STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0135

State of Minnesota,
Respondent,

vs.

Abel Miramontes,
Appellant.

Filed July 1, 2008
Reversed and remanded
Peterson, Judge

Dakota County District Court
File No. K7-05-3140

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

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hasting, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Bradford S. Delapena, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Toussaint, Chief Judge; and

Crippen, 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

PETERSON, Judge

In this appeal from convictions of two counts of first-degree controlled-substance crime, appellant Abel Miramontes argues that the state's failure to disclose a law-enforcement agent's pretrial identification of him as a participant in a controlled drug purchase was a prejudicial discovery violation that requires reversal of his convictions. Because the state's failure to disclose the law-enforcement agent's pretrial identification was a prejudicial discovery violation, we reverse and remand.

FACTS

In September 2005, Agent Joseph Gelhaye of the Dakota County Drug Task Force was contacted by B.M., a former confidential reliable informant (CRI), who said that he could arrange to purchase crystal methamphetamine through a former partner named Ranson Reyes. Gelhaye and B.M. agreed that B.M. would receive between $25 and $100 for every drug purchase completed.

On September 27, 2005, Gelhaye met B.M. at a prearranged location and gave him money to make a drug purchase. Gelhaye then followed B.M. as he first drove to pick up Reyes and then drove to the parking lot of an apartment complex at 1802 Oakdale Avenue, which was under surveillance by task-force officers.

After B.M. and Reyes arrived, a tan sedan pulled up, and a "Hispanic male" got out to speak with B.M. and Reyes. Officers checked the sedan's license-plate number and discovered that it was registered to Juan Coronado. Reyes and the Hispanic male went inside the apartment building for about 15 minutes while B.M. waited in the car.

Reyes came out of the building alone and got into B.M.'s vehicle. They drove to the parking lot of an apartment building at 386 Marie Avenue, and Reyes left the car, went inside the building, and returned after 15 minutes. Gelhaye later met with B.M. at a prearranged location, and B.M. gave Gelhaye a bag that contained 17.08 grams of crystal methamphetamine.

On October 11, 2005, Gelhaye met B.M. at a prearranged location and gave him money to purchase one-half ounce of crystal methamphetamine. Gelhaye followed B.M. to a nearby strip mall, where B.M. met Reyes in the parking lot. After speaking for several minutes, B.M. and Reyes went to the apartment building at 1802 Oakdale in separate vehicles. As before, the area was under surveillance.

Reyes went into the 1802 building alone for 19 minutes. When he left the building, Reyes and B.M. drove to the parking lot of the 386 Marie Avenue building, where Reyes once again went into the building alone. Fifteen minutes later, Reyes came out of the building and met briefly with B.M. before leaving in his own vehicle. B.M. met Gelhaye at the prearranged location and gave him a bag that contained 13.59 grams of crystal methamphetamine. Reyes was then stopped and arrested.

Law-enforcement officials obtained and executed search warrants for one apartment in the Oakdale Avenue building[1] and one apartment in the Marie Avenue building[2] and discovered drugs and drug paraphernalia. Appellant was in the Oakdale

[1] The apartment in the Oakdale Avenue building that was searched was Roberto Garcia's residence.

[2] The apartment in the Marie Avenue building that was searched was appellant's residence.

Avenue apartment when it was searched, and police found 2.81 grams of methamphetamine on his person. Appellant was arrested and charged with two counts of first-degree controlled-substance crime in violation of Minn. Stat. §§ 152.021, subds. 1(1), 3(a) (2004 & Supp. 2005), for the alleged drug sales on September 27 and October 11.

In a pretrial request for disclosure, appellant's counsel asked to be provided with "a statement describing in detail the methods and procedures used to identify [appellant] . . . as the perpetrator[] of the offense alleged . . . including . . . [t]he names and addresses of all persons to whom photographs were exhibited." Appellant's counsel also asked for "[t]he names and addresses of those persons who identified [appellant] and/or any known co-participants from these photographs . . . as perpetrators of this offense, and those who were unable to identify said person." The state did not disclose to appellant's counsel that any witness had viewed photographs of appellant or that any witness had identified the Hispanic male seen in the parking lot on September 27 as appellant. The state did disclose to appellant's counsel before trial (1) an incident report that Gelhaye wrote on September 28, which states that based on a driver's-license photo, Agent Andrew Speakman[3] identified the Hispanic male as Juan Coronado; and (2) a search-warrant application, which states that based on a driver's-license photo, Reyes identified Roberto Garcia as the person who sold him the methamphetamine. Appellant's counsel also had

[3] Speakman was one of the agents conducting surveillance of the September 27 controlled drug purchase.

the complaint, which states that based on a photo that Gelhaye showed Speakman, Speakman identified the Hispanic male as Juan Coronado.

