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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2072**

State of Minnesota,
Respondent,

vs.

Andrew Gary Jennissen,
Appellant.

**Filed October 21, 2019
Affirmed
Peterson, Judge***

Carlton County District Court
File No. 09-CR-18-728

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Lauri A. Ketola, Carlton County Attorney, Carlton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Connolly, Judge; and
Peterson, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from his convictions for first- and third-degree controlled-substance crimes, appellant argues that the district court erred by denying his motion for a new trial because the state failed to disclose exculpatory evidence. We affirm.

FACTS

In April 2018, respondent State of Minnesota charged appellant Andrew Gary Jennissen with one count of first-degree sale of methamphetamine and one count of third-degree possession of methamphetamine. At trial, the state presented evidence that, in February 2018, C.P. began working as a “cooperating informant” (CI) for the Cloquet Police Department (CPD).

While working as a CI for the CPD in April 2018, C.P. performed four “controlled buys of methamphetamine from . . . Jennissen.” In each of the controlled buys, C.P. arranged to purchase methamphetamine from Jennissen. Law enforcement then took a statement from C.P., searched his person to ensure that he did not possess any contraband before meeting Jennissen, outfitted him with a recording device, photographed the cash to be used in the transaction, and then gave that cash to C.P. After each controlled buy, C.P. gave the methamphetamine and any cash left over from the transaction to law enforcement.

The methamphetamine that C.P. purchased from Jennissen was always packaged. In the first controlled buy, C.P. received methamphetamine packaged in a plastic baggie with a purple-colored female silhouette. In the other three controlled buys, C.P. received methamphetamine that was packaged in small, yellow baggies. The total weight of the

methamphetamine that C.P. purchased from Jennissen in the four controlled buys was approximately 20.201 grams.

On April 16, 2018, law enforcement executed a search warrant for Jennissen and the house where he was residing. The search of Jennissen's person revealed 17.53 grams of methamphetamine, a digital scale, and some small, yellow baggies. In the house, law enforcement discovered a number of baggies that matched the baggies that C.P. received from Jennissen in the controlled buys. Law enforcement did not find any of the cash that was used in the controlled buys.

At trial, C.P. testified that he received "monetary compensation" for his work as a CI and that one charge against him for possession of a controlled substance, one charge of possession of drug paraphernalia, and two charges against him for possession of a hypodermic needle were dismissed because of his work as a CI. C.P. also testified that, as a result of being stopped by police on two separate occasions during February 2018, he was going to be charged with separate counts for possession of methamphetamine. But, "because of [his] cooperation with law enforcement," he was not charged with these offenses.

A jury found Jennissen guilty of the charged offenses. Before sentencing, Jennissen moved for a new trial under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), claiming that the state failed to disclose that, on June 4, 2018, C.P. was involved in a traffic stop and was not charged for any conduct discovered during the stop. In an evidentiary hearing, Fond du Lac Police Officer Nils Hansen testified that C.P. was stopped and arrested for driving with a suspended license, but C.P. was not cited for that offense because

he was cooperative with law enforcement in the “investigation of the possession of methamphetamine of [T.W.],” who was a passenger in C.P.’s vehicle when it was stopped. Hansen also testified that officers discovered drugs in C.P.’s girlfriend’s purse during the stop, but she was not cited for a fifth-degree controlled-substance offense.

The district court concluded that there “is little doubt that the June 4th traffic stop information should have been disclosed to [Jennissen].” But the district court also found that Jennissen “fail[ed] to make a showing that the June 4th incident is material as required by *Brady*, or that there is a reasonable probability that the June 4th evidence would have resulted in the jury reaching a not guilty verdict.” The district court, therefore, denied Jennissen’s motion for a new trial. Jennissen was sentenced, and this appeal follows.

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*, 373 U.S. at 87, 83 S. Ct. at 1196-97; *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 the 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).

Jennissen argues that the state’s failure to disclose information about the June 4, 2018 traffic stop involving C.P. constituted a *Brady* violation. His appeal concerns only the third element of the *Brady* analysis—materiality.¹ “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. A reasonable probability is one that is sufficient to undermine confidence in the outcome.” *Campbell v. State*, 916 N.W.2d 502, 511 (Minn. 2018) (quotations and citations omitted). The remedy for a *Brady* violation is a new trial. *Zornes*, 903 N.W.2d at 419. 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).

The district court found that “before trial, the state produced substantial discovery to [Jennissen] regarding [C.P.’s] contact with law enforcement during the time he worked as a confidential informant,” and that C.P. “was impeached through testimony about several felony drug cases that were either not charged or dismissed as a result of his cooperation with law enforcement involving purchasing controlled substances from [Jennissen].” The court then stated that, as result, the “June 4th incident, which involved relatively more minor driving conduct,” would have “[a]t most,” been “cumulative of the evidence that was produced at trial that impeached” C.P. Thus, the court concluded that Jennissen “failed to produce any material evidence to show that the jury would have

¹ There is no dispute that the information about the June 4 stop was not disclosed to Jennissen, and the state does not challenge the district court’s conclusion that “[i]nformation about any favor that [C.P.] might have received from law enforcement, or his involvement with law enforcement is arguably impeachment material.”

reached a not guilty verdict had the June 4th incident been disclosed, and has failed to show any prejudice as a result of the state's discovery violation."

