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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0446**

State of Minnesota,
Respondent,

vs.

DeSean Lamont Thomas,
Appellant.

**Filed April 17, 2017
Affirmed
Smith, John, Judge***

Dakota County District Court
File No. 19HA-CR-14-2948

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

James C. Backstrom, Dakota County Attorney, Dain L. Olson, Assistant County Attorney,
Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Rodenberg, Judge; and Smith,
John, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm Appellant DeSean Lamont Thomas's convictions because he fails to demonstrate prejudice entitling him to a new trial and because his pro se arguments lack merit.

FACTS

The state charged Thomas with one count of attempted second-degree murder (drive-by shooting), one count of drive-by shooting, and one count of firearm possession by an ineligible person following an incident in August 2014. Thomas confronted a man, K.D.L., on behalf of his sister, Breanna Harris, by driving up to K.D.L, exiting the vehicle and shooting K.D.L. Police recovered spent bullet cartridge casings and a phone case from the scene.

Thomas made his first appearance on August 22, 2014, and his counsel indicated, "[W]e would like to schedule this for a speedy." The parties scheduled an omnibus hearing but did not set a trial date. The district court noted Thomas's not-guilty plea and his speedy-trial demand on September 16, 2014. The parties scheduled a settlement conference for October 1, 2014, and a trial date for November 10, 2014.

On September 10, 2014, a BCA forensic scientist emailed the state's investigating detective concerning DNA testing:

I wanted to remind you that the Latent Print section does not perform examinations on bullets or cartridge cases. It was a policy changed about 8 months ago, cartridge and cartridge casings come to DNA due to a better chance of obtaining useable information from these small items of evidence.

I wanted to advise you that the BCA Biology Laboratory has received evidence in a criminal investigation I would like to be able to consume the sample I will take from the submitted cartridge cases to maximize the amount of DNA that may be recovered; however, need permission to do so[.]

...

Please note, testing will not proceed until I have received your written reply (if no one has been charged) or a reply from the prosecutor (if a suspect has been charged).

That email was forwarded to the prosecuting attorney on September 11, 2014. In a letter dated September 12, 2014, the state gave the following notice to defense counsel:

[A]s you know, the BCA has received evidence for this investigation. I have been notified that the Latent Print section does not perform examinations on bullets or cartridge cases [because] cartridges and cartridge casing[s] are now sent to [the] DNA division The planned testing of these items “may preclude any further tests or experiments” within the meaning of Minn. R. Crim. [P.] 9.01, subd. 1(4). . . .

The parties did not reach a resolution at their October 1 settlement conference. But during the conference, the state discussed its DNA-consumption notice with defense counsel. The state clarified its intent that the BCA would be instructed to proceed with testing on October 3, 2014, and that Thomas would need to arrange for an independent expert to observe testing by that date if he intended to do so. Defense counsel responded in a letter dated October 1, 2014, that the defense would not have its own expert present for the testing.

On October 3, 2014, the state emailed the BCA scientist with an instruction to proceed with DNA testing:

I have completed notification of the defense for the testing of the DNA sample on the cartridges which will use the entire sample. The Defense does not wish to have an expert present for the testing.

Therefore the testing on these items may proceed and it is OK if the entire sample is consumed.

On November 7, 2014, the BCA scientist emailed the prosecutor directly, in relevant part:

I wanted to advise you that the BCA Biology Laboratory has received evidence in a criminal investigation I would like to be able to consume the sample from “half of a black phone case” to maximize the amount of DNA that may be recovered[.]

The prosecutor responded within minutes, giving the BCA scientist permission to consume the entire sample.

The parties appeared for trial on Monday, November 10, 2014. The state indicated that it had not yet received the DNA results from the BCA and requested a one-week continuance. Defense counsel objected to the continuance, arguing that Thomas made a speedy-trial demand and that the testing was not labor intensive. The defense also highlighted the state’s ongoing discovery obligations, and the fact that the state was on notice of the case’s pace in light of the speedy-trial demand. Defense counsel also opposed the late introduction of DNA evidence, noting that she would have no opportunity to analyze the discovery or secure an expert witness to testify concerning the evidence. The district court denied the state any continuance, saying, “We are going to start a jury trial on Wednesday, and we are going to proceed with the evidence that’s submitted as of this date.

So if there is [newly discovered] information from the BCA, it should have been here before today.”

The parties appeared for trial on November 12, 2014, but the state moved the district court to reconsider its DNA-evidence ruling based on the state’s receipt of the BCA’s completed DNA analysis. In relevant part, the BCA indicated that the sample taken from the phone case was a major match to Thomas.

