STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1556

State of Minnesota,
Respondent,

vs.

Chris Scott,
Appellant.

Filed September 10, 2018
Affirmed
Florey, Judge

Hennepin County District Court
File No. 27-CR-16-16488

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Halbrooks, Judge; and Kalitowski, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

FLOREY, Judge

In this direct appeal from convictions of second-degree murder and unlawful possession of a firearm, appellant argues that he is entitled to a new trial because the district court (1) erred by allowing a biased juror to be seated for trial; (2) erred by denying a mistrial motion following improper expert testimony; and (3) deprived appellant of his right to be absent during trial.

We conclude that the district court did not abuse its discretion by seating the juror because, although she expressed actual bias, she was rehabilitated. The district court did not abuse its discretion by denying appellant's mistrial motion because it is not reasonably probable that the improper testimony and related discovery violations affected the verdict. Lastly, the district court did not err by requiring appellant to be present for identification testimony because criminal defendants do not have an absolute right to absent themselves from trial. For the aforementioned reasons, we affirm.

FACTS

On June 16, 2016, T.W. was shot ten times and killed around 11:00 p.m. at his residence on Knox Avenue in Minneapolis. The events leading to T.W.'s death started earlier at a gathering on Bryant Avenue. There, T.W. socialized and drank alcohol with a number of individuals, including his friend, M.W., her boyfriend, J.D., and someone that T.W. had never met, appellant Chris Scott. Appellant and J.D. were friends; both men are black, but J.D. has lighter skin and wore dreadlocks at that time.

According to J.D., at some point during the gathering, appellant and T.W. discussed obtaining cocaine, specifically crack cocaine. T.W. said that he could get the cocaine, but it would not be "rocked up" in crack form. Appellant, with T.W.'s assistance, obtained the cocaine, which was contained in a paper bag. Appellant asked T.W. to cook the cocaine to make crack, and T.W. agreed.

Appellant, J.D., and T.W. left the gathering and drove to T.W.'s residence in appellant's maroon Cadillac. The car was parked down the street from T.W.'s house. According to J.D., after arriving at the house, appellant and T.W. went into the kitchen. T.W. refused to cook the cocaine. Appellant then pulled a gun from his waistband and shot T.W. Appellant grabbed the drugs, and he and J.D. left out the front door.

S.S. lived across the street from T.W.'s house. On June 16, he was sitting on his stoop smoking a cigarette when he heard the sound of gunfire coming from T.W.'s house. He saw two black men "running out of the place," and he called 911. According to S.S., one of the men was wearing red and carried a paper bag, and the other was wearing all black. According to S.S., the man in red had dreadlocks. P.N., another neighbor, also saw two black men exit the house; one was darker skinned, wore all black, and carried a paper bag, and the other was lighter skinned and wore a red shirt. According to P.N., the man in red had longer hair, which was braided or in dreadlocks. Both neighbors effectively testified that the man wearing red was nervous and moved faster, and the man in black was calmer.

Two days after the shooting, J.D. walked into a police station and said that appellant was the shooter. J.D. diagrammed the crime scene and indicated that he and appellant were

in the kitchen and T.W. was in the adjoining dining room at the threshold of the kitchen when the shooting occurred. J.D. said that he was wearing a red shirt that day, and appellant was wearing black. He provided his clothing to police.

Appellant was arrested and charged with one count of second-degree murder and one count of unlawful possession of a firearm. He told investigators that he drove T.W. home, went inside the house, T.W. did a line of cocaine, and then he left sometime between 8:00 and 9:00 p.m. Appellant could not recall what he was wearing that night. Street cameras captured footage of a vehicle matching appellant's in the area of T.W.'s house around 11:16 p.m. The murder weapon was never recovered.

An individual named C.K. said that appellant made statements about the killing while the two were in jail together. According to C.K., appellant stated that he and another individual "took a guy home" and "tried to get the guy to cook up some work," but things "got out of control" and appellant "had to dump on the guy." The matter proceeded to trial.

Juror J.P.

