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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1337**

State of Minnesota,
Respondent,

vs.

Abdirisak Dahir Jama,
Appellant.

**Filed August 11, 2009
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27CR07128396

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Melissa Sheridan, Assistant Public Defender, 1380 Corporate Center Curve, Suite 320, Eagan, MN 55121 (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his convictions of five counts of aggravated first-degree robbery and unlawful firearm possession, arguing that the district court abused its

discretion by imposing a discovery-rule-violation sanction whereby appellant's alibi witness was precluded from testifying. In his pro se supplemental brief, appellant argues that the district court erred in allowing his prior convictions to be admitted, he received ineffective assistance of counsel, and the photo-lineup procedures were not proper. We affirm.

DECISION

Alibi Witness

Appellant Abdirisak Dahir Jama argues that the district court abused its discretion by imposing a discovery-rule-violation sanction whereby appellant's alibi witness was precluded from testifying. "[District] courts have broad discretion in imposing sanctions for violations of the discovery rules." *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998). We will not overturn the district court's ruling absent a clear abuse of discretion. *Id.* "Despite the [district] court's broad discretion, preclusion of evidence is a severe sanction which should not be lightly invoked." *Id.* (quotation omitted).

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 district court is particularly suited to determine the appropriate remedy when a discovery violation has occurred. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). When determining the remedy, the district court should consider "(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party;

(3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors.” *Id.*

Following his arrest for a robbery that occurred on December 9, 2007, appellant told police that he was with his girlfriend at the time of the robbery; however, he refused to disclose the woman’s name. The alibi witness was also not included on his witness list. On the first day of trial, appellant disclosed the witness’s name and requested that the court allow her to testify.

If the defendant intends to offer evidence of an alibi, the defendant shall also inform the prosecuting attorney of the specific place or places where the defendant contends to have been when the alleged offense occurred and shall inform the prosecuting attorney of the names and addresses of the witnesses the defendant intends to call at the trial in support of the alibi.

Minn. R. Crim. P. 9.02, subd. 1(3)(c). As a sanction under rule 9.03, subd. 8, the district court refused to allow the witness to testify. The district court found that there was no legitimate reason for appellant’s failure to disclose the name of his alibi witness prior to trial. Appellant asserted his alibi shortly after his arrest so he had sufficient time to disclose the information. The court further found that the state would be prejudiced if this witness were allowed to testify when she was revealed after the jury had been selected, and that appellant could take the stand himself and testify as to his alibi. Because we conclude that the district court’s findings are supported by the record, the district court did not abuse its discretion in not allowing the witness to testify.

Pro Se Supplemental Brief

Appellant also raises several issues in his pro se supplemental brief, specifically that (1) the district court abused its discretion by permitting the state to impeach him with his prior convictions; (2) he received ineffective assistance of counsel because his trial counsel failed to include his alibi witness on his witness list; and (3) proper procedures were not followed on the photo-lineup identification.

Prior Convictions

Appellant argues that the district court abused its discretion when it permitted the state to impeach him with evidence of his prior convictions. A district court's ruling on the impeachment of a witness by a prior conviction is reviewed, as are other evidentiary rulings, under a clear-abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

Minn. R. Evid. 609(a). Whether the probative value of the prior conviction outweighs the prejudicial effect is within the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985).

Some of the factors which the [district] court would have had to consider in determining whether to restrict the use of each of the more recent prior crimes are: (1) the impeachment value of the prior crime, (2) the date of the conviction and the

defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 537-38 (Minn. 1978).

The prior convictions the state sought to use were appellant's 2003 felony theft conviction, 2004 felony assault conviction, 2005 controlled-substance-crime conviction, and 2006 fleeing-police conviction. The state also sought to use appellant's 2005 and 2006 misdemeanor using-false-name convictions and his 2002 misdemeanor bail-jumping conviction from Wisconsin because they show dishonesty. The district court analyzed each of the *Jones* factors with respect to each conviction, and allowed the convictions to be used for impeachment purposes. Based on the court's analysis of the *Jones* factors, we conclude that the district court did not abuse its discretion by allowing appellant's prior convictions to be admitted for impeachment purposes.

Ineffective Assistance of Counsel

Appellant also alleges ineffective assistance of counsel from his trial counsel for failing to include the alibi witness on the witness list. There is a strong presumption that counsel's performance falls within a range of acceptable professional conduct. *State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000). In order to maintain a claim of ineffective assistance of counsel, appellant must show that defense counsel's performance was deficient and that he was thereby prejudiced. *Id.*

The record shows that while appellant had asserted his alibi shortly after his arrest, he failed to disclose the name of his alibi witness to his counsel until just prior to the

commencement of his trial. The fact that appellant chose not to disclose the name of his alibi witness cannot now be held against his counsel. Further, despite acknowledging the timeliness issue, appellant's counsel argued vigorously for the introduction of the testimony. Appellant has failed to show that his counsel's performance was deficient and that he suffered any prejudice.

Photo-Identification Lineup

Finally, appellant argues that proper procedures were not followed with regard to the photo lineup the victims were shown because the victims saw appellant being released from custody while they were waiting to be interviewed at the police station. Appellant did not raise this issue below. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that generally, this court will not consider matters not argued and considered in the court below). Nonetheless, we may review the claim under the plain-error standard of review. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To reverse under *Griller's* three-prong test, "there must be (1) error; (2) that is plain; and (3) the error must affect appellant's substantial rights." *Id.* If these prongs are met, we must determine whether this court "should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

An impermissibly suggestive pretrial-identification procedure violates a defendant's due-process rights. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). The court employs a two-part test to determine if pretrial-identification evidence should be suppressed: first, the procedure must not be unnecessarily suggestive or unfairly single

out the defendant; and second, even if the procedure is somewhat suggestive, the court must determine if, under the totality of the circumstances, the evidence is reliable. *Id.*

The state correctly argues that the fact that the robbery victims were at the police station when appellant was released from custody was merely a coincidence and it was not a situation in which the identification was imposed upon appellant by the police. Further, the witnesses' identification of appellant had independent origins. The victims told police that one of the men who robbed them was missing his front teeth and appellant was missing his front teeth, the victims provided a general description matching that of appellant, and they made quick and confident identifications of appellant in the photo lineup. Finally, appellant testified as to the encounter in the hallway and argued to the jury that the photo identifications were therefore tainted.

Affirmed.