884 N.W.2d at 888. We also rejected DeLaCruz's pro se claims, including ineffective assistance of counsel, prosecutorial misconduct, irregularity of the proceedings, and sufficiency of the evidence. *Id.* at 888-90.

On remand, the district court held a hearing to address DeLaCruz's new trial motion on the merits. Before the hearing, DeLaCruz's defense counsel filed an affidavit stating that the public defender's office had represented C.O. in the 2006 case and, at one time, had a copy of the 2006 court file, which included the 2006 allegation, but had destroyed the copy consistent with office policy.

At the hearing, the prosecuting attorney told the court that, before trial, it informed the defense of "all of [C.O.'s] convictions," including the convictions from the 2006 court file. The prosecuting attorney also stated that the prosecutors working on DeLaCruz's case were unaware of the 2006 allegation and that the 2006 court file was not in their file for the DeLaCruz case. But the prosecuting attorney acknowledged that, while preparing for

the new trial hearing, she had found a copy of the 2006 court file, including the police reports about the 2006 allegation, in the county attorney’s “storage unit.” In response, DeLaCruz’s counsel acknowledged that she was aware of C.O.’s 2006 convictions, but argued that neither side anticipated that the court file “would contain anything regarding criminal sexual conduct.”

In a written order, the district court denied the new-trial motion after determining that no *Brady* violation had occurred and that a new trial was not appropriate under rule 26.04, subd. 1(1). DeLaCruz appeals.

D E C I S I O N

I. The district court did not err in determining that the prosecution did not commit a *Brady* violation when it failed to disclose the 2006 allegation because the evidence was not material.

“[T]he suppression by the State, whether intentional or not, of material evidence favorable to the defendant violates the constitutional guarantee of due process.” *Zornes v. State*, 903 N.W.2d 411, 417 (Minn. 2017) (alteration in original) (quotation omitted). Also known as a *Brady* violation, the test for determining if a violation has occurred includes three elements:

- (1) the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching;
- (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and
- (3) the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant.

Id. “[T]he remedy for a *Brady* violation is a new trial.” *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000).

Under *Brady*, 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.” *Zornes*, 903 N.W.2d at 418 (quotation omitted). “A reasonable probability is one that is sufficient to undermine confidence in the outcome.” *Id.* (quotation omitted). Evidence that would have been “possibly useful,” but “unlikely to have changed the verdict” is not material under this prong. *Id.* Appellate courts “make a materiality determination by considering the effect the undisclosed evidence would have had in the context of the whole trial record.” *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010).

DeLaCruz argues that the district court erred by denying his motion for a new trial because the state committed a *Brady* violation when it did not disclose the 2006 allegation, even though the failure was inadvertent. The district court rejected this argument, in part, because it determined that the evidence would not have materially undermined the case against DeLaCruz. We agree with the district court’s materiality analysis for two reasons: (1) DeLaCruz impeached C.O. at trial, and the 2006 allegation was not materially different impeachment evidence; and (2) independent evidence besides C.O.’s testimony supported DeLaCruz’s guilt.¹

Because materiality is dispositive, we address only the third *Brady* element. We review the district court’s analysis de novo because “a *Brady* materiality analysis involves a mixed question of law and fact.” *Zornes*, 903 N.W.2d at 417 (quotation omitted).

¹ The parties dispute whether the 2006 allegation was admissible. Because we determine that even if the 2006 allegation was admissible, it would not have been material, we do not reach this issue.

1. The 2006 allegation was not material evidence requiring a new trial because DeLaCruz impeached C.O. during trial.

In *State v. Miller*, the supreme court held that no *Brady* violation occurred where the state failed to provide the defendant with complete copies of a witness's criminal history. 754 N.W.2d 686, 706 (Minn. 2008). The undisclosed evidence would have revealed that the witness had been convicted of four felonies. *Id.* The supreme court held that the state suppressed evidence and that the evidence was exculpatory. *Id.* But the supreme court reasoned the evidence was not material because the witness's credibility nonetheless was "successfully impeached at trial." *Id.* The supreme court pointed out that, during trial, the witness "admitted to lying to the police and to being unreliable because he was high on methamphetamines when the events took place." *Id.*

Similarly, DeLaCruz impeached C.O. during trial. In three separate instances, DeLaCruz adduced evidence that C.O. was either untrustworthy or unreliable. First, DeLaCruz offered evidence that C.O. had been drinking on the night of the assault, as well as evidence that C.O. had recently taken amphetamines because a urine test after the assault showed "the highest level" of amphetamines in her system.

