STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1239

State of Minnesota,
Respondent,

vs.

Kamyar Farahan,
Appellant.

Filed September 22, 2009
Affirmed
Ross, Judge

Ramsey County District Court
File No. KX-07-3849

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102-1657 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

ROSS, Judge

Kamyar Farahan appeals his conviction of offering a forged check. Farahan argues that his conviction must be reversed and his case remanded for a new trial because the district court erred by precluding the testimony of a witness that Farahan did not disclose until the day of trial and by limiting the testimony of a disclosed witness. Farahan also raises multiple issues in his additional pro se brief. Because the district court did not abuse its discretion by precluding the testimony of Farahan's undisclosed witness, because Farahan was not prejudiced by the district court's limiting the testimony of his disclosed witness, and because Farahan's pro se arguments are not persuasive, we affirm.

FACTS

Kamyar Farahan visited a TCF Bank branch on Lexington Avenue in St. Paul on September 5, 2007, and attempted to cash two Visa travelers' checks drafted for $500 each. When Farahan presented the checks to the teller, the teller summoned the bank manager to verify and approve the transaction. The manager became suspicious and called the police.

Officer Joel Johnston arrived. The bank manager gave the checks and Farahan's identification to Officer Johnston and informed him that Farahan did not have an account with TCF. Farahan explained his innocence. According to Farahan, "a man" named "Jaques" sent him three checks for $500 each from England as a rental payment. Officer

Johnston was not convinced, so he arrested Farahan. Officer Johnston searched Farahan and found a receipt from a Wells Fargo bank in Woodbury and ten $100 bills.

The next day, Sergeant Mark Johnston assumed the investigation. Sergeant Johnston asked Farahan about the counterfeit checks, the cash, and the receipt. Farahan again claimed that he believed that the checks were legitimate and disclosed that shortly before he was arrested, he had cashed two travelers' checks at a Wells Fargo branch in Woodbury. Sergeant Johnston asked Farahan why he went to the Wells Fargo branch in Woodbury and the TCF branch in St. Paul to cash the travelers' checks when he had an account at neither bank. Farahan explained that both of the banks were conveniently located near Lifetime Fitness Centers where he planned to exercise.

Farahan apparently forgot about "Jaques." He told Sergeant Johnston that he received the travelers' checks from a man in England named "Robert Scooner." He claimed that Scooner had replied to an advertisement on Craigslist.org for a duplex that Farahan owned at 4118 East 54th Street in Minneapolis and that the travelers' checks were for a deposit and the first month's rent. Farahan intimated to Sergeant Johnston that he had some reservations about whether the checks were authentic. Sergeant Johnston investigated the story and found it without merit. He learned that a woman named Delores Robertson owned the 54th Street property. He contacted Visa and confirmed his suspicion that all five checks were counterfeit.

The state charged Farahan with forgery and theft by swindle. The state later amended the complaint, charging Farahan only with offering a forged check. Farahan pleaded not guilty and the case proceeded to a jury trial. On the day scheduled for trial,

Farahan's attorney moved to allow Farahan's friend, Zack Jones, to testify. The district court precluded Jones from testifying.

Farahan testified, but his story shifted again. This time, he claimed that *his brother* owned several rental properties and Farahan was helping him to find tenants. He again claimed that a man from England named "Jaques" responded to an advertisement that Farahan placed on Craigslist.org for a duplex that his brother owned. Farahan claimed that "Jaques" agreed to send $2,500 in travelers' checks and that Farahan agreed to cash them, keeping $2,000 for the first month's rent and a security deposit and sending $500 back to Jaques so that Jaques could pay for his plane ticket to Minnesota.

Farahan added that he received the checks in a DHL envelope from a "Robert Scooner." Farahan testified that the DHL envelope contained five travelers' checks, each for $500 dollars. Farahan said that when he received the DHL envelope from Scooner, he was "a little skeptical." So he called his friend, Carrie Quandahl, for advice. He explained that Quandahl was "not a bank expert" but that she advised him to take the checks to a bank because "that's the only place that would be able to really know whether they're real or not." He also claimed that although he no longer had the DHL envelope that the checks arrived in, he had shown the envelope to Quandahl.

