STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1533

State of Minnesota,
Respondent,

vs.

Benjamin Russell Lockwood,
Appellant.

Filed September 23, 2008
Affirmed
Peterson, Judge

Stearns County District Court
File No. K8-06-5484

Lori Swanson, Attorney General, Ann Cohen, Kimberly Parker, Assistant Attorneys General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janelle P. Kendall, Stearns County Attorney, Administration Center, Room 448, 705 Courthouse Square, St. Cloud, MN 56302 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson Presiding Judge; Klaphake, Judge; and Worke, Judge.

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

PETERSON, Judge

In this appeal from his conviction of third-degree burglary, appellant argues that (1) the district court erred in refusing to suppress a security-camera video recording and a video recording of appellant's statement to police, and (2) he was denied a fair trial when the district court allowed the jury to review the video recording of his statement to police during deliberations. We affirm.

FACTS

On October 26, 2006, building caretaker George Lundholm noticed that someone had placed a brown paper bag over the security camera in the maintenance room of the Empire Apartments. Lundholm contacted St. Cloud Police Officer Christina Zabrocki, who reviewed the video recording from the security camera and recognized appellant Benjamin Russell Lockwood as the person in the recording. Initially, Lundholm did not notice anything missing from the maintenance room. But about one week later, Lundholm needed to use a hacksaw and discovered that it was missing. Lundholm notified Zabrocki and the building maintenance coordinator, Mitchell Czech, about the missing hacksaw. Czech discovered that a few Craftsman wrenches were also missing from the maintenance room.

On November 6, 2007, St. Cloud police arrested appellant on an unrelated warrant and brought him to the police station, where he was interviewed by Investigator Michael Lewandowski. The following exchange occurred during the interview:

Q Okay. Back – back on the 24th, evening of the 24th, early morning hours of the 25th, you are seen at Empire Apartment in their shop putting a bag over the surveillance. Can I ask you what you were doing there?
A I was trying to stay warm. I was actually looking to get into a – a girl that I know there apartment.
. . . .
Q The – the reason I'm asking this is because one of the things that we do when we have a suspicion like this is that we check your pawn record and man you got a boat load of pawn – pawn slips coming in.
A Yeah.
. . . .
Q – and not everything is – I'm going to tell you straight, not everything is documented yet what's missing out of here as far as the maintenance shed. But if something comes up missing out of here, you understand how that's going to look for you?
A Um-hum. Yeah, I didn't – I think, ah, a couple of wrenches was all that I – I wasn't even looking for anything really.
Q Okay. Where are those wrenches right now?
A Um, I put 'em outside the building there.
. . . .
Q Okay. And what was – why would you put 'em outside the building?
A 'Cause I do construction contracting and normally and –
Q Okay. What kinda wrenches? . . .
. . . .
A . . . Just wrenches, wrenches like craftsman-type wrenches.

On November 16, 2006, appellant was charged with third-degree burglary for stealing three Craftsman wrenches and a hacksaw from the maintenance room. The same day, the state provided to defense counsel a transcript of Lewandowski's interview of appellant and still shots from the security-camera surveillance video. At a pretrial hearing on January 19, 2007, appellant demanded a speedy trial. At a pretrial hearing on

March 7, 2007, appellant agreed to waive by one day his right to a trial within 60 days, and the trial date was set for March 20, 2007.

As soon as the trial date was set, the prosecutor requested from the police department copies of the surveillance-camera video recording and the video recording of appellant's police interview. When the state received the copies on March 16, 2007, it provided them to defense counsel. Defense counsel moved to suppress the videos, claiming that he had not had sufficient time to review them. The district court determined that because appellant admitted being on the premises, he would not be prejudiced by the late disclosure, and it denied appellant's motion. The court indicated that it would be willing to grant a continuance, but appellant continued to assert his right to a speedy trial.

Appellant testified at trial and admitted being in the maintenance room. He denied intending to steal the wrenches but admitted that he put them outside the building. He testified that he removed the wrenches because he needed to use the box that they were in to write a note to a building tenant.

During deliberations, the jury asked to review the video recording of appellant's statement to police. Over appellant's objection, the district court replayed the video recording for the jury in the courtroom. Before replaying the recording, the court cautioned the jury not to overemphasize the evidence. The district court denied appellant's request to testify after the recording was replayed. About 50 minutes after reviewing the recording, the jury returned a verdict of guilty.

D E C I S I O N

I.

If a party fails to comply with a discovery rule, the district court "may upon motion and notice order such party to permit the discovery or inspection, grant a continuance, or enter such order as it deems just in the circumstances." Minn. R. Crim. P. 9.03, subd. 8. "The construction of a procedural rule is a question of law subject to de novo review." *State v. Bailey*, 677 N.W.2d 380, 397 (Minn. 2004). But when a discovery violation has occurred, the district court is particularly suited to determine the appropriate remedy for the violation and has discretion in deciding whether to impose sanctions. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Absent a clear abuse of discretion, we will not overturn the district court's ruling. *Id.* When determining the remedy, the district court should consider the reason why disclosure was not made, the extent of prejudice to the opposing party, the feasibility of rectifying such prejudice with a continuance, and any other relevant factors. *Id.*

The discovery rules provide that at the request of defense counsel, the prosecution shall "allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which relate to the case," including relevant written or recorded statements that relate to the case and any material tending to exculpate the accused. Minn. R. Crim. P. 9.01, subd. 1(1), (2), (6). The prosecution's obligation to disclose extends to any material in the possession of those who have participated in the investigation and who report to the prosecutor. *Id.*, subd. 1(8). "Discovery rules are based on the proposition that the ends of justice will best be served by a system of liberal

discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. . . ." *State v. Patterson*, 587 N.W.2d 45, 50 (Minn.1998) (quotation omitted).

