STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0423

William Dumont White, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 22, 2021
Affirmed
Frisch, Judge

Stearns County District Court
File No. 73-CR-17-8469

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota (for appellant)

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

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Frisch, Judge; and Smith, John, Judge.*

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

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant argues that the postconviction court abused its discretion by denying his petition for postconviction relief because (1) the state withheld material evidence, (2) he received ineffective assistance from both his trial and appellate counsel, and (3) the jury would have reached a different result but for the false testimony of a witness. We affirm.

FACTS

The underlying basis of this appeal relates to appellant William Dumont White's conviction of unlawful possession of a firearm. The factual background relating to this conviction is set forth in *State v. White*, No. A19-0307, 2020 WL 132523 (Minn. App. Jan. 13, 2020), *rev. denied* (Minn. Mar. 25, 2020).

In September 2017, White asked his neighbor, J.V., to drive him to pick up his son after learning that his son's friend had been shot. J.V. agreed, and White sat in the front passenger seat of J.V.'s vehicle while they drove to White's son. After locating White's son, J.V. stopped the car and White's son began to enter the vehicle. Police officers approached the vehicle and asked White's son to leave the vehicle, briefly detaining him for questioning about the shooting. White became upset that officers detained his son and exited the vehicle to speak with the officers. White became increasingly loud, hostile, and agitated, which led officers to arrest White and place him into a squad vehicle.

Meanwhile, J.V. parked her vehicle on the side of the road and remained inside. After detaining White, officers approached J.V., noted an odor of marijuana originating from the car, and observed a glass which appeared to contain a mixed alcoholic drink.

Officers asked J.V. for permission to search her car, and J.V. consented to a search. During the search, officers discovered a handgun in the vehicle glovebox immediately in front of where White had previously been sitting.

Respondent State of Minnesota charged White with possession of a firearm by an ineligible person. *See* Minn. Stat. § 624.713, subd. 1(2) (2016). White moved to suppress the evidence of the gun. The district court denied the motion, reasoning that the search of J.V.'s vehicle did not implicate White's Fourth Amendment rights and the search was valid based on J.V.'s consent.

Both White and the state included J.V. on their witness lists for trial. The state called J.V. to testify first as part of its case in chief. She testified that she observed White bring a drink with him into her car but that White did not bring a gun with him into the vehicle. While White confronted the officers, J.V. sat in her car for around five to ten minutes "playing on her phone." After the officers returned, J.V. consented to allow officers to search her car. J.V. did not recognize the gun found in the glovebox, nor did she see White put the gun in the glovebox. J.V. explained that there was a period of time where she was distracted and not watching White. J.V. expressed the opinion that no one other than White could have put the gun in the glovebox. She agreed that all of the other items in the glovebox belonged to her. J.V. testified that she last opened the glovebox that day or the previous day. Lastly, the state asked J.V. if she was prohibited from owning a firearm, and she answered "no."

On cross-examination, White's trial counsel elicited additional testimony from J.V. to show that White did not put the gun in the glovebox. The following exchange occurred:

Q. You told them you never saw [White] with a gun. Is that right?
A. Absolutely.

Q. And is that the truth?
A. Yes.

Q. You told law enforcement you swore on your dead mother's grave you never saw him with a gun. Is that right?
A. Yes.

Q. You told them you never saw him go in the glovebox.
A. Yes.

Q. Is that the truth?
A. Yes.

Q. Now had he opened that glovebox, can you hear it?
A. . . . [Y]eah.

Q. And had he shut it would you be able to hear that?
A. The click.

Q. Did you hear that at all?
A. No.

Trial counsel asked if J.V. had been pressured to submit a DNA sample. J.V. stated that law enforcement had threatened to involve her probation officer, but also clarified that she was not on probation and that she submitted to the DNA test to "clear [her] name." On redirect, J.V. conceded that during the initial police confrontation with White's son and the police, the glovebox could have been opened and closed without her realizing it.

The investigating officers also testified at trial that, among other things, they observed White sitting in the front passenger seat of J.V.'s car directly in front of the glovebox, that J.V. consented to the search of her vehicle, and that J.V. was visibly upset when a gun was discovered in the glovebox.

A jury found White guilty and, after a sentencing trial, found that he is a "danger to public safety" under Minn. Stat. § 609.1095, subd. 2(2) (2016). White moved for a judgment of acquittal because of insufficient evidence or a new trial based on claims of prosecutorial misconduct and juror misconduct. He also challenged the jury's finding that he is a danger to public safety. The district court denied the posttrial motions and imposed an aggravated sentence of 180 months' imprisonment.

