STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1135

State of Minnesota,
Respondent,

vs.

Jason Curtis Keim,
Appellant.

Filed June 10, 2013
Affirmed
Hudson, Judge

St. Louis County District Court
File No. 69DU-CR-11-1511

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Gunnar B. Johnson, Duluth City Attorney, Joanne R. Piper-Maurer, Assistant City Attorney, Duluth, Minnesota (for respondent)

Andrew T. Poole, Poole Law Office PLLC, Duluth, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

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

HUDSON, Judge

Appellant challenges his conviction of fifth-degree assault, arguing that the district court abused its discretion by declining to order a new trial after the state committed a discovery violation by failing to provide the defense with the narrative police report of

the incident before trial. Because appellant has failed to show that, had the narrative report been admitted, a reasonable probability exists that the result of the trial would have been different, we affirm.

FACTS

The state charged appellant Jason Curtis Keim with fifth-degree assault and disorderly conduct after an incident in which he attempted to block G.I., the landlord, from entering a residential unit rented by appellant's girlfriend. Before appellant's jury trial, the defense requested all police reports of the incident from the prosecutor, who then requested them from the City of Duluth. The city informed both parties that no police report existed other than the two-page CAD printout report, which is a computer screen printout generated by the officer in the squad car. The prosecutor furnished the CAD report to the defense, but the defense did not obtain a narrative police report before trial.

At appellant's jury trial, G.I., who owns a duplex in Duluth, testified that, for about five months, appellant had stayed with the tenant of the upper unit in the duplex. G.I. testified that after giving 24-hour advance notice to the tenant, he arrived to show the unit to prospective renters and found appellant sitting on the front steps. G.I. testified that appellant told him that he could not show the apartment and stood in front of the door, and that when he attempted to open the door, he was pushed, with his back shoved up against the door jamb; he then yelled for help and was knocked down. G.I. testified that he was shocked, he thought appellant might have a gun, and he was worried that

appellant would come after him again. G.I. testified that he had cracked lips from appellant's punch; the state introduced photos consistent with those injuries.

Duluth police officer Dan Neitzel testified that he responded to the incident and found G.I. lying on the grass, conscious but upset. Officer Neitzel testified that appellant admitted that his girlfriend had notice of G.I.'s visit and made no claims of self-defense or defense of property, but stated that he did not believe G.I. had the right to enter the unit and had elbowed G.I. He testified that when appellant was told he was being cited for fifth-degree assault, appellant stated that he had done nothing wrong and "would do it again if he had to."

On cross-examination, defense counsel asked Officer Neitzel whether he had filed a separate report, besides the two-page CAD printout. The officer stated that he had filed an additional report, which he had while testifying. At a bench conference, defense counsel indicated that she had never received the separate narrative police report and asked for a mistrial. The prosecutor stated that she had also requested the narrative report from the city, but did not learn of its existence until Officer Neitzel brought it to court that day.

The district court heard arguments on excluding Officer Neitzel's testimony as a proposed remedy for the discovery violation. Defense counsel argued that this remedy was inadequate because Officer Neitzel was the only person to testify about appellant's statement to law enforcement, and the jurors would be unable to disregard that testimony. The prosecutor argued that the narrative report was brief and did not convey significant additional information beyond that contained in the CAD printout. The district court

declined to declare a mistrial, but gave the defense the option of allowing some of the officer's testimony to come in with a cautionary instruction, receiving a brief continuance, or excluding all of the testimony. Defense counsel chose the last option, and the district court instructed the jury to disregard all of the officer's testimony.

Appellant testified on his own behalf that he had received a voicemail that G.I. wished to show the apartment, and he was there when G.I. arrived. Appellant testified that G.I.'s house was in foreclosure, and G.I. had been angry with his girlfriend after she mentioned that the mortgage company was willing to pay them to stay in the house. He testified that he had no intention of letting G.I. into the unit because his girlfriend had paid the rent, and she had a right to a court trial on an eviction. Appellant testified that he told G.I., who was reaching for the door handle, that "[t]his is a civil matter, you don't get to just come in here"; that G.I. then threatened to call the police; and that appellant told him to do so. He testified that G.I. grabbed him and "tried to wrestle [him] back and forth and [he] was assuming [G.I. was] trying to throw [him] to the ground." He stated that, because G.I. was screaming that appellant was threatening him and had a gun, appellant was afraid that G.I. might have a gun, so he became nervous and elbowed G.I. in the head. He admitted that he barred G.I.'s entry and that he injured G.I.'s jaw, but stated that he believed that G.I. was acting irrationally.

