

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2008).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-240**

State of Minnesota,
Respondent,

vs.

Dustin Alan Edsill,
Appellant.

**Filed October 19, 2010
Affirmed
Peterson, Judge**

Rice County District Court
File No. 66-CR-09-3141

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

Kurt S. Fischer, Faribault, Minnesota (for respondent)

Lance R. Heisler, Lampe Law Group, LLP, Northfield, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction of four misdemeanor counts of fifth-degree assault, disorderly conduct, and trespassing, appellant argues that the district court erred

in failing to either grant a continuance or suppress the testimony of a witness who was not disclosed until the eve of trial. We affirm.

FACTS

While at a bar, appellant Dustin Alan Edsill was behaving inappropriately toward women on the dance floor. Two of the women, one of whom was S.D., asked appellant to leave them alone, but he did not. S.D. then saw the bouncer escorting appellant and the people with him out of the bar.

Appellant and his brother resisted, so the bouncer turned around and was attempting to pull them out the door backwards. The bouncer tripped on the stairs and fell backwards, and appellant and his brother fell on top of the bouncer. Both appellant and his brother swung punches at the bouncer, and both men struck him. Bystanders pulled the two men off of the bouncer. When the bouncer got up from the ground, he saw appellant striking S.D. and someone holding appellant's brother down on the ground.

Appellant was charged with two counts of fifth-degree assault and one count each of disorderly conduct and trespassing. Appellant pleaded not guilty to the charges and demanded a speedy trial. The case was scheduled for trial on Monday, December 21, 2009.

At 5:20 p.m. on Friday, December 18, 2009, defense counsel received an e-mail from the prosecutor disclosing for the first time the name of a potential witness, who had been the disc jockey (DJ) at the bar the night of the assaults. Defense counsel had already left the office for the day and did not see the e-mail until Sunday. The prosecutor stated that the late disclosure occurred because the police report referred to the DJ but did

not say much about the DJ and did not state the DJ's name. The prosecutor met with witnesses who told him to talk to the DJ. But the witnesses gave the prosecutor an incorrect name that sounded similar to the DJ's name, and the prosecutor was not able to locate the DJ. The prosecutor called the bar, and the person who answered said that the DJ would contact the prosecutor. The DJ called the prosecutor at about 5:00 p.m. on the Friday before trial.

Defense counsel objected to the late disclosure. The district court noted that felony/gross misdemeanor discovery rules do not apply to misdemeanor cases and asked defense counsel what prejudice was caused by the late disclosure and whether the witness's testimony would differ from the information in the police reports. Defense counsel responded that the witness's testimony would differ from the information in the police reports and requested a continuance on the grounds that she had not had adequate time to prepare for trial because appellant's trial was her fifth trial in four weeks and that "[t]he addition of another witness is just one more thing that I am not prepared for." The district court did not specifically rule on the continuance request but stated that the court was also busy and needed "to be trying cases every week" to keep up with the calendar.

The DJ, who was also a special deputy with the Steele County Sheriff's Department, testified that he went outside and saw two men on top of the bouncer and that the two men were starting to beat on the bouncer. The DJ took out his taser and tased both men repeatedly. The DJ testified that the man on the right got up, walked over to S.D., and hit her, knocking her to the ground. The DJ identified appellant as the person who hit both the bouncer and S.D.

The jury found appellant guilty as charged. This appeal followed sentencing.

D E C I S I O N

“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 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.” *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). A new trial should be granted based on a discovery violation “if there is a reasonable probability that had the evidence been disclosed to the defense, the outcome of the trial might have been different.” *Id.* A defendant must show prejudice to warrant reversal based on the denial of a continuance. *Johnson v. State*, 697 N.W.2d 194, 198 (Minn. 2005).

