

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 6, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1442-CR

Cir. Ct. No. 2005CF528

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IRA ROLACK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Ira Rolack appeals a judgment convicting him of first-degree reckless injury. He also appeals orders denying him postconviction relief from the judgment. He argues for a new trial based on newly discovered evidence and his claims that the State withheld exculpatory evidence. We affirm.

BACKGROUND

¶2 The State charged Rolack with reckless injury in violation of WIS. STAT. § 940.23(1) and aggravated battery in violation of WIS. STAT. § 940.19(5) based on evidence that he stabbed Michael Fenolio. At trial, Rolack claimed self-defense, testifying that he stabbed Fenolio when Jamaal Lee, Dana Scott, and Fenolio physically attacked him.

¶3 Other eyewitnesses offered conflicting accounts of the incident. Fenolio testified that he was waiting in a car while Lee and Scott talked to Rolack. When he got out of the car to retrieve his cell phone from Lee, Rolack attacked and stabbed him without provocation. Lee testified that the stabbing was unprovoked, and occurred when Rolack was talking to Scott, and Lee and Fenolio approached them and stopped a few feet away. A friend of Fenolio's offered a similar account that again portrayed Fenolio as an innocent bystander.

¶4 Scott testified that while he was arguing with Rolack, he saw Lee and Fenolio approach. The stabbing occurred, he testified, as Fenolio approached Rolack from the back and disregarded Rolack's instruction to stay back. Scott further testified that he had anticipated a physical confrontation with Rolack, and Lee and Fenolio were there as backup if there was a fight. He stated that things were very tense, with the three of them essentially encircling Rolack. Scott's girlfriend testified that the stabbing occurred after Lee and Fenolio attacked Rolack. Rolack's girlfriend saw the incident from a distance, and saw Rolack in the middle of a scuffle with several persons.

¶5 According to Lee, the context of the encounter with Rolack that night was the fact that Lee owed Rolack money for a cocaine purchase, and Rolack had been calling him and threatening him about the debt. Lee's girlfriend,

Tanya Reine, testified that Rolack had threatened Lee with harm prior to the incident. She denied knowledge of Lee's involvement in selling cocaine, or possessing weapons.

¶6 Rolack testified that the quarrel was about Lee's failure to repay money Rolack loaned him to help with transportation, and was not cocaine related. He stated that before the incident he knew Lee to carry knives, and to recruit others to help him "jump," or commit violence to individuals. The jury found Rolack guilty of first-degree reckless injury, and acquitted him of aggravated battery.

¶7 Rolack subsequently filed a postconviction motion alleging that the State withheld exculpatory information about Lee's involvement in an incident that occurred seven months after Fenolio's stabbing, and a couple of months before trial, in which Lee allegedly threatened Elgin Alexander in a dispute over Lee's drug debt, and Alexander shot at him. Additionally, Rolack alleged that the State failed to disclose a felony charge of failure to register as a sex offender filed against Lee the day before he testified, which charge was resolved by a short jail sentence. Rolack also alleged that the prosecutor knew but did not disclose that Reine, Lee's girlfriend, had told police she knew Lee possessed a firearm and dealt cocaine, both of which she denied knowledge of in her trial testimony. In Rolack's view, the information about the confrontation with Alexander was exculpatory because it supported his testimony that Lee, Scott and Fenolio attacked him. He contended that the information about the Alexander confrontation, and Lee's sex registry charge and its resolution was also exculpatory because it strongly suggested that Lee received consideration for the State for his testimony against Rolack, which if true was also not disclosed.

Reine's statement to police was exculpatory, he contended, because it impeached her trial testimony.

¶8 The trial court denied the motion after a hearing, finding that there was no evidence of consideration given to Lee to testify because the State had other reasons not to charge Lee in the Alexander matter, and because the prosecutor did not know, and did not have any reason to know, of the sex registry charge. The court also found that there was no harm in the failure to disclose information about the Alexander incident, because the information would have been inadmissible at trial as other acts evidence showing propensity. Rolack had subpoenaed Reine and Lee to testify, but neither complied with the subpoena, and did not appear.

¶9 Rolack subsequently filed a second postconviction motion, alleging newly discovered evidence, consisting of Lee's and Reine's admissions that they had testified falsely at trial. At the hearing on the motion Lee recanted his trial testimony about the stabbing incident and testified for the first time that Fenolio was present, not as an innocent bystander, but to back him up in a confrontation with Rolack, and that the stabbing occurred when Fenolio approached Rolack in an aggressive manner. Reine confirmed that she knew Lee dealt drugs and possessed a firearm, both of which she denied at trial. She also testified that she understood from Lee that he did, in fact, receive consideration from the State for his cooperation in this case. The trial court denied relief, finding that Lee was not a credible witness, that Reine's testimony was not material, and that it had already found that Lee received no consideration for his testimony.

