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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1992**

State of Minnesota,  
Respondent,

vs.

Marlow J. Day,  
Appellant.

**Filed November 18, 2008  
Affirmed  
Hudson, Judge**

Mille Lacs County District Court  
File No. CR-06-1158

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Janice S. Kolb, Mille Lacs County Attorney, Mille Lacs County Courthouse, 525 Second Street Southeast, Milaca, Minnesota 56353 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Bjorkman, Judge.

## **UNPUBLISHED OPINION**

**HUDSON, Judge**

On appeal from convictions of second-degree assault, fifth-degree assault, and possession of a firearm by an ineligible person, appellant argues that the district court abused its discretion by denying his motion for a mistrial. Appellant also raises several challenges in a supplemental pro se brief. Because the record supports the district court's decision, and because we find appellant's pro se challenges to be without merit, we affirm.

### **FACTS**

Appellant Marlow Day was charged by complaint with second-degree assault, fifth-degree assault, and possession of a firearm by an ineligible person. His trial began on September 11, 2006. During the first day of trial, M.R. testified that on April 8, 2006, appellant struck her in the head with the butt of a gun. Shortly after M.R. testified, she was taken into custody in connection with a civil commitment proceeding and sent to the Crow Wing Detoxification Center. The next day, September 12, appellant moved the district court to have M.R. tested for drugs to determine whether M.R. was under the influence of mood-altering substances when she testified. The district court granted the motion. Appellant's trial continued and the jury found appellant guilty as charged.

On November 16, 2006, appellant moved for a mistrial based on M.R.'s toxicology report, which indicated that M.R. had cocaine in her system within 48 hours of testifying. Appellant argued that the cocaine in M.R.'s system rendered her incompetent to testify. On May 10, 2007, the district court issued an order denying

appellant's motion for a mistrial. The district court found that because there was no indication as to when M.R. used the cocaine, it was "entirely possible that there was little more than a lingering residue of cocaine in her system from a much earlier use." The district court also concluded that M.R.'s "appearance, demeanor, and her responses to the attorneys' questions raised no contemporaneous concerns about her competency."

As a result, the district court held that "[t]here [wa]s insufficient evidence to find either that [M.R.] was not competent to testify or that she was under the influence of a controlled substance." Appellant was sentenced to 45 months' imprisonment for the second-degree assault conviction, and 51 months' imprisonment on the ineligible-possession conviction. This appeal follows.

### **DECISION**

Appellant argues that it was an abuse of discretion for the district court to deny his motion for a mistrial. The district court is in the best position to determine whether an incident at trial creates sufficient prejudice to deny the defendant a fair trial such that a mistrial is warranted. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). We review the district court's denial of a mistrial for an abuse of discretion. *Id.* Appellant specifically challenges the district court's determination that M.R. was competent to testify. "Determination of witness competency rests in the discretion of the [district court]" and a finding of competency will not be reversed absent a clear abuse of discretion. *State v. Cermak*, 350 N.W.2d 328, 332 (Minn. 1984).

An intoxicated witness is competent to testify as long as the witness has the "capacity to remember or to relate truthfully facts respecting which they are examined."

Minn. Stat. § 595.02, subd. 1(f) (2006). Here, the district court found that M.R. “possessed a cognitive ability that allowed her to comprehend the questions put to her, to recall necessary events, and to provide answers that were reflective, responsive, and appropriate.” The record supports the district court’s conclusion. M.R. gave almost 60 pages of testimony, and while M.R. at times gave answers that appear confused and struggled with questions, the overwhelming majority of her testimony was coherent and responsive. At no point during M.R.’s testimony did either party or the district court raise any concerns over her responsiveness or ability to remember or relate the facts truthfully.

Appellant further asserts that there is no evidence in the record to support the district court’s determination that it was possible for the cocaine in M.R.’s system to be nothing more than a “lingering residue” from a “much earlier use.” But because there is no evidence in the record as to when M.R. used the cocaine, the district court was correct in noting that it was *possible* for the cocaine in M.R.’s system to be from an earlier use, having little-to-no effect on her competency to testify.

Because the record supports the district court’s conclusion, the district court did not abuse its discretion in determining that M.R. was competent to testify. In turn, it was not an abuse of discretion for the district court to deny appellant’s motion for a mistrial. Appellant also raises several challenges in a supplemental pro se brief. We have reviewed these challenges and find them to be without merit.

**Affirmed.**