White filed a direct appeal, arguing that there was insufficient evidence to support his conviction, that the evidence of the search of J.V.'s car should have been suppressed, and that he is not a dangerous offender, along with other pro se arguments. *White*, 2020 WL 132523, at *1. We affirmed on all issues. *Id.* at *3-6.

In February 2020, following our decision in his direct appeal, White learned that J.V. had a criminal record. J.V.'s record included convictions of multiple misdemeanor thefts and a 20-year-old felony terroristic-threats conviction. The state did not disclose these records to the defense despite being requested to do so during discovery.

White filed a petition for postconviction relief. In December 2020, the postconviction court held an evidentiary hearing and received testimony from the prosecutor, White's trial and appellate counsel, and White himself.

White's appellate counsel testified that he was not aware of J.V.'s criminal convictions at the time of the appeal. Had he known of these convictions, he would have stayed the appeal and filed a petition for postconviction relief. He also stated his belief that J.V.'s testimony was more damaging than helpful to White's case but also admitted that he used some of her testimony to support his argument in White's direct appeal. He

noted that, at times, White would disagree with him about appeal strategy and therefore advised White that he could file his own pro se supplemental brief, which he did.

The prosecutor testified that he took over the case before trial and was unsure what had been disclosed to the defense. He admitted that he knew before trial that J.V. had been convicted of felony terroristic threats but believed that because of the age of the conviction and other factors, she was again eligible to possess a firearm. The prosecutor also thought that, at the time of trial, J.V. was on probation for driving while impaired, but he was not certain of her probationary status.

Trial counsel testified that impeachment of J.V. was inconsistent with her trial strategy because she considered J.V. to be a favorable witness and believed that it was crucial that the jury find J.V. credible because she was the only witness who could testify that White never possessed a gun while in her car. Even after trial counsel learned of potential evidence with which to impeach J.V., trial counsel testified that she would not have changed her trial strategy because she wanted to maintain a balance of portraying J.V. as a favorable witness while also suggesting that the gun could belong to her or any number of other people. Trial counsel also did not want to risk upsetting J.V. or cause J.V. to directly blame White for placing the gun in the glovebox.

Trial counsel also testified that, during trial, White at times expressed his disagreement with trial strategy. At one point, White himself objected in open court regarding whether squad-car video footage should have been played during the trial. But trial counsel also testified that White agreed with the trial strategy of using J.V. as a

favorable witness to the defense, and that at no point was there a plan to directly attack J.V.'s credibility or aggressively suggest that the gun belonged to J.V.

White testified that he was upset that the state did not disclose J.V.'s criminal history before trial and asserts that he could have used that evidence to show that she was a thief and had motivation to lie about the gun because she was ineligible to possess a firearm. White also testified that he did not consider J.V. to be a favorable witness and that he wanted to confront her at the omnibus hearing and at trial. White asserted that he would not let an attorney represent him who refused to use the impeachment evidence against J.V.

In January 2021, the postconviction court held a second evidentiary hearing, at which an investigator testified that he learned that J.V. was on probation after consulting a database, but that he did not speak with any probation agents or officers who were supervising her.

The postconviction court denied White's petition. This appeal follows.

DECISION

We review the denial of "a petition for postconviction relief for an abuse of discretion." *Zornes v. State*, 903 N.W.2d 411, 416 (Minn. 2017) (quotation omitted). "A postconviction court does not abuse its discretion unless it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Henderson v. State*, 906 N.W.2d 501, 505 (Minn. 2018) (quotation omitted). We review legal issues de novo, but our review of factual findings is limited to whether there is sufficient evidence in the record to support the postconviction court's findings. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017).

I. The district court did not abuse its discretion by concluding that the discovery violations were not sufficiently prejudicial to justify a new trial.

White argues that the state's failure to disclose J.V.'s criminal history and probation status justifies a new trial. The state must "disclose all exculpatory evidence, including impeachment evidence." *State v. Miller*, 754 N.W.2d 686, 706 (Minn. 2008) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)); *see also* Minn. R. Crim. P. 9.01, subd. 1(1)(a), (6). The duty to disclose applies to material evidence. *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000). "[E]vidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quotation omitted).

