STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1535

State of Minnesota,
Respondent,

vs.

Thomas Patrick Sullivan,
Appellant.

Filed June 29, 2010
Affirmed; motion granted, motion denied
Stoneburner, Judge

Cass County District Court
File No. 11CR08225

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

Christopher J. Strandlie, Cass County Attorney, Walker, Minnesota (for respondent)

Daniel L. Gerdts, Minneapolis, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Connolly, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

STONEBURNER, Judge

Appellant challenges his conviction of fourth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.345, subd. 1(d) (2008), arguing that the district court abused its discretion by (1) allowing an amendment to the complaint on the first day of trial and denying appellant's motion for a continuance; (2) denying appellant's motions for sanctions for discovery violations; and (3) denying appellant's motion for a new trial based on prosecutorial misconduct. We affirm.

FACTS

Appellant Thomas Patrick Sullivan and T.M. met at a chiropractor's office in early 2007 and began dating that summer. T.M. accepted Sullivan's invitation to go with him to his lake home in Backus for the weekend of July 7. T.M. had previously told Sullivan that she did not believe in sexual intimacy early in a relationship and, prior to the trip to Backus, the couple's physical interaction had consisted only of a brief kiss at the end of a date. On the first night at the lake home, T.M. slept in an upstairs bedroom normally used by Sullivan, and Sullivan slept in a room on the first floor.

What occurred at the lake home on Saturday night of that weekend is disputed by Sullivan and T.M. T.M. has very little memory of what occurred after 10 p.m. until she woke up in bed around 4:30 a.m., naked from the waist down and with her swimsuit top partially removed, exposing her breast. But T.M. had flashes of memories of Sullivan walking her to the house, Sullivan naked in her room, and Sullivan's penis in her vagina, pushing her whole body up in an attempt to penetrate her. When T.M. woke up, she

discovered that Sullivan's swim trunks and t-shirt were on the floor of her bedroom. T.M. later found her bikini bottom wedged between the sheets at the bottom of the bed. T.M. was ill, confused, and concerned about her memory loss. She asked Sullivan what had happened. He said that they had both been intoxicated and lacked judgment and ended up in bed together, but when he realized that she was uncomfortable, he stopped and went to sleep in another room.

T.M. became convinced that some type of drug had been administered to her and that she had been raped, though she knew that there had not been full penetration. She wrote out a detailed chronology of her relationship with Sullivan and everything she remembered about the weekend. She related what she remembered and feared to many of her family members, friends, her chiropractor, massage therapist, counselor, and obstetrician/gynecologist. In a telephone conversation with Sullivan, she read him definitions of sexual offenses and stated that she believed Sullivan had administered a date-rape drug to her when she was at his lake home. On July 24, 2007, she reported the incident to the police, and she gave a recorded statement to a police investigator the next day.

The police investigator took a recorded statement from Sullivan in August, 2007. Sullivan related that T.M. was very intoxicated, yet responsive, and that they each went to their individual bedrooms on the night of the incident**.** Sullivan denied being in T.M.'s bedroom, denied any fondling, and denied removing any of her clothing. He had no explanation for T.M.'s memory loss or the "flashes" of memory she recalled.

Sullivan was charged with one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(d) (2008) (sexual penetration of a mentally impaired, mentally incapacitated,[1] or physically helpless person), and one count of fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(d) (2008) (sexual contact with a mentally impaired, mentally incapacitated, or physically helpless person).

On the first day of trial, which did not occur until December 2008, the state moved to amend the complaint. The amendment eliminated "mentally impaired" from the charges and made "mentally incapacitated" and "physically helpless" separate counts, resulting in two counts of third-degree criminal sexual conduct (one for penetration of a mentally incapacitated person and one for penetration of a physically helpless person) and two counts of fourth-degree criminal sexual conduct (one for sexual contact with a mentally incapacitated person and one for sexual conduct with a physically helpless person).

Defense counsel objected to the amendment arguing that T.M.'s theory was that Sullivan, or someone, had administered a drug to her, rendering her unable to consent to sexual conduct, and the defense was prepared to defend against that specific claim. Defense counsel requested a continuance in the event that the amendment was allowed. The prosecutor noted that defense counsel had previously raised the issue of possible jury

[1] "Mentally incapacitated" is defined as "that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration." Minn. Stat. § 609.341, subd. 7 (2008).

confusion and lack of unanimity if it was confronted with the opportunity to find either mental incapacity or physical helplessness, and that the clarifying amendment was prompted by defense counsel's request and did not depend on any additional facts or change the charges against Sullivan. The prosecutor stated that the state would not object to a brief continuance. The district court granted the amendment but denied defense counsel's request for a continuance.

