STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1908

State of Minnesota,
Respondent,

vs.

Lennie Rydell Senter,
Appellant.

Filed January 15, 2008
Affirmed
Shumaker, Judge

Ramsey County District Court
File No. K1-04-2283

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Blvd. West, Suite 315, St. Paul, MN 55102 (for respondent)

John M. Stuart, State Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and Worke, Judge.

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

SHUMAKER, Judge

Appellant Lennie Rydell Senter appeals from his conviction of fourth-degree gross-misdemeanor assault. Senter argues that his right to a speedy trial was violated because his trial was delayed for nearly two years. Senter also argues that the district court erred in determining his waiver of his right to counsel was valid. Next, he asserts that his due process rights were violated by the state's failure to preserve radio transmission tapes. He also argues that the district court abused its discretion in making specific evidentiary rulings. Senter also contends that the district court erred in allowing the prosecutor to vouch for witnesses during the closing argument and in failing to include a self-defense jury instruction. Because we find no violations of Senter's rights to speedy trial and due process, or any abuse of discretion or clear error by the district court, we affirm.

FACTS

After a trial in which appellant Lennie Rydell Senter represented himself, a jury found him guilty of fourth-degree gross misdemeanor assault of a peace officer.

The incident out of which the charge arose took place at 1:00 a.m. on June 12, 2004. Just before the incident, St. Paul police officer Mark Ross saw Senter make a left turn in his car without signaling. Ross followed him and, after observing two more similar traffic violations, turned on his emergency lights. Senter did not stop, but instead drove onto a freeway. Ross then activated his siren, and Senter got off the freeway and stopped.

As Ross approached Senter's car, Senter kept his window up and his hands hidden from Ross's view. When Ross opened Senter's door and told Senter to get out, he could smell an odor of alcohol coming from inside the car. Ross directed Senter to place his hands on his head, which he did, and Ross patted down his outer clothing. Ross then walked Senter to the squad car but, as he opened the car's door, Senter spun away from him, called him a "motherf . . ker," and swung at him with his fist. Senter walked back towards his car, as Ross radioed for assistance. Ross then tackled Senter, and an altercation ensued during which the two wrestled with each other and Senter struck at Ross with his fists.

Two passersby, C.R. and M.R., saw the struggle. C.R. helped pull Senter away from Ross, while M.R. called 911. Ross sprayed Senter with mace, but it had no effect.

Other officers arrived, and one used a taser twice but Senter was not affected and began to run away. The officers were able to catch him and restrain and arrest him.

The state charged Senter with fourth-degree assault of a peace officer, and he appeared at an omnibus hearing on June 28, 2004, with his public defender. He pleaded not guilty and demanded a speedy jury trial. Senter was in custody at the time, and the court continued the case to August 5 for a case management conference, to be followed by a trial on August 9.

At the August 5 conference, Senter told the court that he would represent himself. The court warned him of the difficulty of representing himself. Senter, who was in his 54th day of custody, nevertheless demanded to be allowed to represent himself, and the court acceded and appointed standby counsel.

By the August 9 trial date, Senter had been released from custody on bail. He appeared on that date and told the court that he did want to be represented by a lawyer. The prosecutor indicated that the state would not oppose a continuance of the trial so that Senter could obtain counsel if Senter agreed to waive his right to a speedy trial. Senter responded: "I would like to waive my speedy trial situation since I'm not in jail anymore. You know, I'm going to need time to prepare too." The court then reset the trial for August 24.

Senter appeared on August 24 and told the court that he wanted another public defender to represent him. But when the court indicated that he could not select the particular public defender he desired, and that there was a good chance that the public defender that represented him initially would be reappointed, he balked at having such representation. The court then continued the case to September 16.

Appearing on September 16, Senter requested a standby attorney. The court then continued the trial until October 20 so as to be able to find standby counsel. Senter and standby counsel appeared on that date but the judge was in trial on another matter, so Senter's trial was continued until November 15, on which date the court placed the case on standby status. Unable to work the case into the trial schedule, the court continued it twice more.

The trial was then scheduled for March 7, 2005, and Senter appeared without counsel before a different judge who was new to the case. Senter agreed that a continuance to May 9 would be appropriate to give the court time to become familiar with the case.

When May 9 came around, the court continued the case again, and on July 26, Senter and his standby counsel appeared for trial But Senter had previously made evidentiary motions and, instead of starting trial, the court heard arguments on these motions and reset the trial for August 24.