Farahan testified that after he received the checks, he left his house in Woodbury for St. Paul to meet Zack Jones to exercise. Farahan stopped at the Wells Fargo branch in Woodbury before entering Interstate 94, and he brought only two of the five travelers' checks into the bank with him. He explained that the bank cashed the two checks and that he "thought definitely they were real at that point." But he stated that he did not try

to cash the remaining three checks because he was late to meet his friend and because "I kind of figured it would be suspicious to go back into a bank—you know, I had just cashed these two. If I went and took another two—I just—it didn't feel comfortable for me to do that going to the same bank." Throughout his testimony, Farahan maintained that he did not know the checks were counterfeit.

Quandahl testified for the defense. She corroborated Farahan's story about his calling her and asking what to do about the checks. She also testified that Farahan "showed [her] the envelope that [the checks] came in." The prosecutor objected, arguing that Quandahl's testimony about seeing the envelope was improper because (1) Quandahl's statement that the prosecutor had received from the defense did not mention the envelope; (2) in her prior statements to Sergeant Johnston, Quandahl had not mentioned seeing the envelope; and (3) if the prosecutor "had known someone other than the defendant was going to come in and testify to this, [the prosecutor] probably would have had Sergeant Johnston do some further looking into trying to subpoena records."

Farahan's attorney explained that Quandahl had not been the source of the attorney's knowledge that Quandahl had previously seen the envelope but that the attorney learned this from some other "privileged source," and that the attorney had disclosed to the prosecutor all the evidence and information that she had received directly from Quandahl. The district court asked Farahan's attorney, "[A]m I interpreting [you] correctly as saying that before you came into court today, you had knowledge that Ms. Quandahl had knowledge of or information about this envelope?" Farahan's attorney answered, "Yes." The district court then sustained the prosecutor's objection and

disallowed further testimony from Quandahl regarding the envelope, stating that "this is a situation where I believe there's an ongoing duty to disclose to the opposition." Farahan's attorney did not ask Quandahl any other questions.

The jury disbelieved Farahan's testimony, finding him guilty. This appeal follows.

D E C I S I O N

Farahan challenges the district court's evidentiary decisions, which the district court based on Farahan's violation of discovery rules. Farahan argues that the district court erred by precluding his friend, Zack Jones, from testifying. He also argues that the district court erred by not allowing Farahan to question Carrie Quandahl to elicit testimony that she saw the DHL envelope that Farahan claimed to have received from England.

"The imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the trial court." *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). This court will not overturn a district court's ruling absent a clear abuse of discretion. *Id.* Even if the district court abused its discretion by imposing discovery sanctions, a new trial will not be granted if the error was harmless beyond a reasonable doubt. *In re Welfare of M.P.Y.*, 630 N.W.2d 411, 418–19 (Minn. 2001).

We first address Farahan's challenge to the district court's decision to preclude Zack Jones from testifying, then the district court's decision to limit the testimony of Carrie Quandahl.

Precluding Testimony of Zack Jones

Minnesota Rule of Criminal Procedure 9.02 requires the defendant to disclose to the prosecutor the names and addresses of witnesses before trial. 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; *Lindsey*, 284 N.W.2d at 373. Sanctions may include ordering discovery, granting a continuance, or "enter[ing] such order as [the district court] deems just in the circumstances." Minn. R. Crim. P. 9.03, subd. 8. Precluding the testimony of an undisclosed witness has been approved as a sanction, but it is considered to be a "severe sanction which should not be lightly invoked." *Lindsey*, 284 N.W.2d at 374. To determine the appropriate response to a failure to comply with required discovery, a district court should consider (1) the reason for the nondisclosure, (2) prejudice to the objecting party, (3) whether the prejudice can be remedied by a continuance, and (4) any other relevant concern. *Id*. at 373.

