STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1497

State of Minnesota,
Respondent,

vs.

Wayne Emil Pexa,
Appellant.

Filed September 16, 2019
Affirmed
Reyes, Judge

Rice County District Court
File No. 66-CR-17-1838

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John L. Fossum, Rice County Attorney, Terence Swihart, Assistant County Attorney, Faribault, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Tracy M. Smith, Judge; and Florey, Judge.

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

REYES, Judge

In this direct appeal from his convictions of first-degree sale and second-degree possession of a controlled substance, appellant argues that the district court denied him the

opportunity to present a complete defense by excluding any evidence that someone else possessed the methamphetamine found in his apartment. We affirm.

FACTS

In March, 2017, agents from the Cannon River Drug and Violent Offender Task Force executed a search warrant on a house believed to be the source of methamphetamine sales in the area. The agents encountered appellant Wayne Emil Pexa in one of the bedrooms, along with his girlfriend. They searched the room and found appellant's wallet with several baggies of suspected methamphetamine inside as well as four methamphetamine pills. The wallet also contained appellant's ID card and $2,430.00 in cash. The methamphetamine weighed 45.61 grams with packaging.

In July 2017, respondent State of Minnesota charged appellant with one count of first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(1) (2016); one count of second-degree possession of a controlled substance in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2016); and one count of fifth-degree possession in violation of Minn. Stat. § 152.025, subd. 2(1) (2016). The state later dismissed the fifth-degree possession charge.

The district court held a jury trial from April 30 to May 3, 2018. Before trial began, appellant announced his intention to proceed pro se. The district court and his public defender strongly advised him against it, but he continued with his motion to proceed pro se. The district court accepted it and appointed him advisory counsel.

The state introduced testimony from Agent Spicer, one of the agents who investigated appellant and conducted the search of the house. She testified that the agents

first encountered four other people inside the house. All four people were detained while the agents continued the search. Eventually, the agents allowed two of those people to leave because "they weren't the subject of the warrant. They didn't have any weapons or drugs or anything on them." Agent Spicer testified that when they searched appellant's wallet, it had "quite a bit" of methamphetamine and "not a user amount at all." Agent Spicer testified that they also found a "huge amount of drug paraphernalia" in the house.

On cross-examination, appellant began asking the agents about the other people in the house that day, and their criminal histories. The state objected. The district court decided to allow the questioning as an attempt by appellant to establish an alternative-perpetrator defense. After concluding the testimony that day, the state made an oral motion in limine to exclude any evidence concerning an alternative perpetrator because appellant failed to provide prior notice. The district court agreed, and ruled that it would no longer allow appellant to present evidence of an alternative perpetrator.

After the state rested, appellant called J.M., who testified that a lot of people lived at the same house as appellant and that those people were likely drinking, doing drugs, and partying. Appellant also testified on his own behalf. Appellant attempted to explain to the jury his belief that the state had "been targeting" him. However, the state objected to this line of testimony, and the district court sustained the objection. He then stated that, "I plead the Fifth on everything else because I don't have any other testimony that I could present . . . I want to tell a story, but I'm objected to absolute[ly] everything that happens."

The jury found appellant guilty of both counts. The district court entered convictions on both counts and sentenced appellant to 75 months' imprisonment on count I. This appeal follows.

D E C I S I O N

Appellant argues that the district court violated his constitutional right to present a complete defense when it precluded him from offering evidence that someone else possessed the methamphetamine. We disagree.

A criminal defendant is guaranteed a constitutional right to present a meaningful defense. U.S. Const. amend. VI; Minn. Const. art. I, § 6. However, when a defendant seeks to introduce exculpatory evidence based on an alternative-perpetrator theory, the court "must still evaluate this evidence under the ordinary evidentiary rules as it would any other exculpatory evidence." *State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004). Therefore, "even when a defendant alleges that his inability to present a defense violates his constitutional rights, evidentiary questions are reviewed for abuse of discretion." *State v. Wilson*, 900 N.W.2d 373, 384 (Minn. 2017) (quotation omitted). And any abuse of that discretion is reviewed for a harmless error. *State v. Greer*, 635 N.W.2d 82, 91 (Minn. 2001). Appellant has the burden to show both an abuse of the district court's discretion and resulting prejudice. *State v. Ahmed*, 782 N.W.2d 253, 259 (Minn. App. 2010). Alternative-perpetrator evidence is only admissible if it has an "inherent tendency to connect the other party with the crime." *Jones*, 678 N.W.2d at 16.

