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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1407**

State of Minnesota,
Respondent,

vs.

Sedale Raymond Roloff,
Appellant.

**Filed July 27, 2020
Reversed and remanded
Ross, Judge**

Ramsey County District Court
File No. 62-CR-17-57

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

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

ROSS, Judge

A jury heard that Sedale Roloff was ineligible to possess firearms or ammunition when officers found him—a gun in his hand and a bullet in his pocket—arguing with a woman on the street. Roloff and others testified that the woman brought the gun to

intimidate him and that he slapped the gun from her hand, struggling with her over the gun and its ammunition. The district court denied Roloff's requests for self-defense and necessity instructions, reasoning that a self-defense instruction was factually unsupported and that Roloff failed to timely notify the state of his necessity theory. The jury found Roloff guilty on both counts, and the district court entered two convictions and imposed concurrent prison terms. Roloff challenges the district court's jury-instruction decisions and its imposition of two convictions and sentences. We conclude that the district court abused its discretion by failing to give a self-defense instruction and by rejecting Roloff's necessity-instruction request based solely on his failure to timely notify the state. Because these errors were not harmless beyond a reasonable doubt, we reverse and remand for a new trial.

FACTS

The state charged Sedale Roloff with two counts of possession of a firearm or ammunition by an ineligible person, *see* Minn. Stat. § 624.713, subd. 1(2) (2016), alleging generally that, in December 2016, police officers saw Roloff with a gun in his hand and discovered a bullet in his pocket while Roloff was ineligible to possess either.

Pretrial Proceedings

Roloff notified the state in May 2017 of his intent to rely on a self-defense theory at trial. He also asked the district court in June to dismiss the charges for lack of probable cause. The state opposed the request, relying on the criminal complaint, police reports, and patrol-vehicle video recordings. Those sources presented the following circumstances.

On December 31, 2016, J.D. (Driver) drove her friend A.R. (Ex-Girlfriend) to meet Roloff. When they arrived, Roloff pointed a gun at them. Driver dialed 9-1-1. Police arrived to find Roloff holding a gun. They arrested him and discovered a bullet in his pants pocket. Ex-Girlfriend initially said that the gun was hers, that she had brought it to confront Roloff about cheating on her, and that the gun had fallen from her hand when he wrested it from her. But she later said that she had never touched the gun and that Roloff had dropped it when police arrived. Ex-Girlfriend and Driver testified at the hearing. Ex-Girlfriend claimed that she had purchased the gun and brought it intending “to scare someone,” and that Roloff had tried to take the gun away so she would not harm him. Driver also said that Ex-Girlfriend had brought the gun there and that she saw Roloff “trying to get [the gun] out of [Ex-Girlfriend’s] hands” before Driver drove around the corner to call the police. She claimed she had reported falsely to the police that Roloff had the gun because she “was scared to get [Ex-Girlfriend] in trouble.” The district court denied Roloff’s motion to dismiss.

On March 15, 2019, three days before the scheduled jury trial, Roloff notified the state of his intent to present a necessity defense. During a March 18 pretrial hearing on the first day of trial, he framed his theory of the case to support a self-defense theory as follows: “[H]e was confronted with an intoxicated, jealous, angry ex-girlfriend with a gun, and he used the force necessary of knocking it out of her hand, trying to get it away from her, to protect himself.” He said that he expected the evidence to show he “had to get [the gun]” in order to defend himself. The district court concluded that Roloff failed to make a prima facie showing justifying a self-defense instruction. Roloff retreated to his request for a

necessity instruction, which the district court denied, citing the untimeliness of Roloff's notice.

Jury Trial

St. Paul Police Officer Vincent Adams testified that he and his partner Officer Eric Flaherty were dispatched to an intersection at about 2:45 a.m. on a report of a man brandishing a gun. Officer Adams arrived and saw Roloff and Ex-Girlfriend, with Roloff holding a black handgun. Officer Adams ordered him to drop the gun, and Roloff did.

