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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2040**

State of Minnesota,
Respondent,

vs.

Joshua Raymond Armendariz,
Appellant.

**Filed February 3, 2014
Reversed and remanded
Halbrooks, Judge**

Watonwan County District Court
File No. 83-CR-11-590

Lori Swanson, Attorney General, Jennifer Coates, Assistant Attorney General, St. Paul, Minnesota; and

Stephen J. Lindee, Watonwan County Attorney, St. James, Minnesota (for respondent)

Ll. Rhyddid Watkins, Special Assistant Public Defender, Faegre Baker Daniels, LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Peterson, Judge; and
Ross, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his conviction of second-degree burglary and theft on the grounds that (1) the district court abused its discretion by precluding him from calling a witness, (2) the district court erred by admitting witness identifications elicited by unnecessarily suggestive procedures, (3) the evidence to support his conviction was insufficient, and (4) his right to speedy trial was violated. Because we agree that the district court abused its discretion by precluding appellant from calling a witness whose testimony was arguably relevant and did not present a substantial risk of unfair prejudice, we reverse and remand for a new trial.

FACTS

On October 3, 2011, a man approached S.S. outside her home in Lewisville and asked for assistance because his van had run out of gas. S.S. responded that she could not help him because she needed to get to work. But S.S. asked her neighbors, C.W. and R.W., if they could lend a hand. C.W. and R.W. got a gas can and met the man and a woman at his van. They spent about 20 minutes getting the van running again. During that time, another individual, R.D., stopped and briefly spoke with R.W.

Sometime later, a burglary occurred at a nearby farmhouse. The father of the homeowner saw a man come out of the house and run away with a backpack. He also saw a van down the road that he had earlier observed near the farmhouse. He spoke with the female driver. He then called the homeowner and told him to take down the license plate of the van, which was heading in the homeowner's direction. The homeowner

reported the license-plate number to the police. Based on the license-plate number, the police determined that the van was registered to the mother of appellant Joshua Armendariz. She told the police that Armendariz was using the van that day. During the ensuing investigation, a police officer showed R.W. a picture of Armendariz, and R.W. identified Armendariz as the man he had helped earlier in the day. C.W. and S.S. also gave descriptions of the man they had encountered. The officer used this information to compile a lineup consisting of six photos, including one of Armendariz.

The next day, an officer went to C.W. and R.W.'s home. He showed C.W. the lineup first. As the officer displayed the photos sequentially, C.W. said, "Bingo," and positively identified Armendariz. The officer then showed the lineup to R.W. Asked if he recognized any of the individuals pictured as the man he had helped, R.W. said, "If he had shorter hair I'd say this guy." The officer noted that R.W. had chosen Armendariz. The officer then took the photos to S.S.'s house. S.S. did not positively identify Armendariz.

Watonwan County charged Armendariz with second-degree burglary in violation of Minn. Stat. § 609.582, subd. 2(a)(1) (2010), and theft in violation of Minn. Stat. § 609.52, subds. 2(1), 3(2) (2010). Armendariz's first trial ended in a mistrial because the jury was deadlocked. In preparation for the second trial, Armendariz's counsel submitted a witness list that included R.D. and a notice of intent to offer an alternative-perpetrator defense. The next week, the state moved the district court to exclude alternative-perpetrator evidence and filed its witness list, which included R.D. The district court took the state's motion under advisement.

Armendariz's second trial began in July 2012. On the third day, the state rested, without calling R.D., and renewed its objection to R.D. testifying for the defense. The district court sustained the objection. After the jury returned a guilty verdict, Armendariz moved for a new trial. He argued that he was prejudiced by not being allowed to call R.D. because R.D. was a material witness. The district court denied the motion. This appeal follows.

DECISION

A criminal defendant has a constitutional right to due process that includes the right to present a complete defense, although the right is not absolute. *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973); *State v. Munt*, 831 N.W.2d 569, 585 (Minn. 2013); accord U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. “The defendant’s right to present witnesses is subject to rules of procedure and evidence designed to assure fairness and reliability in the determination of guilt.” *State v. Hannon*, 703 N.W.2d 498, 506 (Minn. 2005). And “[t]he district court has wide discretion to regulate the presentation, examination, and conduct of defense witnesses.” *Id.* at 505; see also Minn. R. Evid. 611(a) (stating that district court “shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence); *State v. Richards*, 495 N.W.2d 187, 195 (Minn. 1992) (approving district court’s “neither arbitrary nor mechanical” process of striking defense witnesses after asking defendant for offer of proof regarding each witness’s testimony).