Second, DeLaCruz offered evidence from which he argued that C.O. lied about her use of Adderall. C.O. testified that she took Adderall just "one time" a day or so before her assault, and otherwise had never before taken Adderall or had since used the drug. But C.O.'s friend testified that C.O. "consistently use[d] Adderall during 2013." DeLaCruz's counsel argued during closing that, "[C.O.] did not tell you the truth about her use of Adderall. How can you believe her about anything[?]"

Third, DeLaCruz offered evidence that C.O. intentionally did not inform investigators about her use of Adderall. C.O. testified that she did not have a prescription for Adderall. C.O. also admitted that she intentionally mentioned her use of diet pills to investigators to explain the amphetamine test results because she was trying to avoid incriminating the friend who supplied her with the Adderall.² C.O. admitted at trial that she did not disclose her use of Adderall around the date of the assault to the prosecutor until the week before trial. DeLaCruz's attorney raised C.O.'s omissions during closing arguments.

We conclude that the 2006 allegation had limited impeachment value when compared to evidence showing that C.O. was untruthful while on the stand and to state officials during the investigation. The 2006 allegation was remote in time and involved significantly different facts. Notably, C.O. never pursued a complaint against the deputy about the conduct described in the 2006 allegation. Further, C.O. had a motive to fabricate allegations in 2006—to avoid criminal prosecution—and similar motives are not apparent here.

When we consider the impact of DeLaCruz's successful impeachment of C.O.'s trustworthiness and credibility during trial, as well as the low probative value of the 2006 allegation, we are persuaded that the 2006 allegation was not material. There is no reasonable probability that, had the 2006 allegation been disclosed to the defense before

² At trial, C.O. stated that she “underst[ood] that Adderall contains amphetamine.”

trial, the outcome of the trial would have been different. Thus, our confidence in the jury's verdict is not undermined. *See Zornes*, 903 N.W.2d at 418.

2. The 2006 allegation was not material evidence requiring a new trial because independent evidence suggested DeLaCruz's guilt.

In *State v. Jackson*, the supreme court held that no *Brady* violation occurred even though the prosecutor failed to provide the appellant with the criminal record of one of the state's key witnesses. 346 N.W.2d 634, 636-39 (Minn. 1984). The supreme court reasoned that the appellant was not prejudiced by the suppressed evidence because the witness's testimony "was not the only damning evidence" against him, and this decreased "the likelihood that any [evidence suppression] was prejudicial." *Id.* at 638.

Here, independent evidence corroborated C.O.'s account that DeLaCruz assaulted her. First, the nurse who examined C.O. in the early morning of September 14, 2013, said that C.O. appeared "very anxious and afraid." The medical examination showed that C.O. had scratches, abrasions, and bruises on her body, as well as "redness" and "abrasions" around her vagina and uterus, not usually seen in a "normal patient." The nurse also found swelling around C.O.'s labia. Second, C.O.'s neighbors testified that on the night of September 13, she came to their house "screaming," appeared "frantic," and wore only a "little towel." Third, a detective testified that he found damage to C.O.'s bedroom door, a broken "toilet paper holder frame," and other physical evidence corroborating C.O.'s testimony about the assault. Fourth, police found wounds on DeLaCruz that matched the wounds that C.O. said she had inflicted on her attacker, including "a possible bite mark." Finally, DeLaCruz changed his story about how he had received his injuries. Initially, he

said that he received his injuries in a fight. Later, he said that he had received his injuries by falling off a bike.