Officer Mike Biagini testified that he arrived after Roloff's arrest. He searched Roloff, finding a .45-caliber bullet in his pocket.

Sergeant Mark Reding testified that he later interviewed Roloff. During the interview, Roloff admitted to having possessed a bullet in his pocket and knowing he was violating the law.

Outside the jury's presence, the prosecutor told the court that she understood that Roloff's defense witnesses would not be testifying to facts supporting a self-defense theory. The district court said that defense counsel would be allowed to ask the defense witnesses "whatever questions [she] believe[d were] relevant for [her] theory of the case, short of asking them if they believed that Mr. Roloff needed to defend himself from their actions on that date."

Ex-Girlfriend testified that, on the evening of December 30, 2016, she became angry when she discovered that Roloff was seeing another woman, A.G. (Girlfriend). Ex-Girlfriend drank heavily throughout the night, then began calling and texting Roloff and Girlfriend. She roused a sleeping Driver to demand a ride to Girlfriend's house. When

they arrived, Ex-Girlfriend removed from her purse a gun she had purchased and approached Roloff, pointing the gun at him. Roloff slapped the gun out of her hand and the magazine came loose, she said, and she and Roloff began “tussling around on the ground” for the gun and the magazine. The police soon arrived and Ex-Girlfriend “blacked out,” having no recollection of events until later that night when she was at the police station. Ex-Girlfriend testified that she had insistently told police the gun was hers but that an interviewing officer turned off the recording device and told her that if she wanted to go home to see her son, she would need to say that the gun belonged to Roloff. So she did.

Driver testified that she drove an angry Ex-Girlfriend to Girlfriend’s home. They arrived and saw Roloff waiting outside. Ex-Girlfriend exited the car, leaving her purse behind, and Driver noticed she had a gun in her hand. Driver pulled the car forward and called the police. She told the jury that she told police that Roloff had a gun only because she did not want Ex-Girlfriend to get in trouble.

Roloff took the stand in his own defense, telling the jury that Ex-Girlfriend became enraged and violent when she saw on Facebook that Roloff was in a relationship with Girlfriend. Ex-Girlfriend began calling and sending text messages to Girlfriend and Roloff, and sometime around 2:00 a.m., Ex-Girlfriend and Driver arrived at Girlfriend’s house. Roloff went outside to defuse the situation and saw Ex-Girlfriend exit the car. He said that he saw a black handgun in her hand. Ex-Girlfriend yelled at Roloff, telling him she hated him. Roloff said that she raised the gun toward him, at which point he swatted it from her hand. The magazine dislodged from the gun, and both gun and magazine fell to the ground. Roloff tried to get the gun and ammunition to protect himself, but, he claimed, he was able

to get only one bullet from the ground. He said that he and Ex-Girlfriend continued shoving one another until the police arrived. The officers ordered Roloff to put his hands up, and he complied. Roloff denied ever possessing the gun.

The parties rested their cases and, before closing arguments, the prosecutor asked the court about the status of Roloff's proffer of a self-defense theory. The district court reiterated, "[T]he Court has denied the defense's request to assert the affirmative defense of self-defense. It is this Court's expectation that any closing arguments using the words 'self-defense' surrounding the notion that Mr. Roloff was defending himself would be in direct contradiction with the Court's ruling." Roloff urged the district court to reconsider, arguing that he had presented sufficient evidence to support his self-defense theory. The district court rejected Roloff's argument, prohibiting any discussion of self-defense in closing. It reasoned that the facts might support a necessity defense instead, but it refused to include a necessity instruction because Roloff gave his notice of the defense too late.

The jury did not believe Roloff and the women's testimony that Roloff never possessed the gun. It found him guilty of unlawfully possessing a firearm and ammunition. The district court adjudicated convictions on both counts and imposed sentences of concurrent 60-month prison terms, stayed on probationary conditions for a period of five years, with 365 days to be served in the workhouse. Roloff appeals.

