STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2334

State of Minnesota,
Respondent,

vs.

Lenard D. Wells,
Appellant.

Filed April 29, 2008
Affirmed
Toussaint, Chief Judge

Clay County District Court
File No. K1-05-1761

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Brian J. Melton, Clay County Attorney, 807 North Eleventh Street, Post Office Box 280, Moorhead, MN 56561 (for respondent)

John M. Stuart, State Public Defender, Benjamin J. Butler, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Crippen, Judge.*

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

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Chief Judge

Appellant Lenard D. Wells challenges his convictions of first- and second-degree assault, arguing that the trial court abused its discretion by denying his motion to exclude emergency room medical reports as a sanction for an alleged discovery violation and by excluding alternative perpetrator evidence as hearsay. Because the trial court did not abuse its discretion in denying appellant's motion to sanction the prosecution or in excluding hearsay evidence, we affirm.

FACTS

In June 2005, police were called to a stabbing outside of a bar. They located two victims; one had a cut on the side of his abdomen and the other had a cut on his cheek and neck. The victims were taken to the hospital and treated; both survived. Police obtained the victims' signatures on medical-information-release forms shortly after the stabbings. Appellant was charged with first- and second-degree assault for the stabbings.

Prior to trial, and again at trial, appellant's counsel moved to preclude the introduction or use of the victims' emergency medical records as a sanction for the prosecutor's failure to disclose the records. The trial court denied these motions. At trial, the state presented testimony from the two victims, the responding officers, the doctor who treated one of the victims, and a number of people who witnessed the fight. The first victim testified that appellant slashed him with a knife, but did not see what kind of knife it was. The second victim testified that appellant slashed him with a box-cutter style knife, that he has a permanent scar on his face and neck, that he was unable to talk

or eat for four to six weeks after the stabbing, and that the nerves in his face were damaged and had not recovered. Several witnesses testified that they saw appellant cut the victims with some type of knife, but their descriptions of the knife varied.

Prior to the defense's presentation of evidence, the state moved to preclude a defense witness, a police officer, from testifying about his interaction with another individual, A.M., after the fight.[1] Defense counsel made an offer of proof as to the officer's expected testimony, and the trial court ruled that the officer could testify as to his personal observations of A.M. but not as to A.M.'s statements to him or his actions in response to the hearsay statements.

Following a jury trial, appellant was convicted of both charges. He received concurrent sentences of 161 months for the first-degree assault conviction and 60 months for the second-degree assault conviction.

D E C I S I O N

Appellant argues that the state violated the rules of discovery by not disclosing the victims' emergency medical records until ordered to immediately before trial, that the trial court abused its discretion by not excluding these records as a sanction for the violation, and that he was therefore denied his right to a fair trial and is entitled to reversal of his conviction. Whether a discovery violation has occurred is a question of law, which this court reviews de novo. *State v. Bailey*, 677 N.W.2d 380, 397 (Minn. 2004). But the imposition of sanctions for discovery violations is reviewed for an abuse of discretion. *Id.*

[1] A.M. did not testify at trial.

We first turn to whether the prosecution violated the rules of discovery. Minnesota Rule of Criminal Procedure 9.01, subd. 1 provides:

> Without order of court and except as provided in Rule 9.01, subd. 3, the prosecuting attorney on request of defense counsel shall, before the date set for Omnibus Hearing provided for by Rule 11, allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which relate to the case and make the following disclosures:
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> . . . .
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> (3) The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce . . . documents, photographs, and tangible objects which relate to the case . . .
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> . . . .
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> (6) The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.

The prosecuting attorney's disclosure obligation "extend[s] to material and information in the possession or control of members of the prosecution staff and any others who have participated in the investigation or evaluation of the case and who . . . with reference to the particular case have reported to the prosecuting attorney's office." Minn. R. Crim. P. 9.01, subd. 1(7).[2] The prosecuting attorney's disclosure obligation is ongoing. Minn. R. Crim. P. 9.03, subd. 2.

Appellant first argues that the police obtained the victims' medical records on the night of the assault and that the state failed to comply with its obligation to disclose the records to the defense until ordered to by the court. But the record shows only that the

[2] Minnesota Rule of Criminal Procedure 9.01, subd 1(7) was renumbered Minn. R. Crim. P. 9.01, subd. 1(8) effective Oct. 1, 2006.

police obtained the victims' signed release forms. There is no evidence that the police or anyone else within the scope of Minn. R. Crim. P. 9.01, subd. 1(7) had the medical records within their possession or control at any time before the court ordered the prosecutor to obtain them.

Appellant argues: "It denies credulity to believe that law enforcement would not have accessed or at least reviewed [the victims'] medical records to determine the extent of their injuries." But the record does not support this argument, and appellant has not presented any additional support for it here.