Senter was arrested on another matter on August 23, and the trial was continued to August 29. On that date, Senter requested a continuance to obtain counsel. The court granted the request and set trial for October 10. Trial did not occur on that date but rather it was continued to December 12, on which date the court continued it again.

The court made additional pretrial rulings on January 23, 2006, and, in view of those rulings, Senter asked that the trial be continued. The court continued the case to a March setting. In March, the court continued the case so that various motions could be heard on April 3.

Finally, trial was held from May 22 to May 25. Senter represented himself, with standby counsel present, and presented no evidence. The jury found him guilty of fourth-degree assault but without infliction of demonstrable bodily harm, a gross misdemeanor.

Alleging numerous errors and irregularities, Senter brought this appeal.

D E C I S I O N

I. Speedy Trial

It took nearly two years to bring this case to trial. As a result, Senter contends that his Sixth Amendment right to a speedy trial was violated. Both the United States and Minnesota constitutions guarantee a person accused of a crime "a speedy and public trial." U.S. Const. amend VI; Minn. Const. art. I, § 6. Whether or not a person has been

deprived of a speedy trial is a question of law that we review de novo. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). In answering that question, we balance and weigh four factors: (1) the length of delay; (2) the reason for delay; (3) whether or not the accused asserted or demanded his right to a speedy trial; and (4) the extent to which, if at all, the delay prejudiced the accused. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (citing *Barker v. Wingo*, 407 U.S. 514, 530-533, 92 S. Ct. 2181, 2182 (1972)).

Length of Delay

The length of delay in bringing a case to trial is the pivotal factor in a speedy-trial analysis because, until it has been shown that the delay was so long as to raise a rebuttable presumption of prejudice, there is no need to consider the other *Barker* factors. *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). An accused's constitutional right to a speedy trial attaches when criminal charges are filed against him. *State v. Huddock*, 408 N.W.2d 218, 220 (Minn. App. 1987). But, in Minnesota, delay must be assessed from the date on which the defendant demands a speedy trial because our rules provide that the trial must commence within 60 days of that demand unless good cause is shown as to why the defendant should not be brought to trial within that time. Minn. R. Crim. P. 11.10.

The state filed its criminal complaint against Senter on June 14, 2004, and Senter made a formal demand for a speedy trial during an omnibus hearing on June 28, 2004, while he was in custody. The trial did not begin until May 22, 2006, nearly two years after Senter's speedy-trial demand. This lengthy delay raises a rebuttable presumption

that Senter was prejudiced and that presumption requires that we continue our analysis of at least two other *Barker* factors. *See Jones*, 392 N.W.2d at 235 (a seven-month delay in a murder trial was sufficient to trigger further analysis); *State v. Corarito*, 268 N.W.2d 79, 80 (Minn. 1978) (a six-month delay in bringing the case to trial was sufficient to prompt further analysis).

Reason for the Delay

In any criminal case, the three most probable reasons for delay in bringing the matter to trial are the prosecutor's acts or omissions; the defendant's actions; and administrative problems of managing case volume, assigning judges, and scheduling trials.

Delay attributable to the prosecutor weighs heavily against the state if it is deliberate. *Huddock*, 408 N.W.2d at 220 (citing *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192). Senter attributes 106 days of delay to prosecutor conduct, but he does not claim that the prosecutor deliberately delayed the trial; instead, he cites prosecutor unavailability. The record shows that the prosecutor was unavailable once because of a death in the family and other times because of another trial or the unavailability of police witnesses. There is nothing in the record from which to infer that any of the delays attributable to prosecutor unavailability were deliberate.

As Senter points out, there were also administrative delays. It is hardly debatable that the Minnesota District Court is charged with the task of efficiently processing a sometimes overwhelming volume of criminal and civil cases. But "[t]he responsibility for an overburdened judicial system cannot, after all, rest with the defendant." *Jones*, 392

N.W.2d at 235. Administrative delay is a legitimate factor in a speedy-trial analysis, although its weight is less than that given to prosecutorial conduct. *See Huddock*, 408 N.W.2d at 220 (citing *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192) (explaining, in a case involving an administrative delay, that "negligent delays are given less weight").