During the trial, defense counsel learned that T.M. had several contacts with the police investigator and two contacts with the prosecution that had not been disclosed prior to trial. Defense counsel moved for sanctions, including exclusion of T.M.'s testimony and dismissal of the charges based on discovery violations. The district court, after conducting an inquiry into T.M.'s contacts with the police investigator, denied the motions.

On cross-examination of Sullivan, the prosecutor focused on the discrepancies between Sullivan's statement to the police investigator and his testimony at trial. Sullivan testified that he had reviewed his statement the day before he testified and found a "bunch of mistakes." At trial, Sullivan testified that, on the Saturday night in question, he and T.M. had been getting "hot and heavy" in his truck, kissing and hugging before they returned to his house. He testified that they continued to kiss and hug at the house, eventually ending up on the sofa with Sullivan on top of T.M., after having removed her shorts, "grinding" his pelvis into her pelvis**.** Sullivan testified that when he became aware that T.M., who had been very responsive, was becoming uncomfortable, he stopped and helped her to the upstairs bedroom where she fell asleep immediately.

Sullivan testified that he dropped his swim trunks and t-shirt on the floor of that bedroom, put on a robe, and then went to sleep in a different room.

In closing argument, the prosecutor emphasized the differences between Sullivan's statement to the police and his testimony, and suggested that when Sullivan heard T.M.'s testimony and realized that T.M. remembered specific details, he tailored his testimony accordingly. The prosecutor also pointed out Sullivan's failure to explain many things, but followed these remarks with a statement that Sullivan is not required to prove anything. The prosecutor said "but if he does . . . testif[y], you can look at what he said and did not say."

Defense counsel's closing argument noted that T.M. had voluntarily consumed alcohol and pointed out the absurdity of T.M.'s theory that Sullivan had administered a date-rape drug to T.M. Defense counsel focused on T.M.'s own testimony that she pushed at Sullivan and was, therefore, not helpless or incapable of revoking consent. Defense counsel also emphasized the state's burden of proof and that Sullivan did not have a burden to explain anything. On rebuttal, the prosecutor reiterated that Sullivan had no burden of proof and that it is the state's burden to prove all elements of the crimes charged.

Defense counsel moved for a mistrial, arguing that the prosecutor's closing remarks shifted the burden of proof to Sullivan. The district court denied the motion, noting that there had been some "mudding of the water on the issue of the defendant's burden" but that both counsel and the jury instructions had "clear[ed] that up."

The jury acquitted Sullivan of three counts and found him guilty of one count of fourth-degree criminal sexual conduct (sexual contact with a physically helpless person). The district court denied Sullivan's motion for a new trial. Sullivan was given a 24-month stayed sentence conditioned on ten years of probation and 180 days in jail. This appeal followed in which both parties have moved to strike portions of the other's brief.

D E C I S I O N

I. Motions to strike

Respondent State of Minnesota moves to strike three paragraphs of Sullivan's brief because the information recited there regarding an unrecorded chambers conference about jury instructions is not in the record.[2] Because Sullivan failed to follow applicable appellate procedural rules for unreported proceedings, we grant the state's motion to strike these paragraphs. *See* Minn. R. Civ. App. P. 110.03 (providing procedure for statement of unreported proceedings); Minn. R. Crim. P. 28.01, subd. 2 (providing that the Minnesota Rules of Civil Appellate Procedure govern criminal appeals unless the criminal rules direct otherwise).

Sullivan moves to strike the pages of the state's brief that concern the state's argument that the district court did not abuse its discretion by denying Sullivan a continuance. Sullivan maintains that the argument is contrary to the state's position in the district court that a continuance was "appropriate." But the state's consent to a brief continuance is not inconsistent with the state's argument that the district court's failure to

[2] Some of the same information recited in these paragraphs appears in the record in connection with the state's motion to amend the complaint and Sullivan's response to that motion.

grant the continuance was not an abuse of discretion; therefore, we deny Sullivan's motion to strike.

II. Amendment of complaint and denial of continuance

Sullivan argues that the district court abused its discretion by allowing the state to amend the complaint on the first day of trial without granting Sullivan a continuance to prepare for "new" charges. "The district court has broad discretion to grant or deny leave to amend a complaint and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004).

In this case, the amended complaint eliminated the reference to "mentally impaired," and separated "mentally incapacitated" and "physically helpless." The amendment avoided a potential challenge to jury unanimity (an issue raised by the defense) on each element of the offenses charged. The original charges were not changed, and the district court did not abuse its discretion by permitting this clarifying amendment.