When appellant began cross-examining Agent Malecha, he asked him questions about the criminal histories of the other people who lived at the house. The district court

ultimately prevented the admission of evidence of an alternative perpetrator because appellant did not provide notice to the state pursuant to *State v. Sailee*, 792 N.W.2d 90 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). In that case, this court explained that although the alternative-perpetrator defense is not a listed defense requiring notice under Minn. R. Crim. P. 9.02, subd. 1(3)(a), "it is a defense other than that of not guilty and it is similar to the alibi defense, which is specifically listed as a defense requiring notice." *Sailee*, 792 N.W.2d at 94 (quotation omitted). This court therefore held that the defendant had to provide notice to the prosecution of his intent to present evidence of an alternative perpetrator. *Id.*

The district court correctly ruled that appellant had to provide advanced notice of his intent to introduce alternative-perpetrator evidence. However, although the district court has discretion in applying discovery rules, it must examine the *Lindsey* factors before excluding evidence when the defendant's right to present a defense is at stake. *Id.* at 95. The *Lindsey* factors include: "(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." *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Failure to examine the *Lindsey* factors is an abuse of discretion. *Sailee*, 792 N.W.2d at 95. The district court here abused its discretion by not considering the *Lindsey* factors when it prevented appellant from presenting alternative-perpetrator testimony.

But that is not the end of the analysis. As the *Sailee* court noted, "[d]espite this error in excluding the testimony, appellant's conviction will stand if the error was harmless beyond a reasonable doubt." *Id.* An error is harmless beyond a reasonable doubt if it was

unattributable to the jury's ultimate verdict. *State v. Blom*, 682 N.W.2d 578, 622 (Minn. 2004).

Here, the state introduced evidence that the agents found methamphetamine in appellant's bedroom. His girlfriend told the agents that he kept the methamphetamine in his "big wallet." Appellant then told the agents that his wallet was behind a shelving unit along the south wall, and upon searching the room, the agents found it there. The agents searched the wallet, and it contained not only the methamphetamine and cash, but also ID cards with appellant's photo and name on them. When appellant cross-examined Agent Cordova about whether the wallet could have belonged to someone else, the agent replied, "[T]he fact that you told us where it was at and that your documents were found in the wallet kind of makes it difficult to think that it belongs to somebody else." The record establishes that any error by the district court in refusing to allow a complete alternative-perpetrator defense was harmless.

Appellant also argues that the district court's limitation of his testimony was particularly egregious because he "was not permitted to offer exculpatory evidence. He was prepared to testify that someone else committed the crime with which he was charged." This argument is not supported by the record. There is nothing to suggest that appellant actually planned to testify that the methamphetamine belonged to some other specific person. Rather, most of his questions and testimony consisted of vague conjecture. For example, after the district court initially ruled that appellant would be allowed to present alternative-perpetrator evidence, appellant asked Agent Malecha if he had heard anything about the Ortizes, who owned the property. Agent Malecha responded, "[J]ust through

informants people have mentioned their names potentially being involved in drug crimes." Appellant then ceased his questioning, indicating that appellant employed a "strategy" of insinuating that someone else *could* have committed the crime. Nothing in the record shows that he planned to offer actual exculpatory evidence that some other person possessed the methamphetamine and planted it in his room.

In his pro se supplemental brief, appellant makes these same arguments, which we have already addressed. He states that all of the individuals coming and going from the house had been in trouble with the law and that the district court did not give him the opportunity to have them subpoenaed. He argues that the district court treated him unfairly and takes issue with how the state charged him.

None of these arguments have merit. To the extent that appellant argues that the district court prevented him from issuing subpoenas, the record shows that he successfully executed at least one of his subpoenas, of J.B., who testified. The district court provided time for the Sheriff's Department to serve the other subpoenas, but that service was ultimately unsuccessful as the individuals could not be located.

Affirmed.