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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1322**

State of Minnesota,
Respondent,

vs.

Scott Alan Kepner,
Appellant.

**Filed June 18, 2018
Affirmed
Halbrooks, Judge**

Chisago County District Court
File No. 13-CR-16-226

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

Janet Reiter, Chisago County Attorney, Beth A. Beaman, Assistant City Attorney, Center City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

HALBROOKS, Judge

On appeal from his conviction of second-degree criminal sexual conduct, appellant contends that (1) the state committed a *Brady* violation by not disclosing the existence of

a diary authored by the victim before appellant's first trial and (2) the district court abused its discretion by not excluding the evidence of the diary at appellant's second trial. We affirm.

FACTS

After K.M. and her husband divorced in 2005, she and B.M., their grade-school-aged daughter, remained in Minnesota. B.M.'s father moved to Illinois. To cover living expenses, K.M. rented the basement of her home.

Appellant Scott Alan Kepner began renting the basement of K.M.'s home in December 2011. Kepner, K.M., and B.M. shared the kitchen, but Kepner's bedroom and living area were in the basement. On the weekends, Kepner's middle-school-aged son often visited him. Kepner's son and B.M. spent considerable time together riding Kepner's son's four wheeler, going to movies, and sharing meals under Kepner's supervision.

One evening between January 1, 2012 and January 31, 2013, Kepner told B.M. to choose a movie that they could watch alone in the basement. K.M. was upstairs working on the computer. Midway through the movie, Kepner took B.M.'s hand, slid it down inside his pants, and forced her to grab and squeeze his penis. He also touched her breasts and vagina, both over and underneath her clothes. The touching lasted for "[m]aybe 45 minutes."

In order to keep B.M. from telling her mom what had happened, Kepner offered B.M. the chance to drive the four wheeler or go to a movie. B.M. chose driving the four wheeler and did not say anything to her mom. Kepner moved out a month or two later after his rent increased; B.M. moved around the same time to live with her dad.

B.M. subsequently recorded her recollection of the basement incident in two places. First, she wrote an entry in her diary, referencing a “flashback” to when Kepner touched B.M. in her private area and made her touch him. Her mother found the diary entry sometime after B.M. moved to live with her dad. But when she asked B.M. about it, B.M. was vague, and she did not pursue it further. B.M. also wrote a letter saying that “what [Kepner] made [her] do was a crime” and that she had been experiencing flashbacks “[e]ver since that day when [they] were sitting on the couch.” In March 2015, B.M.’s father found the letter when doing B.M.’s laundry and reported it to local law enforcement. B.M. was interviewed by a detective and later spoke to a child-abuse and forensic investigator in Illinois. B.M. explained what happened in the basement and stated that she wrote about the incident in both the letter and her diary.

The state charged Kepner with second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(a) (2010). At trial, B.M. testified about the basement incident and the letter that her dad found. She also testified that her mom “found this diary that I had to write . . . when I was younger.” Kepner’s defense theory was that B.M. fabricated the story because she was upset that she had to move to her dad’s home and because she did not get along with her parents.

The district court declared a mistrial after the jury deadlocked during deliberations. B.M. then provided her diary to the prosecutor. Approximately 29 days before the second trial, the prosecutor disclosed to Kepner excerpted copies of three diary entries. Kepner moved in limine to exclude the diary entries from the second trial, arguing that the

prosecutor had committed a *Brady* violation by not disclosing the diary to Kepner before the first trial.

At the motion hearing, Kepner argued that the diary had both exculpatory and inculpatory value. Kepner argued that the diary had exculpatory value because the third entry supported his defense theory that B.M. fabricated the basement incident as a way to attract attention from her parents. He argued that it had inculpatory value in that it potentially corroborated “what [B.M.] indicated occurred previously with Mr. Kepner.”

The prosecutor advised the district court that she did not realize the value of the diary until B.M. mentioned it in her testimony in the first trial. The prosecutor maintained that she had not committed a *Brady* violation because (1) the diary had not been in the possession of the state or anyone working for the prosecution team and (2) the diary did not have exculpatory value. The prosecutor asserted that the diary did not have exculpatory value because the state “would not have known what the defense’s theory of the case was prior to the first trial, and so it’s not like it would have been something that was readily obvious to the State that it needed to be disclosed.”

The district court offered Kepner a continuance to review the diary in order to prepare a defense and determine if he wanted to retain an expert. Kepner’s counsel advised the district court that she no longer worked in the jurisdiction, so it would be “really difficult for [her] to consider a continuance.” After consulting with his counsel, Kepner declined the continuance.

The district court denied Kepner’s motion in limine, concluding that the prosecutor could introduce the three diary entries at the second trial. The prosecutor admitted into

evidence the diary entries and the letter that B.M. wrote to Kepner. Kepner’s theory of defense in the second trial was the same as in the first trial—that B.M. fabricated the story for parental love and attention and that the third diary entry supported that assertion. The jury found Kepner guilty, and the district court sentenced Kepner to a stayed term of 36 months’ imprisonment. This appeal follows.