DISCUSSION

¶10 On appeal Rolack contends that he should receive a new trial due to the State's failure to disclose exculpatory information, and the newly discovered evidence contained in Lee's and Reine's postconviction testimony.

FAILURE TO DISCLOSE EVIDENCE

¶11 The defendant has a right to evidence the State possesses when that evidence is material and exculpatory. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). To establish a violation of this right, the defendant must show that the State suppressed the evidence in question, that the evidence was favorable to the defendant, and that the evidence was material to the determination of the defendant's guilt or punishment. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Brady*, 373 U.S. at 87. The undisclosed evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Harris*, 2004 WI 64, ¶14, 272 Wis. 2d 80, 680 N.W.2d 737 (citation omitted). The right to disclosure may be violated even if the evidence is unknown to the prosecutor, but is possessed by other law enforcement officers, or is evidence the prosecutor should have discovered through due diligence. *See State v. DeLao*, 2002 WI 49, ¶¶21-24, 252 Wis. 2d 289, 643 N.W.2d 480. On appeal, this court independently applies this constitutional standard to the facts of the case. *See State v. DelReal*, 225 Wis. 2d 565, 571, 593 N.W.2d 461 (Ct. App. 1999).

¶12 Rolack first contends that the prosecutor had a duty to disclose information concerning Lee's incident with Alexander. We conclude that the failure to disclose this information did not prejudice Rolack because the circuit court properly held that it was inadmissible other acts evidence. The incident

occurred months after Rolack's encounter with Lee and Fenolio. It was nothing more than evidence that Lee had a propensity to engage in confrontations over drug deals, and evidence of a propensity to commit certain acts is inadmissible. *Whitty v. State*, 34 Wis. 2d 278, 291-92, 149 N.W.2d 557 (1967). It was also not material, in the sense of creating a probability of a different result, because it was essentially cumulative. Lee admitted at trial that a bad debt from a drug deal was the cause of his meeting with Rolack, and there was testimony from several eyewitnesses that the meeting was confrontational, at the very least. Additionally, the material disputes at trial concerned Fenolio's actions during the confrontation, and the reasonableness of Rolack's response. Evidence of the Alexander incident would have shed no light on those issues.

¶13 Rolack next contends that the prosecutor should have known about and disclosed Lee's sex registry charge. He does not dispute that the prosecutor had no actual knowledge of the charge, which was filed by another assistant district attorney in the Dane County District Attorney's office. Nor does he explain how the prosecutor should or could have known of the charge. *See State v. Armstrong*, 110 Wis. 2d 555, 580, 329 N.W.2d 386 (1983) (the State's duty to disclose exculpatory evidence extends only to evidence within the State's exclusive possession). Additionally, as the State notes, the sex registry complaint was a public record, equally accessible to Rolack. In any case, Rolack also fails to show how the fact of the charge against Lee was exculpatory.

¶14 Finally, Rolack contends that the State should have disclosed the fact that Reine had previously contradicted her trial testimony that she had no knowledge of Lee's involvement in drugs or his possession of a weapon. However, Reine was a peripheral witness, and Rolack fails to show how her testimony on those points was material, even if subject to impeachment by her

previous statements. Lee testified before Reine, and admitted to dealing drugs. Immediately after Reine testified that she had never known Lee to carry weapons, counsel for Rolack elicited her admission that she knew of Lee's conviction for carrying a concealed weapon. Additional impeachment of Reine was therefore unnecessary.

NEWLY DISCOVERED EVIDENCE

¶15 A defendant must prove, among other things, that newly discovered evidence is material and not merely cumulative. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The court must then determine, in its discretion, whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. *Id.*

¶16 As we noted above, Reine was a peripheral witness, her willingness to change her testimony about knowing of Lee's involvement with drugs and weapons was not material, and her trial testimony was effectively impeached in any event. Evidence of her prior inconsistent statement would not have affected the verdict under any reasonable view. As for Lee's altered version of Fenolio's role in the confrontation with Rolack, it was clearly material, but cumulative. Other witnesses testified that Fenolio was present for the purpose of confronting Rolack, and did in fact confront him. Having one more witness testify to that version of events, and one less testifying to the opposing version, would not have created a reasonable probability of acquittal on both counts, especially where Lee's version did not preclude the jury from rejecting Rolack's self defense claim, even if Fenolio was advancing toward him with aggressive intent. The jury could

have fully believed that Fenolio was participating in an aggressive confrontation with Rolack and still found Rolack guilty.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