The identity of the Hispanic male was an issue at appellant's trial. During his opening statement, the prosecutor told the jury that appellant was the Hispanic male who met with B.M. and Reyes in the parking lot on September 27. Appellant's counsel objected, and the objection was overruled. The state called Gelhaye as its first witness. Gelhaye testified about the details of the September 27 and October 11 drug purchases. While describing the September 27 purchase, Gelhaye did not identify the Hispanic male as appellant. When describing the meeting in the parking lot, Gelhaye testified: "[Reyes and B.M.] met with a Hispanic male. They talked for several minutes. Then this Hispanic male and Ranson Reyes went into the apartment building of 1802 Oakdale Avenue."

During a conference held after the jury was excused for lunch, the district court and counsel discussed the identity of the Hispanic male. The prosecutor stated that after observing the driver's-license photographs of appellant and Juan Coronado, and examining the statements of B.M. and Reyes, he believed that he had a reasonable basis to conclude that appellant was the Hispanic male in the parking lot. The prosecutor explained that he intended to ask Speakman if appellant was the man he saw in the parking lot. Appellant's counsel objected on the grounds that the state had not provided notice that Speakman could identify the Hispanic male as appellant.

After the prosecutor had an opportunity to confer with Speakman, the prosecutor told the district court that Speakman said that he could not positively identify the

Hispanic male as appellant. Appellant's counsel moved for a mistrial, which was denied, but the district court told appellant's counsel that he would be allowed to draft a curative instruction informing the jury that it could not find that appellant was the Hispanic male in the parking lot on September 27, 2005, because there was no evidence to support this.

The trial resumed, and during cross-examination, appellant's counsel asked Gelhaye if he could identify the Hispanic male in the parking lot on September 27. Gelhaye responded that he believed appellant was the Hispanic male. He stated that he formed this belief in late September or early October after carefully examining appellant's driver's-license photograph and discovering that he lived at 384/386 Marie Avenue, the site of the September 27 drug purchase. He explained that since the photographs of Juan Coronado and appellant looked so much alike given their similar ages and physical appearances, it was possible to initially confuse the two.

Gelhaye also testified that he did not use appellant's name in the October 11 warrant application that he prepared and that in the application, he mentioned only a "Hispanic male" in reference to the September 27 drug purchase. He also testified that he did not file a supplemental report stating that he believed appellant was the Hispanic male involved in the September 27 drug purchase and acknowledged that there was no written document stating that appellant was the person involved in the sale on September 27.

Speakman was the state's next witness, and he testified that the tan sedan in the parking lot on September 27 was registered to Juan Coronado and that Coronado's driver's-license photo closely resembled the Hispanic male that he saw in the parking lot on September 27. Speakman also stated that the Hispanic male closely resembled

appellant, but on cross-examination, he testified that he could not definitively state whether the Hispanic male was appellant or Juan Coronado.

After Gelhaye and Speakman testified, another conference between the district court and counsel occurred, and the district court informed counsel that the identity of the Hispanic male had become a fact question. The district court stated:

> The dynamics of this matter and this trial continue to have an ebb and flow to it, and the fact of the matter is that there is now a factual dispute based on the testimony of Officer Gelhaye as to the identity of the Hispanic male at the car on September 27, 2005. It became a fact issue when the defense counsel began inquiring along those lines. Direct examination had concluded, and there were no facts identifying the Hispanic male as [appellant], and there were no questions put to the officer to identify this Hispanic male as [appellant]. Furthermore, [the prosecutor] identified on the record to the Court, to defense in the presence of his client, that officer Speakman could not identify [appellant] as the Hispanic male on September 27, 2005, and, so, I don't see a discovery violation. As [the prosecutor] indicated, the information he had is what he had. Police officers don't put everything complete in their reports. What they think is important on the day they write the report may not be important facts that come up a year later. I don't find a violation. I can't give a curative instruction as requested by [defense counsel] to say that [the jury] cannot consider the statement of [the prosecutor], because now there is a fact dispute, and to take that away from the fact finder, in this Court's opinion, is clear error, and I have made my ruling.