One of the prospective jurors, J.P., indicated in her jury questionnaire that she would find police officers more credible than other witnesses "if they were wearing a camera and an incident was recorded." The district court asked J.P., "[I]f you were given the instruction by me as to how to assess a credible witness, do you think you'd give—you'd be able to follow those instructions and apply the same kinds of characteristics of how to do that with each witness and treat them each equally?" J.P. responded, "Yes." The district court asked J.P. why she referenced officers "wearing a camera" in her questionnaire answer. J.P. explained:

> I don't know. I think I was just confused by the question and I think I just—I feel like there's more of a legitimacy to police officers because they are required by law to tell the truth. I don't know. I just—I just picture a police officer and I just—I have a lot of faith in their integrity. I don't know.

The district court asked, "Do you think that there would be—you'd be willing to listen to another witness and give them the same equal—analysis as you would a police officer?" J.P. responded, "Yes." The district court asked, "A police officer wouldn't automatically be believed no matter what?" J.P. responded, "Yes, I think that I could do that." Appellant moved to strike J.P. for cause. The district court denied the motion. J.P. was selected for the jury.

The Stricken Testimony of E.D.

A homicide investigator, E.D., testified about her investigation into T.W.'s death. Towards the end of E.D.'s testimony, the prosecutor questioned E.D. about the crime scene. A portion of that testimony concerned E.D.'s interpretation of physical evidence and whether that evidence corroborated J.D.'s account.

During E.D.'s crime-scene testimony, appellant raised three objections to improper expert testimony. One of those objections was overruled by the district court. The following exchange occurred prior to that overruled objection:

> PROSECUTOR: Are you aware of the location where [T.W.'s] tooth was found at the scene?
> E.D.: Yes.
> PROSECUTOR: Based on the—did the location of the tooth aid you in your ability to assess how everything happened that day—that night?
> E.D.: Yes.
> PROSECUTOR: And where was the tooth?
> E.D.: It was—it was at the—at his feet.

PROSECUTOR: I'm going to show you Exhibit 34, the scene sketch. If you would, [E.D.], with the pointer—can you point on the scene sketch the location that you believe [T.W.] was when he was shot?
E.D.: (Indicating.)
. . . .
E.D.: This is—this is where [T.W.] was
. . . .
E.D.: Oh. I believe [T.W.] was here when he was shot (indicating). And his tooth is here (indicating). So he was shot in the left side of the face, and the tooth came out and fell. He turned, he tried to run, and he fell and continued to get shot.
PROSECUTOR: And so you're referring to the area sort of in between the two—would have been southern chairs; is that right?
E.D.: That's right.
PROSECUTOR: And you think he was standing somewhere in that area, but you can't be certain where?
E.D.: No.
PROSECUTOR: And part of why you think that is because the tooth was over to—would have been his right?
E.D.: Correct.

Appellant objected, arguing "leading; cumulative." The objection was sustained. The prosecutor then asked, "What aided you in determining that that was where he was?" E.D. replied, "Because he was shot in the left side of his face, and his tooth landed here (indicating)." The prosecutor asked, "And given the location of the [discharged cartridge casings], do you have an opinion as to where the defendant was standing when he shot him?" Appellant objected, arguing improper expert opinion. The objection was overruled. E.D. answered, "The casings are located here (indicating), and when the casings eject from the handgun, they go to the right and to the back, so he was standing over here (indicating)."

The testimony continued:

> PROSECUTOR: On the other side of the table?
> E.D.: On the other side of the table.
> PROSECUTOR: Where did [J.D.] indicate where he was standing?
> E.D.: Over here (indicating).
> PROSECUTOR: On the other side of the table?
> E.D.: Correct.
> PROSECUTOR: What are the two points of exit that [T.W.] would have had available to him at that time?
> E.D.: The front door and the kitchen.
> PROSECUTOR: Which was closer?
> E.D.: The kitchen.