Farahan's counsel waited until the day trial was scheduled to begin before she informed the prosecutor and the district court that Farahan wanted to call Zack Jones to testify. Her excuse for failing to disclose Jones as a witness was that she "just got information about this person as a witness yesterday." Farahan's attorney explained that although she had not interviewed Jones or received a statement from him, she believed that Jones would corroborate Farahan's story and that Jones's testimony "would essentially indicate that it would make sense for Mr. Farahan to stop at this bank on the way to [Jones's] house." The state objected to Jones's testifying, contending that "this is a witness who apparently has new information that I haven't heard anything about before

. . . [and] on the basis of not having any more information about what kind of statement they would give, [or] who they are . . . I would have to object to the use of that witness."

Consistent with the *Lindsey* factors, the district court examined the reason for the nondisclosure and the potential prejudice to the state. It questioned why it took so long for Farahan to disclose Jones as a witness since "one could well contemplate that the state would be dealing with the issue of geography in terms of placement of the banks." The district court explained that Farahan's reason was not persuasive, stating,

> I'm really unhappy with this because it has been implicit in this file . . . that there was something unusual about cashing two checks in Woodbury and then going off to this TCF in St. Paul to do the same thing on the same day. So it does not take a rocket scientist to ask the question why or how about other accessible banks.

But rather than deciding the objection immediately, the district court initially took under advisement the question of whether Jones could testify, stating,

> I want an offer of proof in writing as to what this individual would testify to. And I will tell you that if I allow this person to testify, the testimony will be very, very minimal: it will not go to anything beyond whatever the plans were for that day, nothing.
>
> But you've also put the state at a disadvantage. We know nothing about the criminal background, if any . . . [a]nd I don't know if the state's in a position to try to get any information on that as we proceed. If you are unable to get enough information on this person, that will factor into my ultimate decision on whether he is allowed to testify.
>
> . . . I will put his name on the witness list just in case. The name again?

Farahan's attorney repeated that the witness's name was "Zack Jones," and the district court added his name to the witness list. But the disclosure rule requires more than the witness's name. It also requires the defendant to disclose the "addresses of all persons whom the defendant intends to call as witnesses." Minn. R. Crim. P. 9.02, subd. 1(3)(a). And when the district court next asked for Jones's address, neither Farahan nor his attorney could produce it. The district court then decided to preclude Jones's testimony, stating, "You know, I'm sorry; if you can't come with an address on the very day of trial, I'm not going to allow this person to testify." It added, "I was going to try to leave that door open, but it strikes me that if this witness was so important the address would be here this morning. The motion [to allow Jones's testimony] is denied."

Farahan argues that the district court abused its discretion because his lack of disclosure was not in bad faith and the state was not prejudiced by it. The argument cannot prevail on either ground. Whether the nondisclosure was motivated by bad faith does not address the district court's concern that it was unjustified. Contrary to Farahan's argument, preclusion can be justified even when nondisclosure was not motivated by bad faith. *See Lindsey*, 284 N.W.2d at 373–74 (concluding that preclusion of testimony was not an abuse of discretion even though it "may not have been motivated by bad faith"). And the district court reasonably concluded that the state was prejudiced by the nondisclosure. Because Farahan did not disclose Jones until the day of trial, the state had no opportunity to investigate whether Jones had a criminal record, whether Jones was planning on meeting Farahan, whether Jones actually lived in the area where Farahan claimed, or what Jones would say at trial. Without Jones's address, the state could not

interview neighbors, friends, conduct a criminal background check, or obtain telephone records to consider any contact between Jones and Farahan. Whatever investigative tools the state might have employed, Jones's withholding the address denied it the opportunity to employ any of the options and impaired its ability to cross-examine Jones.

