COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP422-CR **Cir. Ct. No. 2003CF158**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SALVATORE J. RIZZO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: MICHAEL FISHER and MARY KAY WAGNER, Judges. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. In 2004, Salvatore J. Rizzo was convicted of repeatedly sexually assaulting the same child in violation of WIS. STAT.

§ 948.025(1) (1999-2000).[1] Postconviction, the circuit court denied Rizzo's motion for an in camera review of the social services records relating to the victim and other involved persons. In ***State v. Rizzo***, No. 2006AP1788-CR, unpublished slip op. (Wis. Ct. App. Oct. 17, 2007) (***Rizzo I***), we remanded to the circuit court "to conduct an in camera examination of the social services records and, if warranted, to disclose or release those records to Rizzo." ***Id.***, unpublished slip op. at ¶43. The circuit court conducted the required examination and based upon the records the court disclosed, Rizzo filed a WIS. STAT. RULE 809.30 (2007-08) postconviction motion alleging that the State failed to disclose exculpatory material as required by ***Brady v. Maryland***, 373 U.S. 83 (1963). The circuit court denied the postconviction motion and Rizzo appeals. We agree with the circuit court that no ***Brady*** violation occurred, and that the social services records did not constitute newly discovered evidence. We affirm the order denying Rizzo's postconviction motion.[2]

¶2 We take the facts from ***Rizzo I***.

> Rizzo's conviction is based upon Caitlyn's testimony that Rizzo sexually assaulted her on multiple occasions between 1999 or 2000 and 2002. Rizzo was married to Caitlyn's mother, Robin, during this time period, and they had a son, Joey R., together.
>
> Testimony indicated that Caitlyn went to live with her aunt in Texas in the summer of 2002. Caitlyn's aunt testified that in September 2002, Caitlyn told her that Rizzo had sexually assaulted her. The aunt testified that she and Caitlyn reported the matter to Robin and authorities in

[1] All references to the Wisconsin Statutes underlying Rizzo's conviction are to the 1999-2000 version. All other references to the Wisconsin Statutes are to the 2007-08 version.

[2] We affirmed the judgment of conviction in ***State v. Rizzo***, No. 2006AP1788-CR, unpublished slip op. (Wis. Ct. App. Oct. 17, 2007) (***Rizzo I***).

> Texas, and that she brought Caitlyn back to Kenosha in November 2002. In December 2002, Caitlyn was interviewed by a Kenosha police detective, John Gregory, regarding the matter.
>
> Gregory testified that Caitlyn told him that the last assault occurred around her birthday, which was May 3, 2002. The parties stipulated that Rizzo was in custody on an unrelated matter from April 30, 2002, to January 22, 2003.
>
> After conviction and sentencing, Rizzo became aware of a pending social services investigation into information indicating that Aaron D.[3] had sexually assaulted Caitlyn and that Caitlyn and Aaron had sexually assaulted Joey. Pursuant to WIS. STAT. § 48.78(2), Rizzo moved for an in camera review by the juvenile court of the social services records related to the investigation of these allegations.

Rizzo I, unpublished slip op. at ¶¶4-7.

¶3 We held in ***Rizzo I*** that the records Rizzo sought were available for in camera inspection.

> In his motion for an in camera inspection, Rizzo contended that the social services records regarding the investigation of these allegations were reasonably likely to contain relevant information necessary to a determination of his guilt or innocence. In his motion and on appeal, Rizzo correctly contends that the jury's credibility determinations were dispositive in this case. Caitlyn was the sole witness to directly testify that the assaults by Rizzo occurred. At trial, expert testimony was presented indicating that Caitlyn's conduct was consistent with that of a child sexual assault victim. The State also argued to the jury that a child who had not been sexually assaulted was unlikely to possess the sexual knowledge displayed by Caitlyn. Since there was no evidence that anyone else had sexually assaulted Caitlyn, this testimony and argument bolstered Caitlyn's credibility and diminished Rizzo's.
>
> Based on the information presented by Rizzo regarding Joey's allegations that Aaron sexually assaulted Caitlyn

[3] Aaron D. was the teenage son of a man with whom Robin was living.