Following E.D.'s testimony, appellant moved for a mistrial, arguing that E.D. gave improper expert opinion and that the state never disclosed that E.D. would testify as an expert. The district court reviewed the transcript and stated as follows:

> So in retrospect, upon review of my transcript, keeping in mind this revision to [r]ule 702, where expert testimony can't come in under the guise of a lay witness, I do have one of my rulings where I believe should have—or wish I did sustain, which I now believe I should have overruled. There's a portion of the testimony where [the prosecutor] asked, "What aided you in determining that that was where he was?" The answer was, "Because he was shot in the left side of his face, and his tooth landed here (indicating)."
>
> The next question was, "And given the location of the [discharged cartridge casings], do you have an opinion as to where the defendant was standing when he shot him?"
>
> [Defense counsel] then objected for lack of foundation and improper expert opinion, and I overruled that objection.
>
> Next the answer went on to include, "The casings are loaded—located here (indicating), and when the casings eject from the handgun, they go to the right and to the back, so he was standing over here (indicating)."

> [The prosecutor] then asked, "On the other side of the table?"
>
> So after reviewing [rule] 701's addition, I now believe the correct ruling on that objection would have been to sustain that objection as to improper expert opinion. I think that was expert opinion testimony, and the [s]tate did not follow the [r]ule regarding notice to the defense, or a summary of the expert's opinion on that specific question. So I do not believe that rises to the level of manifest injustice—or manifest necessity that's required for a mistrial. So I'm not granting the mistrial motion at this time, because I feel there are less drastic measures that can be employed.

Appellant requested a two-week continuance to obtain an expert. The district court was disinclined to provide a two-week continuance given the limited amount of improperly admitted expert testimony. The prosecution offered the remedy of striking E.D.'s "testimony as it related to the crime scene," and providing a cautionary instruction to the jury. Appellant objected to this remedy. The district court adjourned for the day to consider a proper remedy.

The following day, the state retracted its offer of striking E.D.'s crime-scene testimony and suggested that appellant simply cross-examine E.D. Appellant argued that the only proper remedy was a mistrial and directed the court to an email received from the prosecutor the previous day. The email disclosed that a conversation between the prosecutor and E.D. occurred prior to E.D.'s testimony. Appellant argued that the email showed that all of the crime-scene testimony from E.D. was new information that should have been disclosed prior to E.D.'s testimony. The prosecutor disagreed.

The district court determined that all of the crime-scene testimony from E.D. should be stricken, "not because of the evidentiary concerns, but, again, because of any potential

discovery concerns." The district court determined that a curative instruction to the jury was sufficient to rectify the issue. The following curative instruction was given:

> So with that, before we get started again with the cross-examination of [E.D.], during [E.D.'s] testimony yesterday, during the last portion of the morning, she was asked by the [s]tate an entire series of questions that were inadmissible regarding her different examination of items collected at the crime scene and her opinion on what those might have meant in relation to the crime itself.
>
> She was also asked about her theories regarding the placement of [T.W.'s] body in relation to where the evidence items were located. Additionally, she was asked about how a body would react when shot and if she was able to conclude what happened on June l6, 2016. She was referred to a scene sketch, [T.W.'s] tooth, and the placement of the [discharged cartridge casings]. Ultimately, she was asked questions eliciting her opinion on where [T.W.] was shot and her theory on what had occurred.
>
> At this time, I'm informing you all to disregard all of those portions of [E.D.'s] testimony. You are to proceed as if none of these statements were ever made. [E.D.] has not been qualified as an expert to render such opinions. [E.D.] made no mention of any theories or conclusions like those in her police reports, and those opinions are not based on scientific, technical, or other specialized knowledge. None of the answers she gave you in those areas are, then, admissible as evidence in this case.
>
> At this time, I'm ordering that you disregard those specific portions of her direct testimony, and as I instructed you earlier, you must follow when I give you an order to disregard certain testimony.
>
> Earlier, I instructed you how to disregard statements. And just to remind you what that would mean is, at the end of the trial, back in the jury room, you may likely tally up or summarize all the evidence that you've received in this case. From that evidence alone, you're deciding on your verdict, and

> from that evidence alone, you'll determine whether or not the [s]tate has proven their case and met their burden of proof.
>
> Everything here that I've told you to disregard about [E.D.'s] later testimony will simply not be included in the evidence on which you'll place your verdict—or base your verdict. It will not be any part of any of your discussions, and you cannot use it in any way. It will be as if none of it ever occurred. Then, in that sense, you've disregarded it and followed my instructions exactly.