DECISION

Roloff argues that he is entitled to a new trial because the district court abused its discretion by precluding instructions on self-defense and necessity. He alternatively argues that the district court erroneously entered a conviction and imposed a sentence for

more than one crime because both offenses arose from a single course of conduct. We reverse and remand on the defense issues, and we decline to reach the multiple-convictions-and-sentences issue.

I

The state asks at the threshold that we consider Roloff's self-defense and necessity arguments only as they regard unlawful possession of the bullet, not unlawful possession of the gun. We will not so limit the issue because we are unconvinced by the state's assertion that Roloff made his self-defense and necessity requests only concerning the ammunition offense. The state relies primarily on the prosecutor's statements attempting to clarify her understanding about Roloff's theory of the case, not on Roloff's counsel's statements. The state emphasizes that the prosecutor linked the defenses "mainly to count two, possession of the ammunition" and that Roloff's counsel failed to correct the prosecutor's understanding. The state cites no authority for its implied premise that a defendant is bound on appeal to a theory as framed by the prosecutor. And we are not tempted to entertain the premise on this record, where we see that Roloff's trial counsel in fact repeatedly framed the self-defense theory around both the ammunition-based and firearm-based charges.

We are likewise unconvinced by the state's argument that the defenses were unavailable to the firearm charge by virtue of Roloff's disputing that he possessed the firearm. Self-defense is an available defense if a non-aggressor defendant has an honest and reasonable belief of imminent danger and no reasonable possibility to retreat. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). Necessity is an available defense if the

defendant had no legal alternative to violating the law, the harm to be prevented was imminent, and a direct, causal connection existed between violating the law and preventing the harm. *State v. Rein*, 477 N.W.2d 716, 717 (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992). The state suggests that these defenses were unavailable because the defenses presume that the elements of an underlying offense are satisfied. But the presumption is not necessarily so.

The state again cites no authority for what it implies: that Roloff could not pursue his defense theories while simultaneously denying he committed the offense to which those defenses might apply. And our caselaw in somewhat similar situations does not support the premise. We have addressed similar issues in cases where a defendant's own testimony undercut his claim of entitlement to a self-defense or defense-of-others instruction. In *State v. Pacholl*, for example, we affirmed the district court's denial of a defense-of-others instruction, reasoning that the theory "appear[ed] to have been an afterthought" because it was not raised until the close of evidence, was unsupported by evidence, and was actually "inconsistent with Pacholl's own testimony that the incident was an accident." 361 N.W.2d 463, 465 (Minn. App. 1985). And in *State v. Jensen*, we affirmed the district court's denial of a self-defense instruction because the theory was not raised until closing argument, it lacked any evidentiary support, and the defendant testified that he "never struck, kicked, or threatened" the deputy. 448 N.W.2d 74, 76 (Minn. App. 1989). But these cases do not stand for the proposition that a defendant must admit to having committed the underlying offense to pursue an affirmative defense; they instead stand for the principle that an instruction is appropriate only if it is supported by evidence. *See State v. Graham*,

371 N.W.2d 204, 209 (Minn. 1985). It is in this context which we decided *Pacholl* and *Jensen*, where each defendant’s testimony underscored the lack of any evidentiary support for the proffered defense.

Although Roloff denied ever possessing the firearm, his testimony asserted that he engaged in some sort of tussle for the gun, and the state’s witnesses testified that he did possess it. Either based on Roloff’s testimony about having tried to obtain the gun from Ex-Girlfriend, or based on testimony from the state’s witnesses that Roloff at one point was holding the gun, the record contains evidentiary support for the proffered defenses as to possessing both the gun and the bullet. We turn to the merits of Roloff’s arguments.

II

The district court denied Roloff’s request for a self-defense instruction, questioning the defense’s application to the charges and reasoning that Roloff had failed to make a prima facie showing that the instruction was appropriate. We review a district court’s refusal to give a requested jury instruction for an abuse of discretion. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). If the district court abused its discretion, we will reverse unless we conclude that “beyond a reasonable doubt . . . the error had no significant impact on the verdict.” *State v. Koppi*, 798 N.W.2d 358, 364 (Minn. 2011) (quotation omitted).