DECISION

I.

Kepner argues that the state violated his due-process rights and committed a *Brady* violation by not investigating and producing B.M.’s diary before the first trial. We review constitutional issues that raise due-process concerns de novo. *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

The state has an affirmative duty in criminal cases to disclose evidence that is favorable and material to the defense. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963); *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999). To constitute a *Brady* violation, the following three requirements must be established:

- (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;¹ and
- (3) the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant.

¹ The first two components of *Brady* are embodied in the Minnesota Rules of Criminal Procedure. *Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005). Minn. R. Crim. P. 9.01 provides that the state must disclose any written or recorded statements which relate to the case “within the possession or control of the prosecution” as well as any “[m]aterial or information in the prosecutor’s possession and control that tends to negate or reduce the defendant’s guilt.”

Zornes v. State, 903 N.W.2d 411, 417 (Minn. 2017) (quotation omitted). “Because a *Brady* materiality analysis involves a mixed question of law and fact, [appellate courts] review a district court’s materiality determination de novo.” *Id.* (quotation omitted).

The district court ruled as follows concerning the alleged *Brady* violation:

The Court is concerned with the lack of investigation on the part of the State relative to the journal, given the information provided in [the] June 8, 2015 interview with the alleged victim. Still, this Court does not believe the circumstances here amount to a discovery violation, or directly contravene the U.S. Supreme Court’s rule in *Brady*. The lack of disclosure by the State seems to have been the result of the prosecution’s own lack of investigation, and the journal does not appear to be material to guilt or punishment of [Kepner], or to negate or reduce his guilt in this case, so as to constitute exculpatory evidence. Moreover, [Kepner] consulted with counsel and then did not request any continuance of Trial in this matter in the course of the Hearings on February 17 and February 21, 2017. For these reasons, the Court will allow entry of the journal into evidence at Trial.

A. Favorable Evidence

The diary contains the following three entries:

Today is January 4 and [my mom’s boyfriend] keeps calling me names, picking on me and then says you [know] if it were up you’d be at your dad and also says me and [my mom] live together without me and lend me to my dads. So he is so unfair. Feelings = mad sad middle.

Scared for life. Today is January 12 and I had a horrible flash back. About 1 year ago we had a room[m]ate named [S]cott and he was aw[e]some untill Oct-27 when he touched in private area and made [me] touch him. [T]oday I heard [our] new room[m]ate . . . and his friend making sexual noises gross. Feelings—ew grossed out[.]

Today is April-30-2015 I live with my dad now and it sucks[.] I really hate him[.] I screwed up with my mom and now living with him. I am 11 years old and when I lived with my mom I did rollerskating at Roller Garden in Saint Louis Park I wish I could rewind but can't change the past. Feeling—bummed out.

Kepner contends that the third entry is exculpatory because it supports his theory that B.M. fabricated the story involving the incident in the basement. He also argues that the third diary entry is at least impeaching because it differs from the version of events that B.M. provided to the investigator during her interview. The state counters that the diary does not have exculpatory value because its contents “do nothing that tends to negate or reduce [Kepner’s guilt]” and do not directly impeach or contradict B.M.’s trial testimony.

We disagree with Kepner’s assertion that the third entry is exculpatory. Although the third entry establishes that B.M. did not enjoy living with her father at the time, it does not indicate that B.M. fabricated the basement story to attract love from her parents.

Neither does the third entry have impeachment value. It is true that “[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the *Brady* rule.” *Pederson*, 692 N.W.2d at 460 (quotation omitted). But here, the third diary entry makes B.M. more credible. B.M. told the investigator that her father worried “too much,” that he was “annoying,” and that he “puts everything on everybody else.” The third entry is consistent with those statements. It does not provide a basis to impeach B.M.

B. Suppression by the State

Even if the diary had exculpatory or impeachment value, Kepner cannot establish that the diary was suppressed by the state. Kepner does not assert that the prosecutor possessed B.M.'s diary entries or letter before the first trial. The prosecutor disclosed the diary to Kepner when she received it—at least 25 days before the hearing on Kepner's motion in limine and 29 days before the second trial. *See State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987) (concluding that report disclosed 13 days before the beginning of the defendant's case did not constitute a serious discovery violation).

C. Material

But even if the prosecutor had suppressed the diary, Kepner cannot establish that the diary entries were material. "Evidence is material under *Brady* 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 (quotations omitted). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Id.* (quotations omitted). The remedy for a *Brady* violation is a new trial. *Id.* But a new trial is not required "simply because a defendant uncovers previously undisclosed evidence that would have been possibly useful to the defendant but is unlikely to have changed the verdict." *Id.* (quotation omitted). We evaluate materiality in light of the entire trial record. *Id.* at 417.