Accordingly, we conclude that the suppression of the 2006 allegation did not prejudice DeLaCruz. As a result, DeLaCruz has not satisfied the third *Brady* prong and no *Brady* violation occurred. See *Zornes*, 903 N.W.2d at 417 (holding that, to prevail, an appellant “must meet all three requirements to establish a *Brady* violation”).

II. The district court did not abuse its discretion by denying DeLaCruz a new trial under Minn. R. Crim. P. 26.04.

DeLaCruz also moved for a new trial, arguing that the 2006 allegation was newly discovered evidence under Minn. R. Crim. P. 26.04, subd. 1(1). To succeed on this ground, DeLaCruz needed to show:

(1) that the evidence was not known to him or his counsel at the time of trial, (2) that his failure to learn of it before trial was not due to lack of diligence, (3) that the evidence is material (or, as we have sometimes said, is not impeaching, cumulative or doubtful), and (4) that the evidence will probably produce either an acquittal at a retrial or a result more favorable to the petitioner.

Race v. State, 417 N.W.2d 264, 266 (Minn. 1987). We review a district court decision not to grant a new trial based on newly discovered evidence for abuse of discretion. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997).

DeLaCruz’s argument fails the third requirement for a new trial under Minn. R. Crim. P. 26.04, which provides that the new evidence must be material and not “cumulative, impeaching, or doubtful.” *Id.* Here, the 2006 allegation would have served no other purpose than to impeach C.O.’s credibility. Evidence that is “merely impeaching”

does not satisfy the third requirement. *Pippitt v. State*, 737 N.W.2d 221, 228 (Minn. 2007). As a result, the district court did not abuse its discretion by denying DeLaCruz's motion for a new trial under Minn. R. Crim. P. 26.04.³

III. We deny DeLaCruz's ineffective-assistance-of-counsel claim.

DeLaCruz appears to ask this court to remand for additional proceedings to determine whether DeLaCruz's previous counsel provided ineffective assistance during the remand proceedings. It seems that DeLaCruz claims that his previous attorney failed to ask for an evidentiary hearing to allow the district court to determine whether C.O.'s 2006 allegation against the officer was true, contending that this would further support his *Brady*-violation claim.⁴

To prevail on an ineffective-assistance-of-counsel claim, "an appellant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quotation omitted).

Our review of the record indicates that DeLaCruz did not raise an ineffective-assistance-of-counsel argument to the district court, and the district court did not address

³ The district court also determined that a new trial was not warranted based on "the interests of justice" or "prosecutorial misconduct." DeLaCruz does not dispute these determinations on appeal.

⁴ Typically, "The *Knaffla* rule bars postconviction claims of ineffective assistance of trial counsel after direct appeal except when the merits of the claim cannot be determined from the district court record and requires additional evidence, such as that involving attorney-client communications." *Erickson v. State*, 725 N.W.2d 532, 535-36 (Minn. 2007) (quotation omitted). Here, DeLaCruz's ineffective-assistance claim is not barred because he relies on the hearing that occurred after this court remanded his case.

it. Generally, this court will not “decide issues which are not first addressed by the trial court and are raised for the first time on appeal even if the issues involve constitutional questions regarding criminal procedure.” *State v. Roby*, 463 N.W.2d 506, 508 (Minn. 1990) (quotation omitted). But we may address an ineffective-assistance-of-counsel claim if the record before us is sufficient. *See State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (citing *Anderson v. State*, 830 N.W.2d 1, 10 (Minn. 2013)).

DeLaCruz’s ineffective-assistance claim fails to satisfy the prejudice requirement. To support his claim, DeLaCruz contends that his attorney failed to request an evidentiary hearing related to his *Brady*-violation claim. Because we have rejected the *Brady* violation and our reasons for doing so would not have been affected by an evidentiary hearing, DeLaCruz cannot show that the outcome of his *Brady* claim “would have been different” but for the alleged ineffective assistance. *See Rhodes*, 657 N.W.2d at 842. Thus, we deny his claim on the merits.

Affirmed.