The district court instructed the jury a second time to disregard Officer Neitzel's testimony and also gave a self-defense instruction. The jury convicted appellant of both counts. Appellant received a sentence of 90 days, stayed, and this appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion by ordering the exclusion of Officer Neitzel's testimony as a remedy for the state's discovery violation.[1] If a discovery violation occurs in a misdemeanor case, this court uses as guidance caselaw interpreting and construing discovery rules applicable to gross-misdemeanor and felony cases. *State v. Burns*, 632 N.W.2d 794, 797 (Minn. App. 2001). We review the district court's remedy for a discovery violation for abuse of discretion. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). In determining a remedy for such a violation, the district court considers the reason for the lack of disclosure; the extent to which the disclosure violation prejudiced the opposing party; whether the prejudice may be rectified with a continuance; and any other relevant factors. *State v. Scanlon*, 719 N.W.2d 674, 685 (Minn. 2006).

The defense argues that the remedy of excluding Officer Neitzel's testimony was inadequate and that appellant should instead have received a new trial. "Generally, a defendant must show not only a discovery violation, but also prejudice as a result of the discovery violation before a new trial will be ordered." *State v. Boldman*, 813 N.W.2d 102, 109 (Minn. 2012). And "[t]o establish prejudice a defendant must show that a reasonable probability exists that the outcome of the trial would have been different if the

[1] Although the state observes that the district court found that only a "technical violation" occurred, we note that the Minnesota Rules of Criminal Procedure require that "[a]fter arraignment and on request, the defendant or defense counsel must be provided a copy of the police investigatory reports." Minn. R. Crim. P. 9.04; *see* Minn. Stat. § 645.44, subd. 15a (2012) (stating that "'[m]ust' is mandatory").

disputed evidence had been produced." *Id.* (citing *State v. Jackson*, 770 N.W.2d 470, 479 (Minn. 2009)).

Appellant argues that he was prejudiced by the discovery violation because, had the defense known of additional facts contained only in the narrative police report, it would have affected the presentation of the defense's theory of the case. Appellant points to two statements in the narrative report that would tend to incriminate him: that after the officer spoke with G.I. regarding the alleged assault, appellant advised Officer Neitzel of a "similar story"; and that appellant stated that he did not think he had done anything wrong and would do it again if he had to. The defense argues that, had it been aware of these statements before trial, appellant would not have had to test his self-defense theory against unknown facts and would not have attempted to impeach Officer Neitzel based on his alleged failure to create a narrative police report.

Although we agree that the defense's failure to learn the contents of the narrative report before trial may have affected the presentation of a self-defense theory, we conclude that, even if that report had been timely provided, no reasonable probability exists that the trial would have had a different result. *Boldman*, 813 N.W.2d at 109. Appellant, who testified that G.I. grabbed him and was trying to wrestle him to the ground, was able to challenge G.I.'s credibility and present evidence on a theory of self-defense. *See, e.g.*, *Jackson*, 770 N.W.2d at 480–81 (concluding that error in withholding discoverable evidence of transcript of police interview with state's witness was harmless when defense was able to attack witness's credibility by other means). And appellant's statement in the narrative report that he told the officer that he had not done anything

wrong was consistent with appellant's testimony that he had no intention of letting the officer into the unit because his girlfriend had a right to trial on an eviction matter. In addition, the evidence against appellant was strong. *See id*. at 481 (noting strength of the state's evidence as a factor in determining that failure to produce discoverable evidence did not prejudice the defense). Appellant admitted that he blocked G.I.'s entry and that he elbowed G.I. in the side of the face, which was consistent with photos showing G.I.'s injuries. Finally, we conclude that the availability of the narrative report—which meant the defense could no longer impeach the officer with his failure to file a complete report—would not by itself have created a reasonable probability that the jury's verdict would have been different.

Appellant argues that it would have been difficult for the jury to follow the district court's directive to ignore Officer Neitzel's testimony. But the district court instructed the jury to disregard that testimony twice: first, when the testimony was stricken, and second, in its final instructions. The first time, the district court asked all of the jurors whether they could follow that instruction; they all responded that they could. We may presume that the jury followed the district court's instruction. *See State v. Hill*, 801 N.W.2d 646, 658 (Minn. 2011) (presuming that the jury followed the district court's limiting instruction on use of evidence).

Appellant argues that, in some cases, a reviewing court may order a new trial even if no prejudice to the defense has been shown. *See, e.g.*, *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992) (granting a new trial when the state told a witness who had information about an alternative perpetrator to "keep her mouth shut"). But as the

supreme court has noted, "*Kaiser* was an egregious case where the [s]tate took affirmative steps to interfere with the defendant's ability to gather information from potential witnesses." *Jackson*, 770 N.W.2d at 479 (citing *Kaiser*, 486 N.W.2d at 487). No such conduct occurred here. And because the CAD report was timely disclosed, the state did not completely fail to disclose information requested by the defense. *See id.* (citing additional cases in which "the [s]tate completely failed to disclose required information"). Under the circumstances in this case, the district court did not abuse its discretion by ordering exclusion of the officer's testimony as a remedy for the discovery violation, and appellant is not entitled to a new trial.

Affirmed.