The district court abused its discretion by failing to give a self-defense instruction.

One may use reasonable force against another if he is resisting an offense against the person or reasonably believes that he is doing so. Minn. Stat. § 609.06, subd. 1(3) (2016). The law “is not offense-specific and imposes no limits on application of the defense

based on the type of offense charged.” *State v. Soukup*, 656 N.W.2d 424, 428 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003). The supreme court has indicated that self-defense and necessity are related defenses. The *State v. Spaulding* court considered an appellant’s claim that the district court erred by failing to provide a self-defense instruction on an unlawful-possession-of-a-firearm charge. 296 N.W.2d 870, 877 (Minn. 1980). It rejected the appellant’s argument, holding that the district court did not err by giving a necessity instruction that embedded a self-defense element. *Id.* The district court had instructed the jury as follows:

If you find that the defendant obtained a pistol in defense of himself or another, that is justified and the defendant has not violated this law. However, once the necessity for his possession is reasonably over he no longer may possess the pistol. It is for you to determine if continued possession is reasonably justified.

Id. The supreme court’s approval of the mixed necessity-self-defense instruction implies that a self-defense defense is available in unlawful-possession cases.

We next consider whether Roloff was entitled to the instruction. A defendant is generally entitled to a jury instruction if the evidence reasonably supports it. *Johnson*, 719 N.W.2d at 629. A defendant raising a self-defense claim bears the initial burden of supporting the claim by creating a reasonable doubt as to whether his conduct was justified. *Soukup*, 656 N.W.2d at 429. “In evaluating whether a rational basis exists in the evidence for a jury instruction, the evidence is viewed in the light most favorable to the party requesting the instruction.” *State v. Edwards*, 717 N.W.2d 405, 410 (Minn. 2006).

The jury heard testimony that Ex-Girlfriend went to Girlfriend's home carrying a gun, that Roloff saw the gun and was afraid, that he slapped the gun out of her hand when she raised it, that they "tussled" for the gun and magazine, and that he grabbed a round of ammunition to keep it away from Ex-Girlfriend. The defense witnesses' testimony was sufficient to support an inference that Roloff held an honest and reasonable belief that he would suffer great harm if he did not take possession of the weapon or ammunition, that he was not the aggressor, and that he could not reasonably retreat. In light of *Spaulding* and based on the evidence produced at trial, Roloff was entitled to a self-defense instruction.

The state concedes that the district court "likely went further than it should have in evaluating the reasonableness of the evidence," meaning that the district court took on the role that belonged to the jury. But the state argues that the instruction request was properly denied for other reasons. The arguments are not compelling.

The state contends that it would be "difficult to imagine a reasonable factual scenario" in which picking up a bullet would be a necessary act of self-defense, because "by [Roloff's] account," the gun and magazine were already on the ground when police arrived and when he picked up the bullet. But Roloff testified that he hit Ex-Girlfriend's hand, causing the gun and its magazine holding the ammunition to fall to the ground, and that he scrambled to grab either the ammunition or the gun, or both, to protect himself. He testified that he was able to grab a bullet from the ground before he and Ex-Girlfriend began shoving one another, "and *then* the police arrived." (Emphasis added.) The order of events in Roloff's testimony does not defeat a claim of self-defense.

The state also argues that possessing ammunition is not a plausible extension of a self-defense theory. But as the *Spaulding* analysis recognizes that depriving an attacker of a firearm might constitute self-defense, 296 N.W.2d at 877, we recognize that depriving an armed attacker of ammunition for her firearm similarly might constitute an act of self-defense.

We conclude that the district court abused its discretion by failing to give a self-defense instruction when it was both permitted by law and warranted on the evidence produced at trial. Having determined that the district court erred, we next consider the error's prejudicial effect.

The error was not harmless beyond a reasonable doubt.