During the rest of the trial, several witnesses were called, including Ranson Reyes. Reyes testified that he brought B.M. with him on September 27 and purchased the methamphetamine directly from "Jose" in the parking lot.[4] The state used a transcript of

[4] In the October 11, 2005 search-warrant application, Gelhaye included the following information provided to him by Ranson Reyes immediately following his arrest:

Reyes's May 30, 2006 guilty-plea hearing to impeach Reyes. At the hearing, Reyes stated that he bought drugs from a person named Vato, whom he identified as appellant, as well as Jose, whom he identified as Roberto Garcia. Following the reading of this transcript, Reyes asserted his belief that "Vato" means any Spanish person and that he referred to both appellant and Roberto Garcia as such.

The jury found appellant guilty as charged, and the district court sentenced him to concurrent executed terms of 86 months and 110 months. Appellant's motion for judgment of acquittal or a new trial was denied, and this appeal followed.

D E C I S I O N

When the issue depends on construction of a procedural rule, whether a discovery violation occurred is a legal issue, which this court reviews de novo. *State v. Bailey*, 677 N.W.2d 380, 397 (Minn. 2004). "The imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the trial court." *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). When exercising this discretion, a district court should consider (1) the reason why the disclosure was not

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> Reyes stated he purchased this methamphetamine in Apartment #307 from an individual he knows only as "Jose." Checking with management of the Holiday Acres, which includes 1802 Oakdale Avenue, they stated that the only lessee of that apartment is Roberto Garcia, DOB 03/28/82. Your affiant then showed a [driver's-license] photo of Garcia to Ranson Reyes. Reyes stated that Roberto Garcia is the person whom he knows as Jose and who had just sold him approximately one ounce of methamphetamine. Reyes then stated that the main source that he has to talk to before he goes to Garcia's apartment is a Hispanic male he knows only as "Vato." Reyes stated that Vato lives at 386 East Marie Avenue in Apartment #102. Reyes states that he generally drops off the money at 386 East Marie Avenue, Apartment #102, to the Hispanic male known as "Vato." Reyes stated that he drops off the money with "Vato" because he is the main source.

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. *Id*. "Generally, a new trial should be granted only if the defendant was prejudiced by the state's failure to comply with discovery rules." *State v. Ramos*, 492 N.W.2d 557, 560 (Minn. App. 1992), *review denied* (Minn. Jan. 15, 1993). Any misconduct by the state regarding discovery is considered "harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error." *State v. Scanlon*, 719 N.W.2d 674, 685 (Minn. 2006) (quotation omitted).

I.

Pretrial discovery rules play an essential role in the criminal-justice system. *Lindsey*, 284 N.W.2d at 372. By increasing the evidence available to both parties, the inherent fairness of the adversary system is enhanced. *Id.* Minnesota's "discovery provisions are broader than those of either the [American Bar Association] Standards for Discovery and Procedure Before Trial or the Federal Rules of Criminal Procedure." *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992) (quotation omitted). "Our rules, in effect, formalize the pre-rules practice of some prosecutors . . . of completely opening their files to defense counsel." *Id.*

In Minnesota, a prosecutor shall allow access to "all matters within [the prosecutor's] possession or control which relate to the case." Minn. R. Crim. P. 9.01, subd. 1. The prosecutor's obligation extends "to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report

or with reference to the particular case have reported to the prosecuting attorney's office." Minn. R. Crim. P. 9.01, subd. 1(8).

Gelhaye's pretrial identification of appellant as the Hispanic male is a "matter related to the case" under rule 9.01, subd.1, and Gelhaye "participated in the investigation or evaluation of the case" under rule 9.01, subd. 1(8). Thus, under rule 9.01, the prosecutor had an obligation to disclose Gelhaye's pretrial identification of the Hispanic male as appellant.