"When the overall delay in bringing a case to trial is the result of the defendant's actions, there is no speedy trial violation." *State v. DeRosier*, 695 N.W.2d 97, 109 (Minn. 2005). Here, the "defendant's actions" do not imply irregularity or manipulation. Legitimate motions and procedural requests by the defendant, which cause delay for rulings, judge assignment, and scheduling, can fall within an overall delay that will not be deemed a speedy-trial violation. *See id.* (concluding that the defendant's right to a speedy trial was not violated where delays were the result of defense motions for change of venue, continuances, and a rule 20 evaluation).

There were a seemingly inordinate number of continuances and resettings in this case. Some were attributable to judge unavailability, court schedules, and assignment of a judge unfamiliar with the case. But at least as many, if not more, delays were attributable to Senter's problems in accepting public-defender representation, deciding whether or not to represent himself, requesting a standby attorney, failing to appear with counsel, making specific continuance requests, and bringing various defense motions on which the court had to rule and needed time to do so.

Because a defendant's actions that result in delay weigh so heavily that they can negate a claim of a speedy-trial violation, it is a plausible conclusion that Senter's own

conduct resulted in the overall delay of his trial and, therefore, his claim is without merit. This conclusion is supported as well by other considerations, discussed below.

Speedy-Trial Demand

Once a defendant enters a plea of not guilty, as Senter did at the omnibus hearing on June 28, 2004, he "shall be tried as soon as possible after entry" of that plea. Minn. R. Crim. P. 11.10. But "[o]n demand made in writing or orally on the record by the prosecuting attorney or the defendant, the trial shall be commenced within sixty (60) days from the date of the demand unless good cause is shown" why the trial should not be held within that period. *Id.*

Although Senter had made a clear speedy-trial demand, on August 9, 2004, the initial date of the trial, he appeared without counsel and, on the record, stated: "I would like to waive my speedy trial situation since I'm not in jail anymore. You know, I'm going to need time to prepare too." Senter thus withdrew his demand and waived his right to a speedy trial. He contends that his waiver was not effective because the court did not "follow up" or "establish or accept" it. He cites no authority for that argument, and we hold that it is without merit.

At no time did Senter reassert a demand for a speedy trial. He argues that he did just that at a March 7, 2005 court appearance when the case had been assigned to another judge and she said she needed time to become familiar with it. He told the judge, "I've been prepared since October 18th," and he contends that the implication of that statement was that he wanted trial to start. The context of his statement was that the judge not only said she needed time to review the case but also had to take other cases if the defendants

were in custody or had made speedy-trial demands. Senter's full response was, "That's fine. I've been prepared since October 18th. I've waited this long. I can wait some more time." In determining whether a defendant has asserted his constitutional right to a speedy trial, we consider both the force and the frequency of the demand. *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989). Having made a clear demand, a defendant is not required to repeat it, but having clearly waived a speedy trial, he must reassert the demand with the same clarity as required for making it in the first place. Senter waived his speedy-trial right and never reasserted it.

Thus, although we are troubled by the very long delay in getting this matter to trial, Senter's actions reveal that he was not similarly troubled until he was found guilty. We hold that, because Senter contributed substantially to the delay, acceded to most of it, and waived and did not reassert his right to a speedy trial, there was no speedy-trial violation.

II. Waiver of Counsel

A person accused of a crime has a constitutional right to be represented by an attorney. U.S. Const. amend VI; Minn. Const. art I, § 6. The accused may waive his right to counsel as long as he does so knowingly and intelligently. *State v. Worthy*, 583 N.W.2d 270, 275 (Minn. 1998) (citing *Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S. Ct. 1019, 1024 (1938)). The waiver, to be valid, must also be voluntary. Minn. R. Crim. P. 5.02, subd. 1(4); *see also State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997) (requiring the waiver to be knowing, voluntary, and intelligent). To determine the validity of an ostensible waiver of counsel, the district court must perform a "fact-specific

examination" of the circumstances surrounding the waiver. *State v. Garibaldi*, 726 N.W.2d 823, 829 (Minn. App. 2007). A district court's determination that there has been a valid waiver of counsel will be reversed on appeal only if that determination is clearly erroneous. *Worthy*, 583 N.W.2d at 276.

Senter contends that the judge's inquiry as to the waiver was insufficiently thorough and comprehensive.

Senter appeared with his appointed public defender for a case management conference on August 5, 2004. The attorney told the court that Senter wanted to discharge him. When the court inquired of Senter whether that was correct, Senter replied: "Yes, I would, your honor. I would like to represent myself. I was there. I know what happened . . . I would feel more comfortable being the person asking the questions."