We apply a three-part test to determine whether nondisclosure of material evidence requires a new trial: "First, the evidence at issue must be favorable to the accused, either because it is exculpatory or it is impeaching. Second, the evidence must have been suppressed by the state, either willfully or inadvertently. Third, prejudice to the accused must have resulted." *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005) (citations omitted). Here, the state concedes that it failed to disclose exculpatory and impeachment evidence requested by the defense. We therefore only address whether the failure to disclose such evidence was prejudicial to White.

To establish prejudice, a defendant must show "a reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different." *State v. Radke*, 821 N.W.2d 316, 326 (Minn. 2012). Nondisclosure is not prejudicial if the evidence is inadmissible. *Id.* In addition,

> [n]ondisclosure of evidence that is merely impeaching may not typically result in the kind of prejudice necessary to warrant a new trial. For example, where testimony of the witness sought to be impeached by nondisclosed evidence was not the only damning evidence against defendant, we have determined that the likelihood of prejudice is decreased.

Hunt, 615 N.W.2d at 300-301 (quotation omitted). "Because a *Brady* materiality analysis involves a mixed issue of fact and law, we review a district court's materiality determination *de novo*." *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010).

A. J.V.'s Terroristic-Threats Conviction

White argues that he was prejudiced by the state's failure to disclose J.V.'s felony terroristic-threats conviction because (1) he could have used this evidence to show that J.V. was ineligible to possess a gun and was therefore motivated to lie about its possession and ownership and (2) he could have requested an accomplice-liability instruction at trial. We disagree.

We first observe that White asserted essentially the same arguments in his direct appeal. In his arguments about the sufficiency of the evidence to sustain his conviction, White contended that J.V.'s testimony was untrustworthy because she had a motive to lie to avoid prosecution for possession of a firearm without a permit and that he was therefore entitled to an accomplice-liability instruction. We rejected these arguments and affirmed White's conviction. *White*, 2020 WL 132523, at *3. Because we have already determined that the circumstances proved showed that White was "the only person with access to the glove box and an opportunity to place the gun there," and that White's arguments about J.V.'s untrustworthiness and potential consideration as an accomplice were unmeritorious,

we do not reexamine such issues on a second appeal of the same case. *Id.* at *2-3; *see also State v. LaRose*, 673 N.W.2d 157, 161-62 (Minn. App. 2003) ("Under the law-of-the-case doctrine, issues considered and adjudicated on a first appeal become the law of the case and will not be reexamined or adjudicated on a second appeal of the *same case*." (quotation omitted)), *rev. granted* (Minn. Feb. 25, 2004), *order granting rev. vacated* (Minn. Aug. 17, 2004). And importantly, in his postconviction petition, White did not challenge the circumstances proved from sources other than J.V.'s testimony as set forth in our opinion on direct appeal.

Even so, J.V.'s felony terroristic-threats conviction does not materially affect the circumstances proved. The officers' testimony established that White was positioned in the vehicle directly in front of the glovebox where the gun was found, that J.V. consented to a search of her car, and that J.V. was visibly upset and appeared surprised to learn there was a gun in her glovebox. The conclusions drawn from these circumstances proved remain the same—that White exercised "dominion and control over the gun by hiding it in J.V.'s glove box" and that White "was the only person who could have placed the gun in the glove box; he did so without J.V.'s knowledge or consent; and he left the vehicle only after directing J.V. to 'stay there' while he talked to the police." *White*, 2020 WL 132523, at *3.

Therefore, even if J.V. could have been charged with a crime related to possession of the firearm, the officers' testimony provides additional corroborating evidence to support her testimony at trial. The fact that J.V. could have been charged with a crime different than the one White identified on direct appeal does not change the analysis. And

we reaffirm our previous observation that White's argument that it was J.V., not he, who possessed the firearm, frames J.V. as an alternative perpetrator, which "undercuts his attempt to render her testimony not credible as a matter of law." *Id.*

Finally, White's argument also ignores the fact that J.V. and White could have jointly possessed the gun. *See State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017) (stating that multiple persons may constructively possess a firearm jointly). So even if the disclosure of the evidence could have allowed White to prove that J.V. *also* possessed the gun, the evidence does not *disprove* that White possessed the gun. Accordingly, White has failed to set forth a reasonable probability that, had the evidence of the terroristic-threats conviction been disclosed, the outcome of the trial would have been different.