We need not reverse the district court if its error was harmless beyond a reasonable doubt. *See Edwards*, 717 N.W.2d at 413. To determine whether the error was harmless, we may consider the strength of the state's evidence and whether the jury would have likely reached the same verdict had it been properly instructed. *See Soukup*, 656 N.W.2d at 431. Had the district court properly instructed the jury on the elements of self-defense, it would have been the state's burden to negate one of the defense's elements. *Id.* at 429.

Assuming that the state proved the elements of both possession charges, the state failed to present overwhelming evidence tending to negate any of the four self-defense elements. The first element is an absence of aggression or provocation. *Id.* at 428. The jury heard about the inculpatory substance of Driver's 9-1-1 call, but this was contradicted by Roloff's, Ex-Girlfriend's, Driver's, and Girlfriend's testimony. The second element is "an actual and honest belief that imminent death or great bodily harm would result." *Id.*

Roloff's, Ex-Girlfriend's, and Driver's testimony supported Roloff's actual and honest belief. The third element is a reasonable basis for the belief, *id.*, and although the state impeached Roloff and the other witnesses' testimony, the state cites no evidence tending to disprove the element. As for a lack of a reasonable alternative or a means of retreat, *see id.*, again, the state failed to present overwhelming evidence tending to negate Roloff's evidence. The state argues that Ex-Girlfriend's and Driver's testimony "were nearly universally impeached by their actions and prior statements." This may be so, and we can add that the record (and verdict) supports the notion that the jury was unconvinced by the defense-oriented testimony. But we do not weigh the evidence on appeal, and the impeachment of testimony favorable to Roloff cannot substitute for evidence negating a self-defense element.

The state also argues that the jury would have reached the same verdict even if properly instructed because, "once the jury rejected [Roloff's] claim that he did not possess the gun . . . it necessarily rejected his claim that he picked up the bullet and put it in his pocket after disarming [Ex-Girlfriend], because if [Roloff] possessed the gun in the first place then there was no need for him [to] tussle with [Ex-Girlfriend] and disarm her." The state's argument assumes that the jury could have found Roloff guilty of possessing the firearm only if it rejected the Ex-Girlfriend-brought-the-gun-to-the-scene version of events; but the jury might have believed testimony that Ex-Girlfriend brought the gun, that Roloff wrested it from her, and that Roloff possessed it when officers arrived.

We conclude that the error was not harmless beyond a reasonable doubt, and so we reverse and remand for a new trial. We base our decision on the circumstances that have

already occurred at trial, and we leave it to the district court to determine whether the evidence produced at a new trial on remand reasonably supports a self-defense instruction.

III

We turn to Roloff's necessity-defense argument. The district court implied that a necessity instruction would have been appropriate, but it denied Roloff's request for a necessity instruction because Roloff failed to timely notify the state of the defense. Roloff concedes the untimeliness of his notice but challenges the district court's decision to sanction him for the untimeliness without considering other factors. We review the district court's imposition of sanctions for a discovery violation for an abuse of discretion. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). Even if the district court abuses its discretion, we will not reverse if the error was harmless beyond a reasonable doubt. *See State v. Rasinski*, 472 N.W.2d 645, 649 (Minn. 1991). We conclude that the district court abused its discretion by precluding a necessity instruction based solely on the untimeliness of Roloff's notice, and that this error too warrants a new trial.

The district court abused its discretion by precluding a necessity instruction without considering factors other than the untimeliness of Roloff's notice.

A procedural rule requires the defense to "inform the prosecutor in writing of any defense, other than not guilty, that the defendant intends to assert" before the omnibus hearing. Minn. R. Crim. P. 9.02, subd. 1(5). If a party fails to comply, the district court may impose "any order it deems just in the circumstances." Minn. R. Crim. P. 9.03, subd. 8. Imposing sanctions for a discovery violation "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).

