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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1176**

State of Minnesota,
Respondent,

vs.

Michael Peter Derevitsky,
Appellant.

**Filed May 20, 2019
Reversed and remanded
Halbrooks, Judge**

Dakota County District Court
File No. 19HA-CR-17-2656

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Torrie J. Schneider, Assistant County Attorney, Hastings, Minnesota (for respondent)

John L. Lucas, Minneapolis, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Halbrooks, Judge;
and Larkin, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his conviction of fifth-degree criminal sexual conduct, arguing that (1) he was deprived of his constitutional right to present a complete defense, (2) the

evidence was insufficient to sustain his conviction, (3) the postconviction court erred in determining that a *Brady* violation did not occur, and (4) he should have been granted an evidentiary hearing. Because we conclude that a *Brady* violation occurred, we reverse and remand for a new trial.

FACTS

On July 2, 2017, J.G. was at a bar in Apple Valley. While J.G. was standing near the arcade games, a man walked by and “back-hand palmed” her vaginal area. The man then went into the bathroom. J.G. told her friend, A.H., what had happened and indicated that the man was wearing a baseball cap. A.H. checked the men’s bathroom and reported to J.G. that there were two men inside wearing baseball caps. After both men exited the bathroom, J.G. identified appellant Michael Peter Derevitsky as the man who had grabbed her. J.G. then reported the incident to the manager of the bar, J.M., who located Derevitsky and asked him to leave. After J.G. decided that she wanted to contact the police, J.M. went outside and flagged down a passing police officer. Derevitsky was still in the parking lot at that time. Officer Gregg Neumann of the Apple Valley Police Department conducted a show-up identification, and J.G. identified Derevitsky as the man who grabbed her.

Respondent State of Minnesota charged Derevitsky with one count of fifth-degree criminal sexual conduct. On January 8, 2018, Derevitsky waived his right to a jury trial. The following day, the district court held a court trial. During the trial, J.G. testified that the man who grabbed her was shorter than she is. She testified that she is 5’ 9”, and estimated that the man who touched her was roughly 5’ 5” or 5’ 6”. Defense counsel asked J.G. to estimate how tall Derevitsky was, but the prosecutor objected on the basis that J.G.

had not testified that she had experience judging people's heights. The district court sustained the objection. Derevitsky's counsel later requested to have J.G. and Derevitsky stand next to one another to compare their heights, but the district court denied the request. Derevitsky testified in his own defense. He testified that he was at the bar on the night of the incident and had danced with several women, but denied grabbing J.G. He also testified that he is 5' 10" and that that is the height listed on his driver's license.

The district court found Derevitsky guilty. On January 16, the district court issued its written findings of guilt. Following the verdict, Derevitsky discharged his trial counsel and retained new counsel. On May 3, Derevitsky filed a motion requesting that the district court reconsider its finding of guilt or, in the alternative, grant him a new trial. Derevitsky argued that the district court should reconsider its finding of guilt or grant him a new trial because J.G.'s identification of him was weak, she did not identify him in court, and he was deprived of his right to present a complete defense because he was not allowed to introduce evidence that he was taller than J.G. On May 9, the district court denied the motion and sentenced Derevitsky. The district court imposed a stay of imposition and ordered Derevitsky to serve 20 days in jail.

On May 22, Derevitsky moved for a new trial under Minn. R. Crim. P. 26.04, subd. 1(1), and requested an evidentiary hearing. Derevitsky re-alleged the grounds stated in the request for reconsideration and additionally asserted that a *Brady* violation had occurred. Derevitsky alleged that following sentencing, defense counsel asked the prosecutor why J.G. was not asked to identify Derevitsky in court. The prosecutor informed him that, prior to trial, J.G. had stated that she could not identify Derevitsky in

court. Derevitsky argued that the failure to disclose that information constituted a *Brady* violation. The district court initially granted an evidentiary hearing on the issue, but later struck the hearing from the calendar because the state had not received a copy of the motion and supporting affidavit. The district court subsequently denied the motion without an evidentiary hearing because it had not been filed within 15 days of the finding of guilt as required by Minn. R. Crim. P. 26.04, subd. 1(3).

On July 19, Derevitsky filed a notice of appeal. On August 6, he moved to stay the appeal pending the outcome of postconviction proceedings. We granted the motion and remanded the case to the district court. Derevitsky then petitioned for postconviction relief. The petition alleged that there was insufficient evidence to sustain the conviction, that Derevitsky was deprived of his right to present a complete defense, that a *Brady* violation occurred, that Derevitsky received ineffective assistance of counsel, and that the conviction and sentence violate Derevitsky's constitutional rights. The district court denied the postconviction petition without an evidentiary hearing. We then granted Derevitsky's motion to dissolve the stay and reinstate the appeal.

D E C I S I O N

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

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).

Derevitsky argues that the state’s failure to disclose that J.G. indicated that she would not be able to identify him at trial constitutes a *Brady* violation. The evidence is favorable to Derevitsky because it could have been used to impeach J.G.’s identification of him as the man who grabbed her, and it is undisputed that the evidence was not disclosed prior to trial. Accordingly, Derevitsky has established the first two elements of a *Brady* violation and his argument turns on the third element—materiality.

Evidence is considered material for purposes of a *Brady* violation “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 418 (quotation omitted). A “reasonable probability” is defined as one that is sufficient to undermine confidence in the verdict. *Id.* Because we review a district court’s materiality decision de novo, we must consider whether the suppression of the evidence undermines our confidence in the verdict. We conclude that it does.

The state argues that the evidence is not material because the parties and district court were aware that J.G. did not identify Derevitsky during the trial. But knowing that J.G. did not identify Derevitsky at trial is not the same as knowing—before trial—that J.G.

was unable to do so. The state also asserts that Derevitsky could have cross-examined J.G. about her inability to identify him at trial. But Derevitsky would have no reason to cross-examine J.G. on this point if he expected her to provide an affirmative identification. Had he known J.G. would have been unable to identify him, he could have cross-examined her and impeached her earlier identification. There was already conflicting evidence regarding the height of the perpetrator and Derevitsky's height, and J.G.'s inability to identify Derevitsky in the courtroom would have further cast doubt on her earlier identification of him. Additionally, as Derevitsky argues, the knowledge that J.G. would have been unable to identify him may have impacted his decision to waive his right to a jury trial.

On this record, we conclude that Derevitsky has established that the suppressed evidence was material, and therefore a *Brady* violation occurred. Because we reverse and remand for a new trial, we do not address Derevitsky's other assertions of error.

Reversed and remanded.