Respondent contends that no discovery violation occurred because Gelhaye never informed the prosecutor about his opinion that appellant was the Hispanic male involved in the September 27 drug purchase. But this court has explained:

> The prosecution has the duty to learn of any evidence known to others acting on the government's behalf, including police, and to disclose this information to the defense. Failure to disclose is not excused because the prosecutor . . . was unaware of the information. Such a failure constitutes a discovery violation.

State v. Smith, 655 N.W.2d 347, 354 (Minn. App. 2003), *rev'd on other grounds*, 674 N.W.2d 398 (Minn. 2004) (citations omitted); *See also Kaiser*, 486 N.W.2d at 387 (stating that "[a] prosecutor cannot circumvent the requirement of open-file discovery by not taking notes or by not putting things in the file that belong in the file").

We conclude that the district court erred in failing to find that a discovery violation occurred. The record supports the district court's determination that the prosecutor promptly notified the court and defense counsel when he learned that Speakman could not identify the Hispanic male, and there was no discovery violation

with respect to Speakman. But the prosecutor did not disclose that after viewing photographs, Gelhaye identified the Hispanic male as appellant. This failure to disclose was a discovery violation.

II.

Absent "a showing of prejudice to the defendant, the state's violation of a discovery rule will [generally] not result in a new trial." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). *But see Kaiser*, 486 N.W.2d at 386-87 (granting new trial based on intentional non-disclosure by prosecutor even though discovery violation may not have been prejudicial); *State v. Schwantes*, 314 N.W.2d 243, 245 (Minn. 1982) (granting new trial based on inadvertent nondisclosure by prosecutor even though evidence of appellant's guilt was strong).

A discovery violation is prejudicial when it affects a defendant's trial strategy. *State v. Moore*, 493 N.W.2d 606, 609 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). In *Moore*, a defendant charged with rape planned to assert consent as a defense. *Id.* at 607. Immediately before the omnibus hearing, the victim told the prosecutor that the defendant had a scab on his penis, but this information was not disclosed to defense counsel before the victim testified at trial. *Id*. at 608. After concluding that this failure to disclose violated Minn. R. Crim. P. 9.01, subd. 1(2), this court concluded that

> prejudice to the appellant is clear. Had he been apprised of complainant's pretrial statement about the scab, appellant may not have elected to rely on a consent defense at trial because complainant's knowledge of a scab or sore on his penis greatly diminishes the credibility of appellant's claim that complainant consented to intercourse.

Id. at 608-09. This court held that because of the clear prejudice to appellant's tactical decision to assert a consent defense, the district court abused its discretion by failing to order a new trial as a sanction for the discovery violation. *Id*.

As in *Moore*, the state's failure to disclose Gelhaye's identification of the Hispanic male as appellant was prejudicial to appellant's trial strategy of establishing that the Hispanic male in the parking lot on September 27 was not appellant. This strategy was based on the information that appellant obtained during discovery. Appellant expected Speakman to identify the Hispanic male as Juan Coronado and Ranson Reyes to identify him as Roberto Garcia and did not expect Gelhaye to identify the Hispanic male. As a result of Gelhaye's undisclosed identification, appellant's counsel inadvertently elicited testimony that the Hispanic male was appellant, which caused the district court to withdraw the opportunity to draft a curative instruction prohibiting the jury from finding that appellant was the Hispanic male. If appellant's counsel had been aware of Gelhaye's identification of the Hispanic male, he might have pursued a different trial strategy.

Because Gelhaye was the only witness who identified the Hispanic male in the parking lot on September 27 as appellant, other witnesses identified the Hispanic male as two people other than appellant, and the failure to disclose Gelhaye's identification impaired appellant's ability to deal with Gelhaye's identification, we cannot conclude that the jury's verdict was surely unattributable to the prosecutor's failure to disclose Gelhaye's identification. Thus, we conclude that the district court abused its discretion in refusing to grant appellant a new trial as a sanction for the state's discovery violation.

Because we are reversing both of appellant's convictions and remanding for a new trial, we decline to address appellant's claim that the prosecutor committed prejudicial misconduct by introducing issues broader than appellant's guilt or innocence.

Reversed and remanded.