Appellant next argues that the hospital participated in the case and reported to the prosecution by authorizing the police to view the victims' records, that the medical records were within the hospital's possession or control, and, therefore, that the prosecution was obligated by Minn. R. Crim. P. 9.01, subd. 1(7), to obtain and disclose the records. But the victims, not the hospital, signed the release forms authorizing the police to access the records. Moreover, rule 9.01 limits the prosecutor's obligation to "members of the prosecution staff," and "others who have participated in the investigation or evaluation of the case" and who have reported to the prosecution with reference to the case. The hospital is not a member of the prosecution staff; it cannot be characterized as having "participated in the investigation or evaluation of the case" simply because it treated the victims' injuries.

Appellant argues that the state had an obligation under *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct 1555 (1995), to seek out and disclose the medical records because they contained potentially exculpatory information. But the scope of a prosecutor's duty is not

limitless: a "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437, 115 S. Ct. at 1567. Appellant has shown only that the police obtained signed waivers on the night of the assault to access the victims' emergency medical records. Appellant has not shown that the prosecution knew the contents of the emergency medical records or accessed them before the court ordered their production.

Further, our review of the contents of the emergency medical records and the evidence presented at trial shows no reasonable probability that, had the emergency medical records been either excluded or disclosed sooner, the outcome of the trial would have been different. *See State v. Ramos*, 492 N.W.2d 557, 560 (Minn. App. 1992) (appellant must show reasonable probability that outcome of trial would have been different had improperly suppressed evidence been disclosed), *review denied* (Minn. Jan. 15, 1993).

Appellant contends that the trial court erred in precluding portions of a police officer's defense testimony regarding statements that A.M. made to him and that this error violated his constitutional rights to a fair trial and to present a defense.[3] On appeal, appellant must show that the trial court abused its discretion and that he was thereby prejudiced. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Minnesota Rule of Evidence 801(c) provides: "'Hearsay' is a statement, other than one made by the

[3] Appellant initially contends that the trial court's exclusion of the officer's testimony involves an erroneous interpretation of Minn. R. Evid. 801(c) and therefore should be reviewed de novo. But the substance of appellant's argument is that the trial court erroneously concluded that he was offering the officer's testimony to prove the truth of the matter asserted. Thus, we review for an abuse of discretion.

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Prior to the defense's case in chief, the state moved to preclude portions of an officer's testimony about statements A.M. made to him and his search of the garbage can where A.M. said he had thrown the knife. The trial court allowed the officer to testify that he stopped and arrested A.M. for DWI, that he saw blood on A.M., and that he found an empty knife box and a receipt for a knife in A.M.'s car. But the trial court concluded that the officer's testimony that A.M. told him that A.M. had a knife at the bar and had thrown the knife in a garbage can was hearsay and that testimony that the officer had searched the garbage can and not found the knife was predicated on that hearsay. The trial court therefore disallowed this portion of the officer's testimony.

Appellant argues that he should have been permitted to elicit the officer's testimony that A.M. lied when he said he had thrown the knife in a garbage can and that the officer searched the garbage can but did not find the knife. But this testimony is predicated on the truth of A.M.'s statement to the officer that A.M. had the knife at the bar at the time of the assault. A.M. did not testify at trial, and his statement to the officer that he had a knife at the bar at the time of the assault is hearsay. Because the officer's other excluded testimony would have required the defense to establish the truth of A.M.'s statement that he had a knife at the bar at the time of the assault, we see no abuse of discretion in excluding this testimony.

Appellant also argues that the officer's testimony that A.M. told him that he had had a knife and thrown it in the garbage was not hearsay because it was to be offered to

explain the officer's actions in searching the garbage can. *See State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002) (noting that, in criminal cases, an officer's testimony that they received a "tip for purposes of explaining why the police conducted [an investigation] is not hearsay"). But appellant did not make this argument to the trial court, and we therefore consider it waived. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). In any event, it lacks merit. *Litzau* does not apply here because the officer did not receive a "tip" and the jury was fully aware of why the officer was interacting with A.M. The only purpose for the officer's statement that he had received a "tip" that A.M. had thrown a knife in the garbage can would be to circumvent rule 801(c) and establish the truth of A.M.'s hearsay statement that he had had a knife at the bar. We see no abuse of discretion in excluding the testimony.

Finally, appellant argues that the officer's testimony should have been admitted as "alternative-perpetrator evidence." Appellant did not make this argument to the trial court, and we therefore consider the argument waived. *See Roby*, 547 N.W.2d at 357. Again, the issue lacks merit: alternative-perpetrator evidence must be admissible under the rules of evidence, and appellant has not demonstrated that the officer's excluded testimony was admissible under the rules of evidence. *See State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004) ("When a defendant seeks to introduce exculpatory evidence based on an alternative perpetrator theory, the court must still evaluate this evidence under the ordinary evidentiary rules as it would any other exculpatory evidence.").

Affirmed.