The BCA had apparently completed and faxed the DNA-testing results to the state “just after 8:00 p.m.” on Monday, November 10. The state also represented that it provided the BCA with notice of a November 11 trial date. In arguing for its reconsideration request, the state relied on *State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990), in which this court determined the district court abused its discretion by refusing the state’s request for a continuance pending DNA results. The state claimed that the one-week continuance would not have violated Thomas’s speedy-trial demand, and that it “did notify that DNA evidence was on the table, that it was relevant, and it was coming from the DNA back in September to defense.” Defense counsel reiterated its arguments concerning Thomas’s speedy-trial demand, the state’s discovery obligations, and the state’s knowledge of the BCA’s workload. It also pointed to the state’s alleged continuous failures to provide timely discovery.

The district court explained that “the [s]tate gave notice to the defense, we are going to test things, and you have the right to an expert there . . . and apparently, that was a three-week process for an answer from the defense, so here you have the candle burning on both ends.” The district court noted, “[The state] had to wait three weeks for the defense to say

whether they want an expert there. In the meantime, the BCA could have done the testing, but they had to wait three weeks.”

The district court granted the state’s continuance, but ultimately granted continuances to *both* parties to allow the defense time to review the evidence. It relied on *Stroud*, noting that “this continuance of one week is within the 60-day requirement,” and found that the prosecution had not committed any misconduct. (In its written order, the district court determined that “[t]his request for a continuance remained within ninety (90) days of [Thomas’s] request for a speedy trial.”) The district court also acknowledged the practical realities facing the BCA, the state, and the defense surrounding DNA evidence. Defense counsel reserved the right to file a suppression motion.

The parties next appeared for a hearing on December 15, 2014. Defense counsel requested that the DNA evidence be suppressed, this time arguing that the state never requested permission to consume the DNA sample for the phone case. The defense argued that it played no part in any delay regarding testing of the phone case. The parties also noted that Thomas was on a hold in three other counties, but the defense argued that Thomas’s speedy-trial demand was still being violated. The district court denied the suppression motion without an explanation.

The district court indicated it was prepared to proceed with trial on December 15, but defense counsel indicated it would be “tantamount to ineffective assistance of counsel” to proceed without further analysis or expert consultation. Thomas then waived his right to a speedy trial (despite the actual deadline expiring on November 14). Thomas selected a trial date of August 24, 2015.

At the trial that ultimately was held from October 19 through November 3, 2015, BCA forensic scientist Ross Thomas testified, in relevant part, to performing DNA analysis of the phone case. He testified that he received a known DNA sample from Thomas, and compared the sample to the DNA profile from the phone case. He identified a “major male DNA profile” that matched Thomas.

A jury found Thomas guilty of all three counts. The district court sentenced Thomas concurrently to 203 months for second-degree attempted murder and 60 months for prohibited possession.

DECISION

Thomas asks us to reverse his convictions and remand for a new trial. He argues that the district court abused its discretion by allowing the state to present DNA evidence despite allegedly prejudicial discovery violations. Thomas raises several additional issues in his pro se brief. The state urges us to affirm because there were no discovery violations, the district court did not abuse its discretion, and any potential prejudice was cured.

“If a party fails to comply with a discovery rule or order, the court may, on notice and motion, order the party to permit the discovery, grant a continuance, or enter any order it deems just in the circumstances.” Minn. R. Crim. P. 9.03, subd. 8. Whether a discovery violation occurred is a question of law we review de novo. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). But we review a district court’s decision to impose discovery-violation sanctions for an abuse of discretion. *Id.* A defendant must generally demonstrate prejudice before the state’s violation of a discovery rule will result in a new trial. *Id.*; see also *State v. Boldman*, 813 N.W.2d 102, 109 (Minn. 2012) (“Generally, a defendant must

show not only a discovery violation, but also prejudice as a result of the discovery violation before a new trial will be ordered.”).

We therefore consider whether a discovery violation occurred, whether the district court abused its discretion, and whether Thomas was prejudiced. Then we turn to Thomas’s pro se arguments.

I.

Thomas argues that the state violated its obligations to provide timely discovery and to provide notice that testing of the phone case would consume the entire DNA sample. The state contends that there was no discovery violation, but we disagree. “If a test or experiment . . . might preclude any further tests or experiments, the prosecutor must give reasonable notice and opportunity to the defense so that a qualified expert may observe the test or experiment.” Minn. R. Crim. P. 9.01, subd. 1(4)(b). And the rules impose a continuing discovery duty to disclose evidence “before and during trial” and require that disclosures be made “in time to afford counsel the opportunity to make beneficial use of [the evidence.]” Minn. R. Crim. P. 9.03, subd. 2(a), (c).