A district court's ruling on a request for a continuance is also reviewed for abuse of discretion. *State v. Courtney*, 696 N.W.2d 73, 81 (Minn. 2005). Sullivan's argument that the district court abused its discretion by denying a continuance is based on his erroneous assertion that the amended complaint contained new charges. Sullivan cites *State v. Bluhm*, 460 N.W.2d 22 (Minn. 1990). In *Bluhm*, the district court granted a pre-trial amendment to the complaint, charging defendant with an offense that carried a greater penalty than the charge contained in the original complaint, and denied the defendant's request for a continuance. *Id*. at 23. The supreme court held that the district

court "was free to allow an amendment charging an additional or greater offense," and stated that "[u]nder Minn. R. Crim. P. 3.04, subd. 2, the [district] court is relatively free to permit amendments to charge additional offenses before trial is commenced, provided the [district] court allows continuances *where needed*." *Id*. at 24 (emphasis added). In this case, the amendment was made before jeopardy attached and did not add different or more serious charges. Therefore, the district court acted within its discretion in denying a continuance.[3]

III. Discovery violations

Minn. R. Crim. P. 9.01, subd. 1(2), requires the prosecuting attorney to disclose relevant written or recorded statements related to the case and "the substance of any oral statements which relate to the case." During the trial, Sullivan learned of several e-mail and telephone contacts between T.M. and the police investigator that had not been disclosed; one lengthy interview of T.M. by the county attorney and the victim-witness coordinator, and a meeting between T.M. and the prosecuting attorney that occurred at trial. Sullivan moved to exclude T.M.'s testimony and for dismissal of the charges. Nondisclosure of these contacts was also asserted as a basis for granting a new trial.

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

[3] On appeal, Sullivan argues that a continuance was necessary to permit him to call an expert witness to explain an alcohol-induced blackout and why it would not be apparent to others, to counter the claim that T.M. was physically helpless during any sexual contact. The original charges and complaint narrative contained claims that T.M. was physically helpless at the time of any sexual contact, but the record does not reflect that Sullivan made this argument in the district court.

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 for violation of a discovery rule and has discretion in deciding whether to impose sanctions. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). When determining a remedy for a discovery violation, the district court should consider 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*. Absent a clear abuse of discretion, this court will not overturn the district court's ruling on a discovery violation. *Id*.

Here, the district court conducted an inquiry outside the hearing of the jury about the previously undisclosed contacts between T.M. and the police investigator. Both the investigator and T.M. testified that the undisclosed contacts were non-substantive, and both fully disclosed the nature of the contacts. The district court found that lack of disclosure did not prejudice Sullivan or merit sanctions. On this record, the district court did not abuse its discretion by failing to impose sanctions at or after trial for nondisclosure of these contacts.

Regarding T.M.'s meeting with the county attorney and the victim-witness coordinator, T.M. testified that no notes were taken, and the prosecutor informed the district court that there were no notes from such a meeting or reference to such a meeting in the prosecutor's file. The prosecutor is required to disclose all statements relating to the case including the substance of oral statements. Minn. R. Crim. P. 9.01, subd. 1(2). The failure to disclose the substance of T.M.'s meeting with the county attorney and the

victim-witness coordinator is a clear violation of the rule. In *State v. Adams*, this court vacated and remanded for hearing a district court's refusal to order the prosecutor to reveal the substance of two unrecorded and undisclosed conversations: one between a prosecution witness and the prosecution and one between a different prosecution witness and the sheriff. 555 N.W.2d 310 (Minn. App. 1996). We noted that the defendant could not show prejudice until he knew more about the substance of the undisclosed conversations. *Id*. at 312.

Here, after the district court indicated that it did not want to put the prosecutor in the position of being a witness in the case, Sullivan did not request that the district court order the prosecutor to disclose the substance of the meeting either by allowing questioning of the involved county attorney (not the prosecutor at trial) or the victim-witness coordinator, who was present at trial and available for questioning. Furthermore, T.M. was questioned about the meeting. She testified that the county attorney and victim-witness coordinator asked her to tell them her version of events that were, at that time, already detailed in her written chronology. T.M. thought that the purpose of the meeting was for the county attorney to make a decision about moving forward with the prosecution. T.M. testified that, in her meeting with the prosecutor during the trial, the prosecutor told her "what to expect" and to tell the truth. Sullivan's counsel argued in closing that only after meeting with the investigator and county attorney did T.M. begin to use certain phrases, suggesting that her testimony had been influenced by those meetings.