Appellant's Presence during S.S.'s Testimony

S.S. testified about his observations on June 16. After his testimony, he exited the courtroom and told a victim advocate that appellant looked like one of the men he saw leaving T.W.'s residence on June 16. The state requested that S.S. be recalled to give further testimony. Appellant asked that he be excused from the courtroom during S.S.'s testimony. The district court ordered that appellant be present for S.S.'s testimony. S.S. testified that appellant was the man wearing black that he had seen on the night of the shooting.

Appellant was ultimately convicted of both charges and sentenced to 415 months' imprisonment. This appeal followed.

D E C I S I O N

I. The district court did not abuse its discretion by seating J.P. as a juror because, although she expressed actual bias, she was rehabilitated.

Appellant first argues that the district court abused its discretion by denying his motion to strike J.P. for cause. Appellant asserts that J.P. expressed actual bias and was not rehabilitated. The state contends that, for three reasons, appellant's argument is not properly before us. We first address the state's threshold arguments.

First, the state asserts that appellant did not challenge J.P. for cause. A challenge for cause preserves a biased-juror argument for purposes of appeal. *State v. Geleneau*, 873 N.W.2d 373, 380 (Minn. App. 2015), *review denied* (Minn. Mar. 29, 2016). Challenges for cause must be made by motion. *State v. Gillespie*, 710 N.W.2d 289, 296 (Minn. App. 2006), *review denied* (Minn. May 16, 2006). Such motions may be oral, but the grounds must be stated. *Id.*

Prior to J.P. coming in for individual questioning, defense counsel stated that he "support[ed] letting [J.P.] go now," and following J.P.'s individual questioning, defense counsel renewed his "previous request" based upon "everything that [J.P.] said." The prosecutor objected "to striking [J.P.] for cause," and the district court ultimately denied defense counsel's "motion" to dismiss J.P. "for cause."

Defense counsel's request that J.P. be let go, considered in context, was a motion to strike J.P. for cause. While the motion certainly could have been stated more clearly and directly, the record reflects that both the prosecutor and the district court understood that appellant moved to strike J.P. for cause. The basis for appellant's motion was J.P.'s statements to the court, including her statements regarding the credibility of police-officer testimony. Appellant properly moved to strike J.P. for cause.

Second, the state argues that appellant waived any biased-juror challenge by passing the jury for cause. The state points to *Geleneau*, in which this court stated that we "will not consider whether a district court erred by not striking a juror for cause *sua sponte* if the appellant expressly waived the right to challenge the juror for cause." 873 N.W.2d at 376. But, *Geleneau* is distinguishable because, in that case, there was no motion to strike for

cause. *Id.* at 379. Here, appellant moved to strike J.P. for cause and thereby preserved his biased-juror argument for appeal.

Lastly, the state asserts that appellant waived his juror-bias argument because he failed to strike J.P. using a preemptory strike. The state acknowledges that this court "rejected this argument . . . but the issue is currently before the Minnesota Supreme Court." In *Ries v. State*, this court held that "[a] defendant is not required to use a peremptory challenge to strike a juror who should have been removed for cause in order to preserve the claim that the for-cause denial impaired the defendant's right to a fair trial." 889 N.W.2d 308, 310 (Minn. App. 2016), *review granted* (Minn. Mar. 14. 2017). Although review has been granted in *Ries*, we decline to deviate.

Having resolved the threshold arguments, we next address the merits of appellant's challenge. Criminal defendants have a constitutional right to an impartial jury, and the bias of a single juror violates that right. *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015). "Permitting a biased juror to serve is structural error requiring automatic reversal." *Id.* A party may challenge a prospective juror for cause if "[t]he juror's state of mind—in reference to the case or to either party—satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the challenging party." Minn. R. Crim. P. 26.02, subd. 5(1)(1).

We review a district court's denial of a challenge for cause using a two-step process. *Fraga*, 864 N.W.2d at 623. We first determine whether J.P. expressed actual bias, which requires us to view J.P.'s voir dire answers in context. *Id.* Here, J.P. indicated in her questionnaire that she would find officers more credible than other witnesses. She echoed

that sentiment during voir dire and stated, in regard to her questionnaire answer, that she felt that "there's more of a legitimacy to police officers because they are required by law to tell the truth." In *State v. Logan*, the supreme court effectively found actual bias where a juror stated during voir dire that he was inclined to give greater credence to officer testimony than to other testimony. 535 N.W.2d 320, 324 (Minn. 1995). Like the juror in *Logan*, J.P. expressed actual bias concerning the credibility of officer testimony.