B. J.V.'s Misdemeanor Convictions

White argues that he was prejudiced by the state's failure to disclose J.V.'s misdemeanor theft convictions because he could have used this evidence to impeach J.V.'s character for truthfulness or show she was an alternate perpetrator.[1]

Evidence of specific incidents of conduct are admissible if used to show a witness's character for truthfulness or untruthfulness. Minn. R. Evid. 608(b). A witness's prior misdemeanor conviction can be admitted if it involved dishonesty or a false statement.

[1] Although White referenced J.V.'s misdemeanor driving-while-impaired conviction at the postconviction evidentiary hearing, White does not rely on this conviction for purposes of this argument.

Minn. R. Evid. 609(a). A conviction for simple theft is not a crime involving dishonesty.[2] *State v. Darveaux*, 318 N.W.2d 44, 48 (Minn. 1982). Therefore, J.V.'s misdemeanor theft convictions would not have been admissible because they held no impeachment value.

These convictions also could not have been admitted to establish J.V. as an alternate perpetrator. "Alternative perpetrator evidence is admissible if it has an inherent tendency to connect the alternative party with the commission of the crime." *State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004). The party must show that the prior crimes or bad acts are "sufficiently similar to the charged crime in terms of time, place, or modus operandi." *State v. Swaney*, 787 N.W.2d 541, 558 (Minn. 2010). The mere presence of "some similarities" does not render such evidence admissible. *Id.* at 559.

Here, White argues that because the gun was found in J.V.'s car, to which she had exclusive access, and because the gun was stolen, the misdemeanor theft convictions are admissible. But the record contains little detail regarding J.V.'s convictions aside from a handwritten note detailing her theft of an electric toothbrush. In other words, the record contains no evidence to demonstrate that J.V.'s prior acts were sufficiently similar to the charged crime with respect to time, place, or modus operandi, and the prior convictions would not have been admissible to establish a propensity that J.V. could have stolen the gun because she is a habitual thief. *See State v. Atkinson*, 774 N.W.2d 584, 593 (Minn. 2009) (rejecting reverse-*Spreigl* evidence being offered solely to show a propensity for

[2] White cites to *State v. Sims* to support his argument that simple shoplifting constitutes a crime of dishonesty, but *Sims* held the exact opposite. 526 N.W.2d 201, 202 (Minn. 1994) (noting that robbery does not involve dishonesty or false statement).

violence). Because none of the misdemeanor convictions would have been admissible at trial, White suffered no prejudice as a result of their nondisclosure.

C. J.V.'s Probation Status

White argues that he was prejudiced by the state's failure to disclose J.V.'s probationary status and J.V.'s false testimony regarding that status. A witness may be questioned about their probationary status to reveal the existence of a reason to lie or to otherwise show bias. *State v. Johnson*, 699 N.W.2d 335, 339 (Minn. App. 2005), *rev. denied* (Minn. Sept. 28, 2005); *see also* Minn. R. Evid. 616.

Here, J.V. was on probation to the court for two different offenses, but she was not on supervised probation and was not required to check in with a probation officer. A portion of J.V.'s trial testimony related to her description of being threatened by law enforcement to contact her probation officer if she refused to give a DNA sample. Although in this context J.V. stated that she was not on probation and gave the DNA sample to the officer to "clear [her] name," her testimony was not entirely accurate.

But even if the state would have disclosed this evidence, White makes no argument that there is a reasonable probability that the outcome of the trial would have been any different. "A petitioner seeking postconviction relief has the burden of establishing by a fair preponderance of the evidence that the facts warrant relief." *Erickson v. State*, 725 N.W.2d 532, 534 (Minn. 2007) (quotation omitted). We therefore discern no prejudice to White.[3]

[3] White argues that, even in the absence of prejudice, he should receive a new trial. White cites to *Kaiser* and *Schwantes* for the proposition that we have on occasion granted relief

II. The district court did not abuse its discretion when it denied White's claims of ineffective assistance of trial and appellate counsel.

White argues that both his trial and appellate counsel were ineffective, warranting a new trial. A claim for ineffective assistance of counsel requires the claimant to show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) absent counsel's unreasonable performance, the result of the proceeding likely would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694-95 (1984). "We review a district court's application of the *Strickland* test de novo because it involves a mixed question of law and fact. If a claim fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017) (citation omitted). We evaluate claims of ineffective assistance of both trial and appellate counsel under the *Strickland* standard. *See Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007).

