STATE OF MINNESOTA
IN COURT OF APPEALS
A09-134

State of Minnesota,
Respondent,

vs.

Ronald Alfred Thomas,
Appellant.

Filed February 16, 2010
Affirmed
Ross, Judge

Marshall County District Court
File No. 45-CR-08-194

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Michael D. Williams, Marshall County Attorney, Warren, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

ROSS, Judge

Ronald Thomas appeals from his conviction of third-degree assault after he punched his fiancée, L.W., breaking her nose. Thomas maintained that he merely pushed

L.W. and that she injured herself by falling into a dresser. The district court allowed the nurse who treated L.W. to opine on the likelihood that the injury could have occurred in that manner. The prosecutor had not disclosed before trial that the nurse would testify in this way, first revealing her anticipated testimony in his opening statement. Thomas appeals from his conviction, contending that the district court erred by allowing the nurse's testimony and by denying his motion for a continuance so that he could prepare for it. Because Thomas was not prejudiced by the prosecutor's discovery violation, we affirm.

FACTS

The assault underlying this appeal occurred on an evening in April 2008. Ronald Alfred Thomas returned home from work to his fiancée, L.W., and their two-year-old son, T.T. Thomas and L.W. began arguing over money. Thomas wanted to buy new work shoes and change the oil in his car, but L.W. wanted him to pay the electric bill. Thomas and L.W. gave different versions of what happened next.

L.W. testified that she and T.T. were in bed with the television on when Thomas joined them. They began a new argument about how to put T.T. to sleep. Thomas got out of bed and started yelling. L.W. "knew something was going to happen," so she grabbed T.T. and tried to leave the room. Thomas then punched her in the nose, knocking her to the floor with T.T. still in her arms.

Thomas testified that L.W. had been drinking and that after he and L.W. argued about the money, L.W. asked him to go and buy more beer. He claimed that he went to the store, returned with the beer, and drank two beers while L.W. drank six. Thomas

agreed that they argued about how to put T.T. to sleep. But he claimed that L.W. became upset, got out of bed, and left the bedroom before she changed her mind and wanted Thomas to leave. Thomas testified that he was trying to leave the room when L.W. came toward him. He then pushed her out of his way and she fell, hitting the dresser. He said that L.W. then told him that her nose was broken and that he was going to jail.

An emergency room nurse confirmed that L.W.'s nose was broken. Nurse Practitioner Michelle Woinarowicz examined L.W.'s nose and took x-rays. L.W. had a laceration on the bridge of her nose and two fractures. She told the nurse that her fiancé punched her in the nose. The injury required surgery.

Deputy Sheriff Adam Gast investigated the incident, beginning in the emergency room. Deputy Gast described L.W. as scared, crying, and visibly shaking. L.W. told him that Thomas punched her in the face. The deputy then went to the couple's home to interview Thomas. Thomas told the deputy that he and L.W. had gotten into a pushing match and she ended up with a broken nose. Deputy Gast saw drops of blood on the bedroom floor and on the hallway floor leading to the bathroom but no blood on the bedroom dresser. He then arrested Thomas.

The state charged Thomas with third-degree assault. At trial, the prosecutor foretold in his opening statement the testimony Nurse Woinarowicz would give:

> [Thomas] came in, and he was angry, and he struck her right in the face, right in that nose, right here (indicates).
>
> Question. What will Dr. Woinarowicz say about this, this force? . . . She will say that this couldn't have come from [L.W.] falling down on her face and busting her nose like that. No. No. It couldn't come from hitting this dresser

> because the dresser is too tall and she would have had to kind of free-fall flat on her face, as they say, onto something and then hit her nose exactly there in order to have this occur. No, the medical evidence clearly establishes that exactly what [L.W.] said happened, happened.

After the prosecutor's opening statement, defense counsel requested a conference in the district court's chambers. The district court held the conference and made the following record:

> [Defense counsel] asked if all of the discovery had been supplied to him during the course of this pending action, pending trial, and [the prosecutor] has indicated that all of the written material has—has been provided to him. [Defense counsel] asked if there had been any discussions between [the prosecutor] and Nurse Practitioner Woinarowicz regarding . . . the improbability of these injuries being—occurring other than by someone being punched, and [the prosecutor] indicated he had had conversations with the potential witness on this . . . .
>
> [Defense counsel] has indicated that that may affect how he approaches this case, he did not have that information at that point in time, and the Court has agreed to allow a recess for [defense counsel] to talk this over with Mr. Thomas about how they should proceed in this matter.

The district court then stated that the trial was moving forward over defense counsel's objection and recessed to allow Thomas to confer with his counsel.

Thomas offered to stipulate that L.W.'s broken nose satisfied the element of substantial bodily harm in exchange for precluding the nurse's testimony. Thomas withdrew this offer after the district court indicated that the state could rebut Thomas's testimony with the nurse's testimony if he claimed that L.W.'s injury was the result of a push. Thomas objected in limine to the nurse's opining about how the injury might have

occurred. The district court overruled the objection. The nurse offered her opinion about the injury's cause, critical of the idea that it resulted from a fall into a dresser. The jury found Thomas guilty. This appeal follows.

D E C I S I O N

Thomas argues that his conviction is infirm because the district court should have allowed a continuance or disallowed Nurse Woinarowicz's testimony because the prosecutor failed to disclose before trial that she would testify to her opinion about the likelihood that a fall caused L.W.'s injury. "A new trial is warranted when the State's discovery violations viewed in the light of the whole record, appear to be inexcusable and so serious and prejudicial that the defendant's right to a fair trial was denied." *State v. Miller*, 754 N.W.2d 686, 705 (Minn. 2008) (quotation omitted).