> and Caitlyn sexually assaulted Joey, the social services records are reasonably likely to contain evidence which could provide an alternative source for Caitlyn's sexual knowledge and diminish the impact of the expert testimony regarding the characteristics and behavior of child sexual assault victims. The records therefore could cast doubt on the evidence relied on by the State at trial in arguing that Caitlyn was credible.
>
> In addition, as contended by Rizzo, evidence that a child sexual assault victim has been sexually assaulted by someone else may be relevant to whether she is projecting a sexual assault committed by someone else onto the defendant. *See* ***State v. Harris***, 2004 WI 64, ¶30, 272 Wis. 2d 80, 680 N.W.2d 737. Based on Joey's allegations, the social services records are reasonably likely to contain evidence indicating that Caitlyn was sexually assaulted by Aaron and to support an inference that she projected that assault onto Rizzo.

Rizzo I, unpublished slip op. at ¶¶12-14.

¶4 The criminal complaint was filed in February 2003. Rizzo's trial was held from April 19-21, 2004. In his postconviction motion after remand from ***Rizzo I***, Rizzo contended that the State should have disclosed the following records to him in order to discharge its ***Brady*** obligation: (1) a "Protective Service Report" under Robin's name with a referral date of April 27, 2004 and a signature date of May 14, 2004 identifying Aaron D. as an alleged maltreater and including Joey R.'s March 16, 2004 allegations to his foster parent that he saw Aaron D. on top of Caitlyn and saw Aaron D. engage in sexual activity; (2) handwritten notes from February 14, 2004 apparently memorializing an interview with Robin, including Robin's contention that Caitlyn lies, steals and is mean and verbally aggressive; (3) four pages from a fifteen-page "Dispositional Report to the Court" dated January 27, 2004 and prepared for a CHIPS hearing stating among other things that Robin required Caitlyn to announce to her teachers that Rizzo sexually assaulted her but that Robin questioned Caitlyn's credibility; and (4) a Kenosha

county case finding determination in Robin's case dated June 17, 2004 (signed July 14, 2004) determining that sexual abuse was unsubstantiated but likely to occur ("sexual abuse could not be proven at this time though based on the alleged victim's actions there is reason to believe that something has occurred").

¶5 The circuit court denied Rizzo's postconviction motion. The court found that the witnesses' credibility was addressed at trial, and that the evidence overwhelmingly supported Rizzo's guilt. The issues raised in the social services records were sufficiently covered at trial, and "evidence of the boy and those allegations came after the initial police document …would have been ruled nonadmissible and irrelevant." The court rejected Rizzo's claims that the prosecutor should have disclosed these records or that the records constituted newly discovered evidence.

¶6 As discussed below, prevailing on a ***Brady*** claim or a newly discovered evidence claim requires a reasonable probability that the outcome would have been different if the evidence had been available to the defense. We conclude that the four documents Rizzo claims were withheld constituted neither a ***Brady*** violation nor newly discovered evidence because Rizzo cannot meet the reasonable probability of a different outcome test applicable to both claims. The documents were either created after Rizzo's trial or they addressed credibility issues that were well aired at trial and would have been cumulative to evidence at trial.

¶7 In ***Brady***, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment…." ***Brady***, 373 U.S. at 87. The prosecution must disclose such evidence even if the accused has not made a

formal request for the evidence. ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. "Evidence is favorable to an accused, when, 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" ***Id.*** (citation omitted). Evidence favorable to an accused may include exculpatory and impeachment evidence. ***Id.*** The defendant bears the burden of proving a ***Brady*** violation, i.e., that the withheld evidence is favorable and material. *See* ***id.***, ¶13. "[E]vidence 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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***Id.***, ¶14 (citations omitted).

¶8 If a defendant establishes newly discovered evidence material to an issue in the case and not cumulative to other evidence at trial, a new trial is warranted only if there is a reasonable probability that a different result would be reached in a new trial. ***State v. Armstrong***, 2005 WI 119, ¶¶161-62, 283 Wis. 2d 639, 700 N.W.2d 98.