The court then informed Senter that it was "a bad idea to try to represent yourself," advised Senter that he would not be in a position "to do the things a lawyer has to do in court," and explained that he would not be able to help Senter. After hearing the judge's comments, Senter indicated he would need another attorney. The court told him that he would not be able to choose another public defender and reiterated that it was a bad idea for him to try to represent himself and that he would "not know the proper courtroom procedure." The conference ended with Senter stating that he wanted someone else to represent him and the court appointing standby counsel and setting the trial for a later date.

There followed several trial settings at which Senter appeared without counsel and requested continuances to obtain representation or announced that he would represent himself. Ultimately, Senter represented himself with standby counsel present.

The court did not follow a particular procedure in obtaining Senter's waiver, which would have been the better course. But the court's omission of a procedure is not tantamount to clear error; rather, we must consider all the circumstances surrounding the waiver. *See id.* at 275-76 (explaining that the waiver's constitutionality depends on the particular facts and circumstances of each case).

Senter had been represented from the outset by a public defender. And it is clear that Senter and his attorney had discussed whether the attorney would continue to represent him. The court was entitled to presume that the attorney had told Senter of the pitfalls of being pro se. *Id.* at 276. During 54 days of representation, it was also reasonable for the court to presume that Senter and his attorney discussed the case and the evidence. Senter did not elaborate on his dissatisfaction with his appointed attorney. But he did intimate that the problem was not a lack of information about the case but rather explained, "I feel like Mr. Sarette [the public defender]—I've been in here for 54 days—has not been getting any deals. He's not hired." This statement also suggests that the public defender had discussed the case with the prosecutor but had not been able to obtain a plea offer and had told this to Senter.

The judge repeatedly and pointedly advised Senter of what a bad decision it would be to represent himself because he would be too emotionally involved and was not legally trained. The judge also made it clear that he could not help Senter through the trial.

Even before the trial began, almost two years after the incident, Senter was well aware of the gravity of appearing pro se.

Senter did not make his choice to represent himself in the heat of the moment. Rather, he had nearly two years to consider, and reconsider, that choice. Nor did Senter make the choice without further legal consultation for he indicated that he had discussed possible representation by the Neighborhood Justice Center.

Finally, Senter was decisive in his choice and expressed confidence in being able to represent himself by saying, "I was there" and "I would feel more comfortable being the person asking the questions."

Senter cites *Garibaldi* in support of his argument. Two major differences between *Garibaldi*, where this court found the waiver invalid, and this case are: first, the defendant in *Garibaldi* made a waiver and then proceeded with a stipulated-facts trial without the benefit of counsel at all, even standby counsel; and, second, the district court's inquiry of Garibaldi was cursory. 726 N.W.2d at 830-31. Here, Senter had numerous opportunities to weigh his decision and change his mind; he had months during which to obtain a lawyer if he wished; he had opportunities again to accept the public defender if he wished; and he had standby counsel available to assist him at trial. Even though it is preferable that the court conduct a more particular inquiry than it did here, we cannot conclude that its ruling that Senter validly waived counsel was clearly erroneous.

We note also that a waiver can occur when, as here, the defendant dismisses an appointed public defender and fails to retain substitute counsel. *State v. Brodie*, 532

N.W.2d 557, 557 (Minn. 1995); *Finne v. State*, 648 N.W.2d 732, 736 (Minn. App. 2002), *review denied* (Minn. Oct. 29, 2002).

III. Failure to Preserve Recordings of Various Transmissions

There were various audio transmissions of aspects of this incident. These included Officer Ross's report of the initial stop and his request for assistance, transmissions to and from assisting officers, a 911 call from a passerby, and possibly sounds picked up through officers' open microphones during the encounter.

On June 28, 2004, Senter, through his public defender, filed a written Rule 9 request for discovery. Minn. R. Crim. P. 9.01, subd. 1. On June 15, 2005, Senter made a pro se motion to compel discovery of the police transmission recordings. By the time of this motion, the police transmission recordings had been destroyed under a policy that requires the police department to retain such records for only 90 days, and it appears that the 911 call had not been recorded.