We first consider whether a discovery violation occurred. A prosecutor must "provide defense counsel with the substance of any oral statements which relate to the case." Minn. R. Crim. P. 9.01, subd. 1(2). The prosecutor disclosed the nurse as a witness before trial but did not disclose that she would offer an opinion about the likelihood that something other than a punch caused L.W.'s injuries. The prosecutor should have disclosed that the nurse planned to testify to her opinion; the state does not disagree, characterizing this breach as a "technical" violation.

A district court may, in its discretion, impose sanctions for failure to comply with criminal discovery requirements. Minn. R. Crim. P. 9.03, subd. 8; *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). We must determine whether the district court's decision not to sanction was a clear abuse of that discretion. *State v. Ramos*, 492 N.W.2d 557,

559–60 (Minn. App. 1992), *review denied* (Minn. Jan. 15, 1993). A district court should determine the appropriate response to a violative failure to disclose by considering (1) the reason for the nondisclosure, (2) the extent of prejudice to the objecting party, (3) whether the prejudice can be remedied by a continuance, and (4) any other relevant concern. *Lindsey*, 284 N.W.2d at 373.

Determining whether the district court considered the *Lindsey* factors is difficult because the conference occurred off the record. The district court summarized the conference, but the summary does not indicate whether or how the district court applied the *Lindsey* factors. After a careful review of the record, however, we find that we need not address the district court's analysis because Thomas was not prejudiced by the prosecutor's discovery violation. *See Ramos*, 492 N.W.2d at 560 ("Generally, a new trial should be granted only if the defendant was prejudiced by the state's failure to comply with discovery rules."). A new trial should not be ordered if there is no reasonable probability that the outcome would have been different if the evidence had been disclosed. *State v. Freeman*, 531 N.W.2d 190, 198 (Minn. 1995).

We are not persuaded by Thomas's argument that he did not have adequate time to prepare to cross-examine the nurse. Nurse Woinarowicz testified that L.W.'s injuries were not consistent with a fall. On cross-examination, however, she acknowledged that it would be possible under certain circumstances for L.W. to break her nose on the dresser. The nurse said that it was her medical opinion that the injury could have been caused by the dresser if L.W. hit her nose directly with enough force. She opined that most people

extend their hands protectively to brace for a fall, but she acknowledged that in some circumstances a falling person might fail to do so.

The jury heard testimony that could have led it to believe that such a circumstance was present for L.W.'s alleged fall. L.W. testified that she was holding her son when she was attacked. Thomas claimed that L.W. had consumed six beers shortly before the fall. Deputy Gast said that L.W. smelled like she had been drinking. The jury also heard that L.W. was taking prescription medicine that should not have been taken with alcohol. On these facts, the jury could have believed Thomas's defense regardless of the nurse's generally unfavorable testimony. And Thomas's counsel had ample time to weave this theory into the nurse's cross-examination if he had thought it best to do so.

Thomas emphasizes the importance of Nurse Woinarowicz's testimony. "The entire trial turned on whose version of events was credited: [L.W.'s or Thomas's]. . . . As a nurse practitioner with years of medical experience, Woinarowicz's evaluation of how [L.W.] received her injuries was very compelling to the jury and corroborated [L.W.]'s testimony." We agree that the nurse was an important witness, and had she given unequivocal testimony that Thomas's story was incredible, Thomas's argument for a new trial would have greater weight. But on cross-examination the nurse admitted that Thomas's story was plausible. And this successful cross-examination compels our holding that the discovery violation was not prejudicial. *See State v. Jackson*, 773 N.W.2d 111, 127 (Minn. 2009) (holding that the failure to disclose a pretrial conversation was a harmless violation in part because the defendant had an opportunity to cross-examine a party to the conversation).

Thomas also argues that he was prejudiced by the nondisclosure because he did not have time to locate a contrary expert witness of his own. But Thomas was able to press Woinarowicz on cross-examination to testify that L.W.'s injuries could have been caused by a fall into the dresser, and Thomas does not suggest that any expert witness would have testified any more supportively about his rejected theory. We hold that the district court did not abuse its discretion by failing to preclude the nurse's testimony or to grant a continuance. *See Freeman*, 531 N.W.2d at 198 ("[P]reclusion of evidence is a severe sanction that should not be lightly invoked."); *Lindsey*, 284 N.W.2d at 376 (Wahl, J., concurring) ("Because there was no prejudice in this case, there was no need to grant a continuance.").

Thomas next argues that even if he was not prejudiced by the untimely discovery, he should still be granted a new trial. Thomas asserts that the prosecutor's discovery violation was so blatant and needless that reversal is necessary as a prophylactic measure. Thomas cites *State v. Kaiser*, a discovery-rule-violation case in which the supreme court ordered a new trial in the exercise of its supervisory power over the trial court. 486 N.W.2d 384, 387 (Minn. 1992). This court has declined to exercise such supervisory powers because they are reserved to the supreme court. *See, e.g.*, *State v. Gilmartin*, 535 N.W.2d 650, 653 (Minn. App. 1995), *review denied* (Minn. Sept. 20, 1995); *Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 640 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995). We follow the same approach here.

Thomas raises two additional arguments in his supplemental pro se brief. We have considered them and conclude that they do not warrant reversal or call for further discussion.

Affirmed.