Having determined that J.P. expressed actual bias, we next determine whether she was properly rehabilitated. *State v. Prtine*, 784 N.W.2d 303, 310 (Minn. 2010). We consider a juror to be rehabilitated if he or she "states unequivocally that he or she will follow the district court's instructions and will set aside any preconceived notions and fairly evaluate the evidence." *Id.* J.P stated unequivocally that, if given instructions on how to assess witness credibility, she would follow those instructions. She then gave an explanation for her questionnaire answer and indicated that officers are more credible because they are required by law to tell the truth. But, this statement was in regard to the reasoning behind her questionnaire answer and did not necessarily detract from her rehabilitation. She subsequently indicated unequivocally that she would analyze officer testimony the same as other testimony. When the district court asked, "A police officer wouldn't automatically be believed no matter what?" J.P. replied, "Yes, I think that I could do that."

We defer to the district court's ruling on challenges for cause because the district court is "in the best position to observe and judge the demeanor of the prospective juror." *State v. Graham*, 371 N.W.2d 204, 206 (Minn. 1985). Here, the district court was best

positioned to evaluate J.P.'s responses. J.P. indicated unequivocally that she would follow instructions and consider officer testimony the same as other witness testimony. The district court did not abuse its discretion by declining to remove J.P. for cause.

II. The district court did not abuse its discretion by denying appellant's mistrial motion because it is not reasonably probable that the improper expert testimony from E.D., a related discovery violation, and a potential second discovery violation affected the verdict.

Appellant next argues that the district court erred by refusing to grant a mistrial. We review the denial of a mistrial motion for an abuse of discretion. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). "A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *Id.* (quotation omitted). Appellant's mistrial motion was based upon both the improper expert testimony of E.D. and a discovery violation stemming from the state's failure to disclose E.D. as an expert. Appellant also argued to the district court that oral statements made by E.D. to the prosecutor prior to E.D.'s testimony should have been disclosed. We address these issues individually. We first address the improper expert testimony, and we begin that analysis by addressing appellant's threshold argument that the district court applied an improper standard when determining if a mistrial was warranted.

The district court denied the mistrial motion because E.D.'s testimony did not rise "to the level of manifest injustice—or manifest necessity." The manifest-necessity standard is applicable in cases where the state seeks a mistrial without the defendant's consent. *State v. Long*, 562 N.W.2d 292, 296 (Minn. 1997). But in cases like the present,

where a defendant moves for a mistrial, the proper standard is whether "there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *Manthey*, 711 N.W.2d at 506 (quotation omitted).

The district court applied the wrong standard. However, this does not require automatic reversal. If under the proper standard the district court's ruling was warranted, no prejudice resulted and reversal is not required. *See State v. Fox*, 868 N.W.2d 206, 215 n.1 (Minn. 2015) ("[O]ur precedent has made clear that even if the district court applied an incorrect standard, such an error is not reversible if the facts support the same result under the correct standard."). We therefore examine if, under the proper standard, the district court abused its discretion by denying appellant's motion.

The district court did not abuse its discretion because it is not reasonably probable that the outcome of the trial would have been different if the improper expert testimony was not admitted. The objected-to improper expert testimony constituted approximately one page in the over 1,300 pages of trial transcripts. The testimony concerned the positioning of appellant, T.W. and J.D. at the time of the shooting. This was the subject of some inconsistent evidence. For example, J.D.'s diagram of the crime scene indicated that he and appellant were in the kitchen when appellant shot T.W., but shell casings were recovered from the dining room, suggesting that the shooter was in the dining room. Despite these inconsistencies on how individuals were situated, the state's overall case against appellant was strong. *See State v. Bahtuoh*, 840 N.W.2d 804, 819-20 (Minn. 2013) (considering the strength of the state's evidence when determining whether the district court abused its discretion by denying a motion for a mistrial).