Senter argues that the bad-faith destruction of those recordings violated due process. *See State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000) ("'[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" (alteration in original) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963))). A so-called *Brady* violation occurs when the state willfully or inadvertently suppresses evidence that would have been favorable to the accused because it is exculpatory or impeaching and, as a result, the accused suffers prejudice. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936,

1948 (1999). We conduct a de novo review of *Brady*-violation rulings. *See Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005) ("[B]ecause materiality issues under *Brady* combine issues of fact and law, the proper standard of review is de novo."). The district court ruled that the transmission recordings were subject to discovery and disclosure could be compelled, but that, because of the lateness of the specific motion, those items likely had been destroyed and there was nothing to compel. And the items had been destroyed, as the court surmised.

To find a sufficient due-process violation warranting a reversal of a conviction, "a defendant must demonstrate that the unpreserved evidence had apparent exculpatory value, that he was unable to obtain comparable evidence by other reasonably available means, and that the state intentionally destroyed or allowed the destruction of the evidence in bad faith." *State v. Engle*, 731 N.W.2d 852, 857 (Minn. App. 2007), *review granted* (Minn. Aug. 7, 2007). The state is obliged to preserve and disclose evidence of both apparent and potential exculpatory value. *State v. Schmid*, 487 N.W.2d 539, 541 (Minn. App. 1992), *review denied* (Minn. Sept. 15, 1992). If the evidence had only potential exculpatory value, bad faith by the state must be shown to support a conclusion that the accused's right to due process has been violated. *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

Senter argues that the police transmissions had "obvious exculpatory value" because they provided a chronological record of the events or they captured Officer Ross's state of mind and attitude before he approached Senter's car. And the 911

recording, he states, would disclose the caller's state of mind. It is entirely speculative as to whether the police transmissions created an objective chronology of events, and Senter fails to show how such a chronology, even assuming it had been captured in the transmissions, would be exculpatory. As to Officer Ross's state of mind and attitude, Senter does not explain how they would exculpate him. The same is true of the 911 caller. Furthermore, Senter had an opportunity to call as witnesses all persons involved and to cross-examine them about anything relevant to the case Because Senter was present from the beginning of the incident, he presumably knew the chronology of events and had the opportunity to establish it through cross-examination if he felt it would be exculpatory.

Although it can be difficult for an accused to show the exculpatory nature of evidence that has been destroyed since it is possible that the evidence would speak for itself, he needs to do more than merely point to the nature of the evidence and invite the speculation that it would have been exculpatory. In fact, considering that most of the evidence consisted of police transmissions, if one were to speculate, one would be far more likely to conclude that the evidence was inculpatory. We conclude that Senter has failed to show any apparent exculpatory value of the police transmissions or the 911 tape.

With respect to potential exculpatory value, we draw two conclusion from Senter's discussion. First, he has not shown, beyond general speculation, that the materials had even potential exculpatory value. Second, he has failed to point to anything that would lead us to hold that there was either an intentional destruction of evidence, as opposed to an innocent destruction in the ordinary course of business, or that the state acted in bad

faith respecting its failure to preserve the evidence. Senter merely speculates that because the materials were not preserved the failure was intentional or in bad faith.

Although ideally it would have been preferable that these materials be retained, we cannot conclude that their destruction violated due process.

IV. Evidentiary Rulings

Senter alleges that the trial court erred when it denied his request to introduce evidence about the traffic stop, the officer's alleged bias, the adverse effects of the destruction of recordings, and evidence of his urine sample. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted). Due process requires that every defendant be "'afforded a meaningful opportunity to present a complete defense.'" *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984)); *accord* U.S. Const. amend. XIV, § 1; Minn. Const. art I, § 7. The right to present a defense is not without limitations because the accused and the state must comply with procedural and evidentiary rules "'designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Richards*, 495 N.W.2d at 195 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973)). Relevant evidence is admissible and irrelevant evidence is not admissible at trial. Minn. R. Evid. 402. Even relevant evidence may be excluded if the probative value is "substantially outweighed by the danger of unfair prejudice, confusion

of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403.

Traffic Stop

Senter argues that the court improperly barred him from introducing evidence about the details of the initial traffic stop, which he suggests was illegal. The court disallowed this because the court found that the traffic stop was legal; the issue of the legality of the stop was not before the jury. The court did not otherwise restrict Senter. He was able to bring in any other evidence about the incident except that regarding the legality of the stop. Senter was given a full opportunity to cross-examine Officer Ross about everything after the moment of the stop. The court, by disallowing evidence of the alleged illegality of the traffic stop, was exercising the discretion afforded it. The issue at trial was whether or not Senter committed assault, and barring evidence of the legality of the initial stop was within the province of the district court, and there was no abuse of discretion.