The district court should consider why the disclosure was not made, the extent of prejudice to the opposing party, whether that prejudice could be corrected by a continuance, and “any other relevant factors.” *Id.* Failing to consider these *Lindsey* factors when determining sanctions for an untimely disclosure constitutes an abuse of discretion. *State v. Sailee*, 792 N.W.2d 90, 95 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). The district court here considered only the untimeliness of Roloff’s disclosure. Although both Roloff and the state prompted it to consider other necessary factors, the district court did not discuss any prejudice to the state, whether the prejudice could be cured, or any other relevant factors. The district court’s failure to consider the applicable factors was an abuse of discretion.

We are not persuaded otherwise by the state’s contention that the district court’s ruling was proper because, in refusing to give the instruction about necessity, the district court did not preclude Roloff from presenting evidence about necessity. We do not see how this mitigates the failure to apply the *Lindsey* factors before sanctioning Roloff’s discovery breach. Allowing testimony about necessity does not cure the harm that results from refusing to instruct the jury on the legal significance of necessity. We are likewise not persuaded by the state’s contentions that Roloff failed to adequately explain why his notice was late and that the late notice prejudiced the state. These arguments go to other *Lindsey* factors that the district court failed to examine, and the arguments about deficiencies in Roloff’s request do not address the district court’s failure to properly address the factors bearing on sanctions.

We conclude that the district court abused its discretion by precluding a necessity instruction based solely on the untimeliness of Roloff's notice. We next consider whether the error warrants a new trial.

The district court's error was not harmless beyond a reasonable doubt.

We reverse because the district court's error was not harmless beyond a reasonable doubt. The state argues that either Roloff was not entitled to the instruction in the first place or that the jury would have rejected the defense. Neither argument prevails.

A defendant need make only a prima facie showing of his entitlement to a necessity instruction, and he is entitled to an instruction if the evidence at trial supports it. *See State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006). Necessity is an available defense if: (1) the defendant had no legal alternative to violating the law; (2) the harm to be prevented was imminent; and (3) a direct, causal connection existed between violating the law and preventing the harm. *Rein*, 477 N.W.2d at 717. Roloff presented sufficient evidence to make a prima facie showing on each necessity element. This evidence includes testimony alleging that an armed and angry Ex-Girlfriend approached him, that he swatted the gun from her hand, that the gun and magazine separated, and that he was trying to recover items from the ground to prevent danger to himself. There was a sufficient rational basis in the evidence supporting a necessity instruction. *See Edwards*, 717 N.W.2d at 410.

The state contends that the jury would have rejected Roloff's defense based on a lack of imminent harm or a reasonable alternative to grabbing the bullet because, by the time Roloff pocketed the bullet, the gun was on the ground and police were on the scene. But again, Roloff testified to a different sequence of events, saying first that he hit

Ex-Girlfriend's hand, second that the gun and magazine fell to the ground, third that he scrambled to grab "the ammunition and/or the firearm to protect [him]self," fourth that he and Ex-Girlfriend shoved one another, and fifth that police arrived. The jury might have believed Roloff's account despite the contrary evidence, had it been instructed on necessity. It might have found that Roloff possessed both the handgun and bullet but did so without a legal alternative. It is not clear beyond a reasonable doubt that the jury would have found Roloff guilty if the jurors understood the necessity defense. The error warrants a new trial.

We have concluded only that the district court abused its discretion by precluding a necessity instruction without conducting a proper *Lindsey*-factor analysis. We have *not* conducted a de novo balancing of the *Lindsey* factors, because sanctions for violations of discovery rules are discretionary with the district court. *See In re Welfare of M.P.Y.*, 630 N.W.2d 411, 417 (Minn. 2001). We offer no opinion about what the district court should conclude on any factor or how it should apply its conclusions to shape its discretionary decision on sanctions. Consequently, our decision should not be construed as suggesting any outcome on Roloff's request for a necessity instruction. On remand, the district court must determine whether the evidence produced at trial warrants a necessity instruction. If it does, the district court must consider the *Lindsey* factors to determine what sanction, if any, is appropriate in light of Roloff's undisputed failure to give a timely notice of his defense.

Reversed and remanded.