J.D. was consistent in his assertion that appellant shot T.W. J.D.'s eyewitness testimony was corroborated by other evidence, such as the testimony of C.K., which indicated that appellant was the shooter. S.S. identified appellant as the man wearing black who exited T.W.'s residence after the shooting. Both S.S. and P.N. testified that two black men exited T.W.'s house after the shooting, one wearing red and the other wearing black. This is consistent with J.D.'s account. Although S.S. and P.N. were inconsistent on who held the paper bag, the fact that both testified about a paper bag supports J.D.'s version of events. Video evidence showed a vehicle matching appellant's vehicle leaving the area of the shooting around the time of the shooting. All of this corroborating evidence conflicted with appellant's statement to police that he left T.W.'s residence between 8:00 and 9:00 p.m. and that no shooting occurred.

Further, the district court retroactively sustained appellant's objection to the improper expert testimony and provided an extensive corrective instruction to the jury. *See State v. Mahkuk*, 736 N.W.2d 675, 689 (Minn. 2007) (stating that the district court did not abuse its discretion by denying a motion for a mistrial after it sustained the defense's objection and gave a curative instruction). The district court did not abuse its discretion by denying appellant's mistrial motion based on the improper expert testimony.

We next address the discovery violations. Whether a discovery violation occurred is an issue of law, which we review de novo. *State v. Bailey*, 677 N.W.2d 380, 397 (Minn. 2004). There are really two violations at issue. The first is the prosecution's failure to disclose that E.D. would be testifying as an expert. Prior to trial, the prosecutor must disclose the name of "[a] person who will testify as an expert but who created no results or

reports in connection with the case" to the defense, as well as "a written summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert's qualifications." Minn. R. Crim. P. 9.01, subd. 1(4)(c). We agree with the district court's conclusion that E.D. offered improper expert testimony. The prosecutor failed to disclose E.D. as an expert witness.

The second violation at issue is the failure of the prosecution to disclose oral statements made by E.D. to the prosecutor prior to E.D.'s testimony. The prosecutor must disclose the substance of any oral statements that relate to the case. *Id.*, subd. 1(2)(c). The existence of this second violation is less clear. The record does not indicate the specifics of E.D.'s prior oral statements, and the district court did not conclusively determine that this second violation occurred. E.D.'s crime-scene testimony was struck because of "potential discovery concerns." It appears that the district court was simply acting out of an abundance of caution when it chose to strike approximately ten-and-a-half pages of transcript testimony. We disagree with appellant's assertion that all of E.D.'s crime-scene testimony should have been disclosed, as much of the testimony concerned the positioning of physical evidence. If there was a failure to disclose, it related to E.D.'s opinions on the implications of the location of physical evidence. However, even assuming that the prosecutor failed to disclose E.D.'s opinions, the district court did not abuse its discretion by denying a mistrial. It is not reasonably probable that the verdict would have been different had disclosure occurred.

"The imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the [district] court." *State v. Lindsey*,

284 N.W.2d 368, 373 (Minn. 1979). A new trial should be granted based on a discovery violation if "there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the trial would have been different." *State v. Clobes*, 422 N.W.2d 252, 255 (Minn. 1988).

Proper disclosures may have resulted in additional objections to E.D.'s opinions about the crime scene (though appellant did raise 11 objections, only three of which were overruled), restrictions on that testimony, a more effective cross-examination, and perhaps a rebuttal expert. But E.D.'s crime-scene opinions were not as critical as appellant contends. Inconsistent evidence on the exact positions of appellant, J.D., and T.W. at the time of the shooting existed both before and after E.D.'s testimony. E.D.'s opinions on how the shooting transpired were overshadowed by J.D.'s testimony that the shooting did transpire. While there were inconsistencies on how individuals were situated, J.D. consistently claimed that appellant was the shooter, and he was consistent on the positioning of T.W.'s body. His corroborated version of events stood in direct conflict with appellant's statements to police that nothing occurred. Moreover, the district court provided an extensive corrective instruction that directed the jury to disregard E.D.'s opinions on what occurred at the crime scene. *See Mahkuk*, 736 N.W.2d at 689; *see also State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002) (noting that we presume a jury follows a district court's instructions). The district court did not abuse its discretion in declining to grant a mistrial as a sanction for the discovery violations.