Officer's Bias

Senter sought to question Officer Ross about a lawsuit Senter thought he might bring against the police department for damages for police brutality. His purpose was to show bias on the part of Ross. The bias of a witness may be shown for the purpose of attacking the witness's credibility. Minn. R. Evid. 616. As nearly as we can tell, Senter's theory was that Officer Ross would likely testify in a particular way if he knew he would eventually face a civil lawsuit accusing him of police brutality.

It was well within the court's discretion to preclude evidence of a hypothetical lawsuit, particularly when the court afforded Senter full opportunity to cross-examine Ross about all of his conduct during the incident. The court may "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." *State v. Brown*, 739 N.W.2d 716, 720 (Minn. 2007) (quotation omitted).

Audio Recordings

Senter asserts that he was erroneously precluded from commenting on the destroyed audio recordings and that the court erroneously failed to instruct the jury on the presumption of destroyed evidence. The court granted the state's motion to bar Senter from discussing the destroyed tapes. It determined that had Senter requested the transmissions in a timely fashion, he would have been able to use them at trial, but because he did not have them, he could not discuss what may or may not be contained in them. That was not an abuse of discretion.

Senter also argues that the court should have instructed the jury about a presumption in his favor regarding the transmission tapes. But this was not an abuse of discretion because Senter did not request an instruction, and the court is not required to give special instructions sua sponte. *See State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001) (finding that in the absence of any authority requiring an instruction or a request by defendant, the district court's failure to sua sponte give an instruction cannot be deemed plain error).

Urine Sample

Finally, Senter alleges error in the district court's decision to bar him from showing evidence of his urine sample analysis. Senter gave notice to the court that he intended to bring in his urine analysis results at trial. But Senter never actually offered the evidence. The transcript does not reveal such an offer. Generally, an issue not argued or considered below is not properly before this court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). The district court did not abuse its discretion in failing to allow evidence that was not offered to it.

V. Prosecutor's Comments

Senter asserts that the prosecutor, during her rebuttal, made inappropriate remarks about the credibility of witnesses and about witnesses who did not testify. If a defendant fails to object to prosecutorial error at trial, the right to appeal the issue is forfeited. *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). However, the general rule that a party must object to alleged prosecutorial misconduct or waive the issue does not apply to a criminal defendant appearing pro se. *State v. Reed*, 398 N.W.2d 614, 617 (Minn. App. 1986), *review denied* (Minn. Feb. 13, 1987). When the misconduct is unduly prejudicial, relief may be granted absent a trial objection or request for instruction. *State v. Whittaker*, 568 N.W.2d 440, 450 (Minn. 1997). Only when the error, "viewed in light of the entire record, is of such serious and prejudicial nature that appellant's constitutional right to a fair trial was impaired," is a reversal warranted. *State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007).

Senter alleges error in the prosecutor's comments during her rebuttal argument at the close of the jury trial. Senter takes issue with the prosecutor's statement that:

> The testimony has been very clear and very consistent that the other officers arrived after the assault happened. So, yes, five officers could have come in and testified about all of that, but it would have been things that would have happened after the crime occurred. That would have served to just cause more confusion and to distract your attention away from what the defendant did. That's not what this trial is about. What the other officers saw has already been in evidence.

Senter also criticizes this statement by the prosecutor: "What they did has already been in evidence. Officer Ross told you, yes, you know, they tased him twice . . . . That's not covering anything up. That's telling you what happened." Senter also finds fault in the prosecutor's rhetorical question: "[D]o you need to hear it, the same thing from five different people? We told you what was relevant. The people who saw the assault were here. They told you what they saw." Senter argues the prosecutor was improperly commenting on witnesses who did not testify at trial.

The prosecutor's comments were not improper. The matter being tried was Senter's assault of Officer Ross. The prosecutor was making it clear to the jury that the state presented the persons who witnessed that assault and that the officers who were not called to testify came on the scene after the assault. It is not improper for an attorney to explain to the jury what evidence relates to what facts or issues so as to avoid confusion

Next, Senter contends that the prosecutor engaged in impermissible vouching when she argued the credibility of the two citizen witnesses who were at the scene of the assault:

> [C.R. and M.R.] were very honest. They said we don't exactly remember. I'm not sure at times, they said, and that's what they meant. Go through the factors in these instructions and evaluate their credibility for yourself before you decide, before you jump to any conclusions about whether anybody was lying. They were consistent about what was important. They were consistent about how Officer Ross ended up on the ground. They were consistent about who was the aggressor.