Appellant argues that because the state waited until the eve of trial to give defense counsel copies of the surveillance-camera video recording and the video recording of appellant's statement to police, the district court erred in refusing to suppress this evidence, which forced appellant to either give up his right to a speedy trial to review the evidence or accept the state's discovery violation and proceed. Appellant's argument is based on the premise that the prosecutor was required to provide copies of the video recordings to appellant and that the failure to provide copies earlier was a discovery violation. But the discovery rules do not require the prosecutor to provide copies of recordings. With respect to statements, the discovery rules provide that "[t]he prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any relevant written or recorded statements which relate to the case." Minn. R. Crim. P. 9.01, subd. 1(2). With respect to documents and tangible objects, the rules provide that "[t]he prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce . . . photographs and tangible objects which relate to the case." *Id.*, subd. 1(3).

Although the state did not provide appellant copies of the recordings until shortly before trial, it disclosed the existence of the recordings multiple times, beginning in November 2006. The complaint, which was provided to appellant on November 16, 2006, states that Zabrocki "viewed the surveillance video up to the time the bag was placed over the camera" and that "a taped statement was taken of [appellant] on

November 6, 2006 by Officer Lewandowski." Also on November 16, 2006, the prosecutor provided defense counsel notice of the evidence against appellant under Minn. R. Crim. P. 7.01. The notice listed "confessions, admissions, or statement in the nature of confessions made by the defendant" and "surveillance video." The notice stated that more specific information could be obtained by contacting the prosecutor. Included with the notice were a transcript of appellant's statement to Lewandowski and still shots from the surveillance video. The witness list served on defense counsel on March 8, 2007, lists the following exhibits: "1. Surveillance video; 2. Still photos; and, 3. Statements."

These disclosures revealed to appellant that the prosecutor possessed the recordings, and under the discovery rules, appellant could have reproduced the recordings. Appellant does not claim that he attempted to reproduce the recordings. Because the rules did not require the prosecutor to provide copies of the recordings to appellant, there was no discovery violation, and the district court did not clearly abuse its discretion when it did not suppress the recordings.

II.

During its deliberations, the jury asked for a transcript of appellant's police interview and asked to review the video recording of the interview. The district court informed counsel that it was not inclined to give the jury unfettered access to the transcript and the recording and proposed that the jury be allowed to review the recording and transcript one additional time in the courtroom as they had done during trial. Defense counsel objected and asked that appellant be allowed to testify about the

circumstances of the interview if the court went ahead with its proposal. The district court denied appellant's request to reopen the record and went ahead with its proposal.

Appellant argues that he was denied a fair trial when the district court allowed the jury to review the recording of his police interview. We review the district court's decision to permit the jury to review the recording under an abuse-of-discretion standard. *State v. Haynes*, 725 N.W.2d 524, 528 (Minn. 2007). In *Haynes*, the supreme court explained:

> If a deliberating jury asks to review "certain testimony or other evidence," a district court should conduct the jurors to the courtroom. The court "may have the requested parts of the testimony read to the jury and permit the jury to re-examine the requested materials admitted into evidence." The court also has the discretion to "have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested."

Id. at 528 (citation omitted) (quoting Minn. R. Crim. P. 26.03, subd. 19(2)).[1]

Appellant contends that the district court abused its discretion and he was prejudiced when the court allowed the jury to review the recording without allowing appellant to retake the witness stand, which highlighted one piece of evidence to the exclusion of others. But rule 26.03, subd. 19(2), does not permit the district court to open the record to allow the jury to hear new evidence; it permits the court to allow the jury to

[1] Appellant argues that the district court's determination to permit the jury to review the recording should include three considerations identified in *State v. Kraushaar*, 470 N.W.2d 509, 515 (Minn. 1991). But the issue in *Kraushaar* was whether the district court erred in allowing the jury to review a videotape in the jury room, rather than in open court. *Id.* at 514. The three considerations identified by appellant are to be taken into account when the district court decides what to permit the jury to take into the jury room. *Id.* at 514-15 & 514 n.4.

"review other evidence relating to the same factual issue." Allowing appellant to testify would have created new evidence, instead of reviewing existing evidence.

Appellant argues on appeal that to avoid the risk that the jury would overemphasize the recording, the district court, "at the very least, should have reread [appellant's] trial testimony regarding the wrenches." But in the district court, appellant did not ask to have his testimony read to the jury, and on appeal, appellant does not explain why reading his testimony would have avoided the risk that the jury would overemphasize the recording.

By replaying the video recording to the jurors in the courtroom, rather than allowing them to take the recording into the jury room, the district court followed the practice recommended in *Haynes*. The district court also allowed the jury to review the recording only once and in the parties' presence and cautioned the jury not to overemphasize the evidence. Appellant has not shown that the district court abused its discretion when it allowed the jury to review the recording during deliberations.

Affirmed.