Appellant argues that the district court abused its discretion by not applying the factors from *Lindsey* when determining the appropriate discovery sanction. In determining

whether to impose sanctions for a discovery violation, 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." *Lindsey*, 284 N.W.2d at 373. Failure to consider these factors constitutes an abuse of discretion. *State v. Sailee*, 792 N.W.2d 90, 95 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). Although the district court did not expressly cite to *Lindsey*, the record establishes that the court sufficiently addressed each *Lindsey* factor.

First, the district court considered the reason why the disclosure was not made. The parties made a thorough record on why E.D.'s oral statements and expert testimony were not disclosed. The prosecutor did not believe that the questioning of E.D. called for specialized expert knowledge. The prosecutor argued that "it doesn't require expert opinion or expert testimony or any kind of specialized knowledge to determine where people were when all this took place." Likewise, the prosecutor did not view E.D.'s oral statements made prior to the testimony "as new information that required disclosure." The record indicates that the district court considered "the explanation by the [s]tate" when determining the appropriate sanction for the discovery violation.

Second, the district court considered the extent of prejudice to appellant. The court examined the transcript and noted that the vast majority of appellant's objections to E.D.'s testimony were sustained, and only a limited portion of E.D.'s testimony was improperly admitted. Third, the district court considered the feasibility of resolving the issue with a continuance. Appellant requested a continuance of "a couple weeks." The district court noted that the objected-to improper expert testimony was limited, a two-week continuance

was therefore unjustified, and "less drastic measures" could "rectify" the issue. Lastly, in its thorough examination of the discovery issue on the record, the district court considered other relevant factors, such as the potential for a curative instruction to be given to the jury. The district court effectively considered the *Lindsey* factors.

III. The district court did not err by requiring appellant to be present in the courtroom for S.S.'s testimony because criminal defendants do not have an absolute right to absent themselves from trial.

Lastly, appellant argues that the district court erred by requiring him to be present for S.S.'s identification testimony. Appellant asserts that his presence inhibited an effective cross-examination of S.S. because S.S. could not be questioned without appellant sitting "right in front of him." Appellant contends that his due-process rights were violated because he could not put on a full defense. Appellant's arguments are unavailing.

In *Carse v. State*, this court stated that "a district court is not required to accept a defendant's waiver of his right to be present and, particularly where identity is at issue, a defendant may be required to be present." 778 N.W.2d 361, 371 n.4 (Minn. App. 2010), *review denied* (Minn. Apr. 20, 2010). Appellant asserts that our statement in *Carse* was dictum. *See Brink v. Smith Cos. Constr.*, 703 N.W.2d 871, 877 (Minn. App. 2005) ("[D]ictum, if it contains an expression of the opinion of the court, is entitled to considerable weight." (quotation omitted)), *review denied* (Minn. Dec. 21, 2005).

Regardless of whether our statement in *Carse* is dictum, the statement is sound. A defendant may be compelled to submit to some form of identification procedure. *See, e.g.*, *United States v. Wade*, 388 U.S. 218, 222-23, 87 S. Ct. 1926, 1929-30 (1967) (requiring a defendant to participate in a pretrial lineup); *United States v. Valenzuela*, 722 F.2d 1431,

1433-34 (9th Cir. 1983) (requiring a defendant to appear clean shaven to facilitate identification).

Appellant asserts that his forced presence violated his right to due process, but this argument has been rejected. In *United States v. Moore*, a federal appellate court stated that "there is no perceptible due process violation by demanding that the defendant attend trial, even where such identification is an integral part of the issues before the jury." 466 F.2d 547, 548 (3d Cir. 1972); *see also United States v. Fitzpatrick*, 437 F.2d 19, 27 (2d Cir. 1970) (concluding that defendant's contention that it was reversible error for the district court to deny his motion to waive his presence in the courtroom finds no support in caselaw); *Swingle v. United States*, 151 F.2d 512, 513 (10th Cir. 1945) ("A defendant, lawfully charged, may be compelled to present himself for trial."). Appellant fails to offer any support for the assertion that a defendant has an absolute right to absent himself from trial. The district court did not err by requiring appellant to be present for S.S.'s identification testimony.

Affirmed.