Appellant argues that the district court erred in failing to grant a continuance when the prosecutor did not disclose the DJ as a witness until after 5:00 p.m. on Friday and trial was scheduled to begin the following Monday morning. In misdemeanor cases, any discovery beyond police investigatory reports is by consent of the parties or motion to the district court. Minn. R. Crim. P. 7.04 (2009). Appellant does not contend that the state violated this rule. Rather, appellant argues that when a police officer deliberately omits a witness’s name in a police report in order to disadvantage the defense, the unidentified

witness's testimony should be suppressed. But nothing in the record indicates that the investigating officer deliberately omitted the DJ's name from the report. There is no evidence that the investigating officer knew the DJ's name or received any information about the DJ's knowledge of the assaults beyond that stated in the police report.

Appellant argues that the DJ's testimony was critical to the state's case because the DJ was the only neutral witness in that he was not friends with either of the victims and was not involved directly in the altercation and because other witnesses had been drinking and were uncertain about the identity of who committed the assaults. Appellant's argument that S.D. knew only that "someone" hit her misstates S.D.'s testimony. S.D. testified that before the assault, she did not know appellant's name. At trial, she positively and unequivocally identified appellant as the person who hit her and testified that she had gotten a good look at him in the bar, and the record does not contain evidence that S.D. had been drinking.

Two other witnesses, J.K. and the bouncer, also positively identified appellant as the person who hit S.D. J.K. testified that appellant pushed S.D. to the ground and was on top of S.D. hitting her and punching her. The bouncer testified:

Q: And after the people were pulled off you, what do you recall happening?

A: . . . I got back up and I noticed that [appellant's brother] who was with [appellant] was on the ground, another gentleman was holding him down, and then looked over and I seen [appellant] attacking [S.D.]

Q: What do you recall seeing at that point?

A: Just -- there was just -- [S.D.] laid on the ground, him attacking her, a bunch of witnesses or people standing around trying to pull him off from what I could tell, so --

Q: Do you recall whether at that point he was standing up or on top of her, or how was he that you recall?

A: He would have been over -- on top of her, maybe kneeling or kind of down like that, I do believe.

Q: Did you see [appellant] strike [S.D.]?

A: Yeah.

Q: More than once?

A: Yep.

Regarding the assault on the bouncer, appellant notes that the bouncer was uncertain as to who struck which blows and how many times each assailant hit him. But the bouncer testified positively and unequivocally that both appellant and his brother were “on top of me swinging punches” and that both men hit him. Like the DJ, the bouncer was working that evening, and he did not drink when he was working. Although the bouncer was the victim of an assault, there is no evidence that he was otherwise biased against appellant.

Appellant argues that he did not have sufficient time to prepare to cross-examine the DJ about the taser gun. Appellant testified that the taser caused great pain, making it impossible for him to have gotten up and assaulted S.D. after being tased. The DJ testified that his gun was not completely effective because it was lacking a dart cartridge accessory that would have increased its power.

Appellant argues that he needed additional time to consult with experts to counter the DJ’s testimony about the taser’s ineffectiveness. Appellant, however, has made no showing that additional time would have resulted in him obtaining such expert testimony, and nothing in the record indicates that the DJ’s testimony was inaccurate. Appellant also argues that he needed additional time to compare the DJ’s statement with that of

other witnesses and to investigate his reputation for veracity. But this is a straightforward assault case, the DJ's testimony was consistent with that of other witnesses, and appellant has made no showing that it would not have been sufficient to interview the DJ during the first day of trial.

Appellant also argues that defense counsel's representation was inadequate because appellant's trial was defense counsel's fifth trial in four weeks. To prevail on an ineffective-assistance-of-counsel claim, appellant must "affirmatively prove that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotation omitted).

The district court's need to keep up with its caseload does not outweigh a defendant's right to a fair trial. But because appellant has not shown any prejudice, that the lack of disclosure was deliberate, or that the result of the trial would have been different, but for an error by counsel, he is not entitled to a new trial based on the district court's denial of a continuance or based on ineffective assistance of counsel. For the same reasons, appellant is not entitled to reversal based on the district court's failure to suppress the DJ's testimony.

Affirmed.