Minnesota cases have failed to provide a clear test as to what constitutes so-called "vouching," preferring instead to engage in an ad hoc jurisprudence of "I-know-it-when-I-see-it." But it appears that vouching occurs when a lawyer ties the credibility of a witness to his own personal opinion or that of a party to the case instead of to the evidence and to the court's instructions, or implies a guarantee of truthfulness, or refers to facts outside the record. *State v. Gail*, 713 N.W.2d 851, 866 (Minn. 2006); *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006); *State v. James*, 520 N.W.2d 399, 405 (Minn. 1994); *State v. Starkey*, 516 N.W.2d 918, 927-28 (Minn. 1994).

Senter misunderstands the vouching proscription and broadens it to bar virtually any comment the prosecutor might make as to the credibility of witnesses. Despite the lack of a reasonably definitive rule or bright-line test in Minnesota, it is clear that a lawyer in final argument may argue the credibility of witnesses as long as the argument is tied to the evidence and the court's credibility instructions. *Gail*, 713 N.W.2d at 866; *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003). Additionally, an attorney in final argument can further avoid a claim of impermissible vouching by reminding the jury that ultimately the credibility of witnesses is exclusively their province. *See State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 2002) (explaining that assessment of credibility of a

witness is exclusively a jury determination); *In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006) (explaining that attorney's reminder, in conjunction with the court's instructions, to jury about its exclusive power to determine credibility negates prejudice stemming from improper vouching).

The prosecutor here did not express her personal opinion as to the credibility of the bystanders who testified; she did not intimate that either she or the state had any "inside" knowledge about the believability of these witnesses; and she implied no guarantee of truthfulness. Rather, she tied her credibility argument precisely to the evidence, pointing out consistencies and inconsistencies and arguing that there were no inconsistencies on dispositive points. She also invited the jury to review the credibility factors in the court's instructions and to evaluate credibility for itself. Senter's argument is completely devoid of merit

VI. Self-Defense Instruction

Senter contends that the court erred in failing to instruct the jury on self-defense. We note first that Senter never requested a self-defense instruction, nor did he object to the instructions the court gave. Thus, he has waived any error that might have occurred in the instructions given. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Despite this waiver, we may review the instructions for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

The first prong of the plain-error analysis requires a showing that an error of some sort occurred. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). The alleged error here is the omission of a self-defense instruction.

A defendant is entitled to a jury instruction on his theory of the case if the evidence supports the theory. *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977). The court is required to give a jury instruction only if it is warranted by the facts and the applicable law. *State v. Holmberg*, 527 N.W.2d 100, 106 (Minn. App. 1995), *review denied* (Minn. Mar. 21, 1995).

In a criminal case, a defendant who claims self-defense "has the burden of going forward with the evidence to support" the claim. *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). Once the defendant has done that, the burden is on the state to disprove the claim beyond a reasonable doubt. *Id.* An essential element of self-defense is "the absence of aggression or provocation on the part of the defendant." *Id.* at 285.

Senter did not testify or call any witnesses or submit any evidence at all. Thus, at the conclusion of the state's case, which also concluded the trial, the only evidence was that presented by the prosecution. Presumably a defendant may present evidence through cross-examination of the state's witnesses and thereby legitimately raise a self-defense issue that merits a jury instruction. But here the record shows that none of the evidence was sufficient to raise an issue of self-defense. *See generally State v. Soukup*, 656 N.W.2d 424, 432 (Minn. App. 2003) (noting the difficulty for a defendant to meet the burden of production for a self-defense instruction without testifying), *review denied* (Minn. Apr. 29, 2003). Furthermore, all the evidence, either directly or circumstantially, showed that Senter was the aggressor and the one who provoked the physical confrontation. Although Senter persists in his argument that he acted in self-defense, he

failed to carry his burden of going forward with evidence to support the claim. The court did not err in failing to instruct the jury on self-defense.

Senter bolsters his argument by pointing to a question from the deliberating jury: "Does it make a difference who initiated physical aggression?" Senter contends that such a question shows his entitlement to a self-defense instruction. Despite the question, there was no evidence to support the self-defense claim. A question from an astute and curious jury could not change that fact. The court did not err by directing the jury to reread the instructions on the assault charge. *State v. Laine*, 715 N.W.2d 425, 434 (Minn. 2006).

Affirmed.