And although the district court did not consider the third *Lindsey* factor—whether the prejudice could be remedied by a continuance—the record shows that Farahan never suggested a continuance as a remedy. Farahan gives us no reason to conclude that a short continuance would have remedied Farahan's failure to disclose, even if he had requested one.

The last *Lindsey* factor is the catch-all, "any other relevant factors." 284 N.W.2d at 373. Farahan argues that Jones's testimony was crucial to his defense because it "would have bolstered [Farahan's] credibility regarding his explanation as to why he went to the Lexington Parkway TCF." But even if Jones's testimony would have bolstered Farahan's credibility on one minor issue, that Jones apparently lived near the TCF where Farahan was arrested does not directly address the principal issue of whether Farahan knew that the travelers' checks were counterfeit. Jones's testimony could have made Farahan's decision to stop at one of the banks seem reasonable. But it could not possibly have bolstered Farahan's credibility on a matter of any consequence. Farahan's remarkable and shifting story about receiving the checks from a stranger in England to pay rent for a property that Farahan falsely claimed to own could not be overcome by testimony that might, at most, establish that one of the bank locations was convenient.

Limiting Testimony of Carrie Quandahl

Farahan argues that the district court erred by limiting Quandahl's testimony regarding the DHL envelope and that he did not have to disclose the substance of Quandahl's testimony because it was protected by the attorney-client privilege. He maintains that although Quandahl had not previously told Farahan's attorney, the police investigators, or the prosecution that she had seen the DHL envelope that the counterfeit checks came in, Farahan's attorney learned of her testimony only because Farahan told her so. The argument that the nondisclosure can be justified by the attorney-client privilege lacks merit.

The attorney-client privilege protects only communications made for the purpose of securing legal advice. *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998). The privilege is strictly construed, protecting communication, not information. *Id.* at 440, 443. The *Kobluk* court explained that there "is a distinction between the communication itself, which is privileged, and the facts communicated therein, which are not." *Id.* at 443. Farahan's telling his attorney that Quandahl would testify about the DHL envelope was not a communication that was protected by the attorney-client privilege, and, even if it were, the privilege does not prevent Farahan's attorney from disclosing the fact of Quandahl's supposed knowledge.

Even if the district court erred by limiting Quandahl's testimony or by precluding Jones from testifying, Farahan would not be entitled to a new trial unless he showed that the violation was prejudicial. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). "In other words, a reviewing court ordinarily should not order a new trial if no reasonable

probability exists that the outcome of the trial would have been different if the evidence had been available." *State v. Colbert*, 716 N.W.2d 647, 655 (Minn. 2006) (quotation and citation omitted).

The outcome of the trial would have been the same if the district court had allowed Jones's testimony and admitted Quandahl's testimony fully. The critical factual issue was whether Farahan intended to defraud or intended to offer a forged check. *See* Minn. Stat. § 609.631, subd. 3 (2006) (listing the elements of offering a forged check). The envelope that the checks arrived in was not a significant issue in the case. Similarly, allowing Jones's testimony would not have changed the outcome of the case. Jones's testimony was offered only to establish that he lived in the general area where Farahan tried to cash the third and fourth checks. Jones's testimony was only marginally relevant, and even if he had testified, there is no reasonable probability that the outcome of the trial would have been different.

Farahan's own inconsistent and evolving story about the checks was so unbelievable that his conviction was almost certain. He admitted that he cashed two of the checks at the Wells Fargo branch in Woodbury, and he offered two more checks at the TCF branch in St. Paul. His various statements about the checks constituting a payment for a duplex were proven false by records that showed that neither Farahan nor his brother owned the property. We hold that no reasonable probability exists that the outcome of the trial would have been different if Jones or Quandahl had testified in the manner that Farahan represented they would. The jury reasonably found Farahan's claim

that he did not know that the checks were counterfeit to be incredible. Nothing these witnesses were planning to say could reasonably alter that finding.

Finally, we have reviewed Farahan's pro se brief and find that the arguments warrant no further discussion.

Affirmed.