A. Trial Counsel

White argues that his trial counsel was ineffective because she should have discovered J.V.'s criminal history as part of her reasonable investigation of the facts of the case. "When determining whether alleged failure to investigate constitutes ineffective

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"even where prejudice cannot be shown." *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992) (noting that we have reversed without a showing of prejudice "on occasion"); *State v. Schwantes*, 314 N.W.2d 243, 245 (Minn. 1982). But we highlighted the egregious nature of the disclosure violations in those circumstances where we have granted relief. *See Schwantes*, 314 N.W.2d at 244-45 (reversing based on a "serious breach of the discovery rules" when the prosecutor inadvertently failed to disclose defendant's wife's statements discrediting defendant's alibi). Although we do not excuse the nondisclosure by the state, we do not find the circumstances here to warrant relief without an affirmative showing of prejudice.

assistance of counsel, we consider whether the decision was based on trial strategy or whether it demonstrated that counsel's performance fell below an objective standard of reasonableness." *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009). "We give trial counsel wide latitude to determine the best strategy for the client." *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013).

Here, trial counsel testified that she made the tactical decision to take action to preserve the credibility of J.V., the only witness who testified at trial that White did not possess the gun. Trial counsel explained that she chose not to investigate J.V.'s criminal history because she did not want to disclose such a history to the state if discovered and risk the impeachment of her only favorable witness. This reasonable trial strategy did not constitute representation that fell below an objective standard of reasonableness.

Even so, we have already concluded that the nondisclosure of J.V.'s criminal history did not prejudice White because there is no reasonable probability that the outcome would have been different even if trial counsel would have had access to the information.

B. Appellate Counsel

White first argues that his appellate counsel was ineffective because he did not discover J.V.'s criminal history. But White cites no authority to suggest that appellate counsel is required to undertake a fact-finding mission to discover evidence not contained in the record. "An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *Louden v. Louden*, 22 N.W.2d 164, 166 (Minn. 1946). Failure to "cite either the record or legal authority to support [a]

claim" on appeal results in waiver of the claim. *State v. Sontoya*, 788 N.W.2d 868, 876 (Minn. 2010).

White next argues that appellate counsel was ineffective because he did not raise a claim of ineffective assistance of trial counsel related to trial counsel's failure to seek dismissal of the action based upon White's arrest allegedly in contravention of Minn. R. Crim. P. 6.01 or lack of probable cause.[4] Counsel is not obligated "to include all possible claims on direct appeal, but rather is permitted to argue only the most meritorious claims." *Nunn v. State*, 753 N.W.2d 657, 661 (Minn. 2008) (quotation omitted). Counsel "does not act unreasonably" by declining to assert claims that she "could have legitimately concluded would not prevail." *Wright v. State*, 765 N.W.2d 85, 91 (Minn. 2009). These are such claims. On direct appeal, we concluded that White's "arrest did not lead the police to search the vehicle, and the search did not lead the police to arrest [White.]" *White*, 2020 WL 132523, at *4. Therefore, White can show no prejudice resulting from the failure of his counsel to raise issues related to his arrest because it had no impact on the outcome. And we discern no merit to White's summary probable-cause challenge.

III. The arguments in White's pro se supplemental brief are unmeritorious.

White argues that he is entitled to a new trial based on the *Larrison* rule. The *Larrison* rule applies when a witness has been discovered to have given false testimony

[4] We note that these issues were not raised at White's contested omnibus hearing and were therefore waived. *See State v. Allen*, 706 N.W.2d 40, 43 (Minn. 2005). White cites to no authority, and we are not aware of any, to support that his argument regarding ineffective assistance of prior counsel negates this waiver. *See Sontoya*, 788 N.W.2d at 876 (failure to cite to legal authority to support a claim results in its waiver). Even so, we do not find counsel to have been ineffective.

which might have led a jury to reach a different result in the absence of that false testimony, and the party seeking a new trial was taken by surprise by the false testimony and was not made aware of its falsity until after trial. *State v. Caldwell*, 322 N.W.2d 574, 584-85 (Minn. 1982); *see also Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928); *Reed v. State*, 925 N.W.2d 11, 26-27 (Minn. 2019).

Here, the testimony given by J.V. that she was not on probation and that she was eligible to own a gun were arguably inaccurate. However, as set forth herein, correction of this testimony would not have led a jury to reach a different result regarding White's guilt. White is therefore not entitled to a new trial.

Affirmed.