Although the violation of disclosure requirements in this case is inexcusable, on this record, which does not include the district court's refusal to permit further discovery, we cannot conclude that the district court abused its discretion by denying Sullivan's motion to exclude T.M.'s testimony and by denying a new trial for the discovery violations. T.M.'s version of the incident was committed to writing before any of the undisclosed contacts; Sullivan used the contacts in an attempt to discredit T.M.'s trial testimony; Sullivan did not ask for an opportunity for further discovery during trial; and Sullivan's own testimony supported the jury's finding that he had sexual contact with T.M. while she was helpless.

IV. Prosecutorial misconduct

Sullivan's motion for a new trial was based, in part, on the nondisclosure already discussed, and, in part, on his assertion that the prosecutor's closing argument impermissibly shifted the burden of proof to Sullivan by detailing what Sullivan had failed to explain to the jury, and violated Sullivan's right to confrontation by suggesting that Sullivan tailored his testimony based on the testimony of other witnesses. On appeal, Sullivan focuses the challenge to denial of the motion for a new trial on the prosecutor's suggestion that he tailored his testimony.

We review the denial of a motion for a new trial for an abuse of discretion. *State v. Green*, 747 N.W.2d 912, 917 (Minn. 2008). The state's closing argument "must be based on the evidence produced at trial, or the reasonable inferences from that evidence." *State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006) (quoting *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995)).

At trial, Sullivan did not object to the prosecutor's suggestion that he tailored his testimony. The plain-error doctrine is used when examining unobjected-to prosecutorial misconduct. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). The defendant has the burden to demonstrate that error occurred and that the error was plain. *Id*. at 302. When the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden then shifts to the state to demonstrate that the misconduct did not affect substantial rights. *Id*. "[T]he state would need to show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id*. (quotations omitted). We first turn, then, to a determination of whether Sullivan has demonstrated that error occurred and, if so, whether the error was plain.

In *State v. Swanson*, the supreme court addressed the issue of whether the state may impeach a defendant by arguing that a defendant can "'adjust' his testimony because he testified last . . . implicitly criticizing the defendant for exercising his constitutional right of confrontation." 707 N.W.2d 645, 657 (Minn. 2006). The supreme court concluded that

> although not constitutionally required, the better rule is that the prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, *at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case.* Without specific evidence of tailoring, such questions and comments by the prosecution imply that all defendants are less believable simply as a result of exercising the right of confrontation.

Id. at 657–58 (emphasis added). In *Swanson*, because the record did not contain evidence of tailoring or any other reason for the state's argument, the prosecutor's questions and comments suggesting tailoring were held to be error, but the error was ultimately held to be harmless. *Id*. at 658.

In *State v. Leutschaft*, we stated:

> So-called "tailoring" occurs when a witness shapes his testimony to fit the testimony of another witness or to the opponent's version of the case. This obviously would be improper and dishonest, and surely would be fair game for attack if the evidence shows that it has occurred.

759 N.W.2d 414, 419 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Because in *Leutschaft* there was "at least an arguable suspicion" of tailoring-based discrepancies between Leutschaft's statements to the police and his trial testimony, we held that if the prosecutor's questions suggesting tailoring were error, they were not plain error. *Id*. at 419. Likewise, in this case, the discrepancies between Sullivan's statement to the investigator and his trial testimony, coupled with Sullivan's discovery of "mistakes" in his statement only the day before he testified, raises at least an arguable suspicion of tailoring such that any error in allowing the prosecution to attack his credibility based on tailoring, was not plain error. Therefore, Sullivan has failed to establish that the district court committed plain error by denying his motion for a new trial based on the prosecutor's closing argument.

On appeal, Sullivan mentions his argument to the district court that the prosecutor attempted to shift the burden of proof to Sullivan by suggesting that his explanations were inadequate. "A prosecutor's misstatement of the burden of proof is highly improper

and constitutes misconduct." *State v. Jackson*, 773 N.W.2d 111, 122 (Minn. 2009) (quotation omitted). But this argument is mentioned only in the context of cumulative errors entitling Sullivan to a new trial. Issues not briefed on appeal are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). The record reflects that the prosecutor never misstated the burden of proof and more than once reminded the jury that Sullivan had no burden and that state had the burden to prove all elements of the offenses charged. And the jury's acquittal on three charges demonstrates that the jury was not misled about the burden of proof in this case.

Based on the foregoing discussion of Sullivan's claims of error, we find no merit in his assertion that he is entitled to a new trial based on the cumulative impact of these errors.

Affirmed; motion granted, motion denied.