Here, the prosecutor objected to R.D. being called as a witness by the defense because (1) the district court had already ruled that alternative-perpetrator evidence was

precluded¹; (2) R.D.'s physical appearance was irrelevant to Armendariz's argument that witnesses had misidentified him; and (3) if R.D., who was incarcerated at the time of trial, testified wearing prison garb, it would lead the jury to consider him to be an alternate perpetrator. Armendariz's counsel responded that he wanted to call R.D. not to suggest that he was an alternative perpetrator, but in order to establish potential eye-witness confusion. Defense counsel explained that C.W. saw both "the individual that committed the crime" and R.D. before she chose Armendariz from the photo lineup, and that R.D. and Armendariz "look substantially similar to one another." Therefore, defense counsel argued, C.W. may have been twice mistaken when she made her identification: first, she was looking for R.D. instead of "the other individual that she saw at the scene," and second, she picked Armendariz because of his similarity in appearance to R.D. Defense counsel also stated that he would ask R.D. to show his arms to the jury, to demonstrate that he had no tattoos.

The district court determined that at least one purpose for calling R.D. as a witness was to support an alternative-perpetrator defense. The district court then sustained the prosecutor's objection, stating, "I have considered the arguments of both parties, and I

¹ We cannot find, nor do the parties cite to, the district court's ruling on alternative-perpetrator evidence, but the record suggests that a ruling was made. When arguing that the district court should preclude R.D. from testifying, the prosecutor said that he believed that the district court had "ruled that there's just not enough evidence to . . . sustain that type of a defense." In response, defense counsel said, "The buzz words, alternative perpetrator, is that the hang[-]up? Because we've already discussed that. Your Honor has ruled. And we've withdrawn any alternate[-]perpetrator defense option. I mean, you ruled that out."

have considered the issue, and I am going to sustain [the state's] objection and not allow [R.D.] to testify.”

On this record, we conclude that the district court abused its discretion by precluding Armendariz from calling R.D. as a witness. All relevant evidence is admissible unless a rule or law provides otherwise. Minn. R. Evid. 402. And evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. Based on defense counsel’s theory, R.D.’s testimony was relevant because it had some tendency to make it more likely that the jury would conclude that C.W. misidentified Armendariz in the photo lineup. Identification is a fact question for the jury to decide. *State v. Fields*, 529 N.W.2d 353, 358 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995). Accordingly, whether the district court or the prosecutor was convinced by the defense’s theory was immaterial to whether R.D.’s testimony was relevant. Furthermore, we note that the state included R.D. on its own witness list. So it effectively conceded that R.D. was a permissible witness with relevant information to share.

Evidence that is relevant can still be excluded if the danger of unfair prejudice substantially outweighs its probative value. Minn. R. Evid. 403. The state argues that it would have been prejudiced if R.D. took the stand because he would be wearing prison attire. This argument is unpersuasive. The state listed R.D. in its pretrial witness list and secured a writ to bring R.D. from prison to court so that he could testify. We cannot say

that the state would have been prejudiced if R.D. testified simply because it did not call him first.

The state further argues that the probative value of R.D.'s testimony was outweighed because, as the district court recognized, the defense was still trying to present R.D. as an alternative perpetrator. We conclude that this concern did not substantially outweigh the testimony's probative value. The proper procedure would have been to impose limits on R.D.'s testimony, not to prevent him from testifying altogether. Had the district court allowed Armendariz to examine R.D., the prosecutor could have objected to specific questions or testimony. This would have satisfied any concerns that the state had that the defense would ignore the district court's earlier ruling and impermissibly argue that R.D. was an alternative perpetrator, while still respecting Armendariz's right to present a complete defense.

R.D.'s testimony was relevant, and we conclude that admitting it would not have posed a danger of unfair prejudice. Therefore, the district court should have allowed Armendariz to present the evidence and the jury to evaluate it. Precluding the testimony was an abuse of discretion that violated Armendariz's right to a complete defense.

Such an error on its own does not justify overturning Armendariz's conviction. We will not disturb the verdict if a reasonable jury would have reached the same verdict had the testimony been admitted. *Munt*, 831 N.W.2d at 583. But the error warrants reversal if there is a reasonable possibility that the jury may have reached a different verdict had the testimony been admitted. *Id.* We "must remand unless the state proves its burden of showing that the error was harmless." *Hannon*, 703 N.W.2d at 505.

At trial, the state relied primarily on the testimony of Armendariz's alleged accomplice and reinforced that with the photo-lineup identifications. Because of the significance of the witness identifications, we cannot say that precluding Armendariz from examining R.D. was harmless. C.W. was the only witness who unconditionally identified Armendariz. R.W. said he would have picked the photo of Armendariz "if he had shorter hair" and S.S. did not positively identify Armendariz. Had R.D. testified, the jury could have reasonably doubted C.W.'s and R.W.'s identifications. The error therefore not only violated Armendariz's right to a complete defense but also undermined the jury's verdict.

Reversed and remanded.