¶9 Rizzo argues that the State failed to disclose records of the Kenosha County Department of Health and Social Services (KCDHSS). Rizzo discusses general principles relating to the State's duty to disclose, but he offers no authority for the proposition that the KCDHSS is within the scope of the prosecutorial unit. A prosecutor's duty to disclose evidence extends to that evidence which the prosecutor should have discovered by the exercise of due diligence. ***State v. DeLao***, 2002 WI 49, ¶22, 252 Wis. 2d 289, 643 N.W.2d 480 (citation omitted). The realm where evidence might be found includes law enforcement investigative agencies. *See* ***id.***, ¶¶23-24. "The State is charged with knowledge of material and information in the possession or control of others who have participated in the investigation or evaluation of the case and who either regularly report or with

reference to the particular case have reported to the prosecutor's office." ***Id.***, ¶24. However, Rizzo offers no authority for the proposition that such agencies include social service agencies. *See*, *e.g.*, ***United States v. Morris***, 80 F.3d 1151, 1169 (7th Cir. 1996) (no duty on prosecutor's office to learn of information possessed by other government agencies uninvolved in investigation or prosecution).

¶10 Even if the KCDHSS files were within the purview of the State to review for ***Brady*** material, Rizzo would not prevail. These documents either post-dated the trial (items 1 and 4), placing them outside the requirements of ***Brady***, or dealt with Caitlyn's credibility (items 2 and 3), which was addressed at trial, rendering the evidence cumulative to other evidence at trial and therefore not newly discovered under the applicable standards.

¶11 Item 1, the May 14, 2004 protective services report containing Joey R.'s allegations of sexual activity between Aaron D. and Caitlyn, was not subject to ***Brady*** because Rizzo has not shown that the prosecutor had a duty to disclose the record, and the record did not come into existence until May 14, 2004, a month after Rizzo's trial. According to other records released to Rizzo, Joey R.'s foster parent did not contact KCDHSS until April 16 to report Joey R.'s March 16 statements. On April 26, the KCDHSS worker was still reviewing how to proceed. The referral came in on April 27, and the protective service report was not prepared until May 14. On May 28, 2004, one month after Rizzo's trial, KCDHSS referred Joey R.'s statements to the Kenosha County Sheriff's Department for investigation. As discussed above, evidence within the control of law enforcement agencies can be considered subject to the ***Brady*** disclosure requirements. Here, however, the sheriff did not learn of the allegations until one month after the conclusion of Rizzo's trial.

¶12 Item 1 also did not meet the criteria for newly discovered evidence. Rizzo argues that evidence that Caitlyn had sexual contact with someone other than Rizzo was the source of her sexual knowledge. According to the May 14, 2004 protective services report, Joey R.'s allegations regarding sexual activity between Aaron D. and Caitlyn occurred after Robin and her children were no longer living with Rizzo. Caitlyn first made her allegations about Rizzo's conduct in the fall of 2002 and alleged that the conduct dated back to 1999. Caitlyn moved to Texas in June 2002. The contents of this report did not make it reasonably probable that the outcome would have been different had Rizzo had access to this evidence for trial.

¶13 Items 2 and 3, an interview with Robin and an excerpt from a dispositional report, both addressed Caitlyn's credibility, including Robin's view that Caitlyn was not credible and had a history of lying. At trial, Robin was questioned about Caitlyn's reputation for truthfulness. Therefore, items 2 and 3, if they contained any admissible evidence, would have been cumulative to other evidence at trial, and therefore did not qualify as newly discovered evidence. *See* ***Armstrong***, 283 Wis. 2d 639, ¶¶161-62.

¶14 Item 4, the July 14, 2004 case finding that sexual abuse was unsubstantiated but likely to occur, post-dated Rizzo's trial and cannot be the basis of a ***Brady*** violation. The evidence also does not qualify as newly discovered because the evidence would not make a different outcome reasonably probable. The sexual abuse which is the subject of the case finding allegedly involved Aaron D., which post-dated Caitlyn's allegations about Rizzo.

By the Court.—Order affirmed.

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