Jennissen argues that the district court's decision is erroneous because the June 4 evidence "showed that C.P. had additional and on-going reasons to impress officials with his testimony." (Emphasis omitted.) Jennissen contends that because "C.P.'s reliability was key to the state's case," the "absence" of the June 4 evidence at trial "is sufficient to undermine confidence in the jury's verdict."² We are not persuaded.

The United States Supreme Court has held that the cumulative effect of withheld impeachment evidence can be insufficient to undermine confidence in the jury's verdict. *Turner v. United States*, 137 S. Ct. 1885, 1894-95 (2017) (concluding that "in the context of this trial, with respect to these witnesses, the cumulative effect of the withheld evidence is insufficient to undermine confidence in the jury's verdict"). But when the nondisclosed evidence "could have significantly impeached the state's key witness," a defendant has suffered prejudice. *State v. Hunt*, 615 N.W.2d 294, 301 (Minn. 2000).

In *State v. Miller*, the supreme court held that no *Brady* violation occurred when 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

² As the state notes, Jennissen's *Brady* claim is relevant only to the conviction on count one for distribution of methamphetamine and does not affect his conviction on count two for possession of methamphetamine because the evidence proving the possession offense did not depend on the jury's assessment of C.P.'s credibility. Rather the evidence proving that offense depended on the testimony of the law-enforcement officer who found the 17.53 grams of methamphetamine on Jennissen's person. See Minn. Stat. § 152.023, subd. 2(a)(1) (2016) (stating that a person who unlawfully possesses ten or more grams of methamphetamine is guilty of third-degree possession of a controlled substance).

the witness had been convicted of four felonies. *Id.* The supreme court held that the state suppressed the evidence and that the evidence was exculpatory. *Id.* But the supreme court reasoned that 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.*

Here, C.P. was obviously the state's key witness, and evidence that the June 4 incident did not result in any charges against either C.P. or his girlfriend is impeachment evidence. But the jury heard testimony that C.P. was working as a CI for the CPD and that, in exchange for his services, one pending charge for possession of a controlled substance, one pending charge for possession of drug paraphernalia, and two pending charges for possession of a hypodermic needle were dismissed. C.P. also acknowledged at trial that, as a result of being stopped on two separate occasions during February 2018, he was going to be charged with separate counts of possession of methamphetamine, but he ultimately was not charged "because of [his] cooperation with law enforcement." The jury also heard testimony that C.P. received "monetary compensation" from the CPD for his work as a CI. As a result, the jury was well aware that C.P. was receiving a benefit from working with law enforcement, and evidence of the June 4 incident was simply cumulative impeachment evidence. Because C.P. was impeached at trial with a plethora of evidence that he had received substantial benefits for working as a CI for the CPD, evidence of the June 4 incident was merely cumulative impeachment evidence that was immaterial to the outcome of the trial. *See Turner*, 137 S. Ct. at 1895 (concluding that where the record shows that

the undisclosed impeachment evidence was “largely cumulative of impeachment evidence petitioners already had and used at trial,” the “effect of the withheld evidence is insufficient to undermine confidence in the jury’s verdict”); *see also State v. Brown*, 815 N.W.2d 609, 622 (Minn. 2012) (concluding that although a plea deal between a state’s witness and another county attorney’s office constituted impeachment evidence, the undisclosed impeachment evidence was not material where the witness “was impeached with five felony convictions that were all disclosed on the record and [with] his plea agreement with the Hennepin County Attorney’s Office that was more favorable than the plea agreement reached with the other county attorney’s office”); *Miller*, 754 N.W.2d at 706 (holding that undisclosed impeachment evidence was not material because the witness’s credibility was “successfully impeached at trial”).

Also, the supreme court has determined that the “likelihood of prejudice is decreased” where “testimony of the witness sought to be impeached by nondisclosed evidence was not the only damning evidence against defendant.” *Hunt*, 615 N.W.2d at 301 (quotation omitted). C.P.’s testimony was not the only damning evidence against Jennissen. Investigator Darrin Berg of the CPD testified that he was present at the four controlled buys involving C.P. and Jennissen, and he explained the procedure followed by law enforcement when conducting a controlled buy. In addition, audio recordings of each controlled buy, Facebook Messenger posts between C.P. and Jennissen in which C.P. set up the controlled buys, and photographs of the buy money given to C.P. by law enforcement were admitted into evidence. Although none of the buy money was recovered during the search of Jennissen’s person and residence, the search did reveal 17.53 grams

of methamphetamine, a digital scale, and small baggies of the same type used in the controlled buys. In light of all the evidence produced by the state at trial and the cumulative effect of the undisclosed June 4 evidence, the June 4 evidence was not material because it was not sufficient to undermine confidence in the outcome of Jennissen's trial. Accordingly, Jennissen is not entitled to a new trial.

Affirmed.