Kepner cannot establish that the diary entries were material because he cannot show that the outcome of the first trial would have been different had the evidence been available. First, the prosecutor disclosed the diary entries, the district court admitted them at the

second trial, and a jury again convicted Kepner. Second, even if there was a *Brady* violation, Kepner cannot establish prejudice because he received the remedy articulated in *Brady*: a new trial. *See id.* If anything, the prosecutor’s failure to obtain the diary earlier represents, as the district court noted, an incomplete investigation by the state. But without a showing of prejudice, “allegations regarding an inadequate police investigation do not amount to a *Brady* violation.” *Woodruff v. State*, 608 N.W.2d 881, 888 (Minn. 2000). Because Kepner cannot establish all three prongs, the district court properly concluded that the state did not commit a *Brady* violation.

II.

Kepner also contends that the district court erred by admitting the diary in evidence at the second trial, arguing that the district court should have instead suppressed the diary as an appropriate sanction for the discovery violation.² A district court can impose sanctions for violating Minn. R. Crim. P. 9.01, subd. 1, and in doing so, the district court should take into account “(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors.” *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). The district court is in the best position to fashion a remedy. Therefore, we will not reverse a district court’s decision concerning sanctions for discovery violations unless it constitutes a clear abuse of the district court’s discretion. *Id.*

² We acknowledge the irony in Kepner’s argument that the diary constituted *Brady* evidence because it is exculpatory but that the district court abused its discretion in admitting the diary at the second trial.

The district court took the above-stated factors into account in denying Kepner's motion in limine. The district court stated that the parties became aware of the diary after reviewing the transcript of the interview between B.M. and the investigator, but that neither party requested an order for production. The district court determined that the lack of disclosure stemmed from the state's inadequate investigation but reasoned that Kepner could have remedied any potential prejudice through a continuance because it would have given him additional time "to more fully review the entries in the journal and/or retain an expert to examine the diary itself." The district court further noted that it had offered Kepner a continuance and that, after Kepner consulted with counsel, he declined it.

The district court "is in the best position to determine whether any harm has resulted from the particular violation and the extent to which this harm can be eliminated or otherwise alleviated." *Id.* The district court considered its options in light of the record and offered Kepner time to remediate any potential prejudice. We therefore conclude that the district court properly exercised its discretion by admitting evidence of the diary entries in the second trial.

III.

In a pro se supplemental brief, Kepner argues that he received ineffective assistance of counsel at his second trial because his attorney (1) did not object during B.M.'s testimony, (2) did not ask questions about Kepner's father molesting Kepner's younger sister, (3) did not question B.M. on cross-examination like she did during the first trial, and (4) did not want a continuance because she transferred to a position in a different county.

Kepner did not raise these arguments to the district court or in a postconviction petition. The general rule is that “an appeal from a conviction is not the most appropriate way to raise issues of trial counsel’s ineffective representation . . . because [appellate courts] do not have the benefit of all the facts regarding why defense counsel acted as [s]he did.” *State v. Cermak*, 350 N.W.2d 328, 332 n.6 (Minn. 1984). Because Kepner did not raise his ineffective-assistance-of-counsel claim in district court, that claim is not properly before us. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts “generally will not decide issues which were not raised before the district court”).

Even if we assume that Kepner properly raised this claim in district court, it fails on the merits. *See Voorhees v. State*, 627 N.W.2d 642, 649 (Minn. 2001) (addressing claims alleging ineffective assistance of trial counsel on direct appeal where the existing record was sufficient to determine those claims without any additional fact finding). When an ineffective assistance of counsel claim is properly raised in a direct appeal, we examine the claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). The defendant must affirmatively establish that his counsel’s representation “fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotations omitted).

Kepner’s first three claims of ineffective assistance of counsel amount to disagreements with his counsel’s trial strategy. We will not review ineffective-assistance-of-counsel claims that are based on trial strategy. *Andersen v. State*, 830 N.W.2d 1, 10

(Minn. 2013). The fourth claim alleges that Kepner's trial counsel was ineffective because she had transferred to a different county and declined a continuance for a second trial. During the hearing on Kepner's motion in limine, when the district court asked Kepner whether he wanted a continuance, the following exchange occurred among the district court, Kepner's counsel, and Kepner:

[COUNSEL]: Your Honor, I've discussed it with my client. He really wants to move forward, so we're not requesting a continuance.

THE COURT: So there will be no continuance requested. That is a remedy the Court would allow in this case if your client wished it. I would note that that is being waived. Mr. Kepner, that is your request?

[KEPNER]: Yes, your honor.

The record establishes that Kepner declined the offer of a continuance. Kepner has not pointed to any record evidence establishing that his trial counsel fell below an objective standard of reasonableness. *Ellis-Strong*, 899 N.W.2d at 536. Kepner has failed to affirmatively establish the first prong of the *Strickland* test. *Id.* Therefore, even if Kepner properly raised his ineffective-assistance-of-counsel claim, it fails on the merits.

Affirmed.