The correspondence between the state, the BCA, and defense counsel make clear and explicit references to bullets, cartridges, and cartridge casings *without* reference to the phone case. The state’s consumption notice to the defense referenced “bullets or cartridge cases” and its authorization to the BCA scientist also only referenced “cartridges.” The

state admits that it “made the mistake” of referring to “cartridges” rather than “evidence” in its relevant email.¹

The state’s miscommunication is necessarily tied to its last-minute disclosure of the relevant DNA evidence. The BCA gave the results to the state on the evening of the first scheduled day of trial, a Monday, and defense counsel did not receive preliminary results until that Wednesday morning. This disclosure did not provide the defense a reasonable opportunity to make use of the evidence for the scheduled trial. The state asserts that it could not disclose what was not yet in its possession. *See* Minn. R. Crim. P. 9.01, subd. 1. But the untimely disclosure traces its roots, like the defective consumption notice, to the state’s miscommunication. Having determined that there was a discovery violation, we consider whether the district court abused its discretion by not suppressing the evidence.

II.

Thomas argues that the district court abused its discretion by permitting the state to present the challenged DNA evidence. District courts should consider the four “*Lindsey*” factors when determining discovery sanctions: “(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors.” *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). The imposition of sanctions for discovery violations is a

¹ The state points us to a BCA report dated September 17, 2014, which references DNA testing and the phone case, and provides a notice that testing “may preclude further tests or experiments.” But this document appears only in the state’s addendum, not in the record preserved at the district court, and we therefore do not consider it. *See* Minn. R. Crim. P. 28.02, subd. 8.

matter “particularly suited to the judgment and discretion of the [district] court.” *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998) (quotation omitted). Suppression of evidence “is a severe sanction which should not be lightly invoked.” *Lindsey*, 284 N.W.2d at 374. The district court had two relevant opportunities to exclude the challenged evidence and declined to do so each time, but failed to provide a *Lindsey*-factor analysis.

Thomas alleges numerous errors amounting to an abuse of discretion. We have said that “failure to consider the *Lindsey* factors is an abuse of discretion.” *State v. Sailee*, 792 N.W.2d 90, 95 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). The fact that the district court was presented with an apparent continuance request followed by a suppression motion might explain the district court’s failure to address the *Lindsey* factors. But the district court still erred in calculating the speedy-trial deadline, and we do not think the defense was partially to blame for any delay given the state’s miscommunications. Regardless, under *Sailee*, the district court abused its discretion by failing to address the appropriate *Lindsey* factors.

III.

Thomas claims, “The trial court’s decision to allow the state to introduce newly disclosed DNA evidence at trial was highly prejudicial to Thomas.” Thomas focuses specifically on the district court’s ruling and its implications on his right to a speedy trial. He argues that the district court’s decision “forced [him] to decide between [two] constitutional rights: the right to a speedy trial and the right to effective assistance of counsel.” Thomas also claims that “the continuances necessitated by the court’s ruling further violated his right to a speedy trial.”

“Generally, without a showing of prejudice to the defendant, the state’s violation of a discovery rule will not result in a new trial.” *Palubicki*, 700 N.W.2d at 489. In *Lindsey*, the supreme court identified that the state was prejudiced by the defense’s discovery violation because it “had not taken steps to independently investigate what [the witnesses] might testify to because [the prosecutor] had not been put on notice that they might be called at trial.” 284 N.W.2d at 373–74. And the *Palubicki* court said that a district court’s determination should be reversed “only when the prosecutor’s misconduct, viewed in the light of the whole record, appears to be inexcusable and so serious and prejudicial that the defendant’s right to a fair trial was denied.” 700 N.W.2d at 489 (quotation omitted). Our caselaw has repeatedly clarified that the prejudice of a discovery violation refers to its effect *on the trial*. See, e.g., *Boldman*, 813 N.W.2d at 109 (“To establish prejudice a defendant must show that a reasonable probability exists that the outcome of the trial would have been different”); *State v. Scanlon*, 719 N.W.2d 674, 687 (Minn. 2006) (“[N]one of the violations were prejudicial, even cumulatively, and Scanlon was not deprived of a fair trial.”).

The state identifies that “the only possible prejudice was the last minute disclosure of the DNA causing insufficient time to prepare.” We think that *this* is the type of prejudice appropriate for consideration. But the closest Thomas comes to arguing the issue on appeal is that “the late disclosure was highly prejudicial because the defense lacked the time and resources to properly examine the new evidence.” Under a *Lindsey* analysis, insufficient time to prepare would obviously be prejudicial, but that analysis also considers the feasibility of rectifying prejudice with a continuance.

And consistent with a proper *Lindsey*-factor analysis, the ability to rectify any potential prejudice due to the inability to prepare is readily curable through a continuance. *See Lindsey*, 284 N.W.2d at 373 (considering “(2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance”). The state correctly emphasizes that “the trial had not started, no jurors had been brought into the courtroom, and [Thomas] had no witnesses to reschedule.” It urges that “a continuance was appropriate to allow [Thomas] time to prepare and was the correct remedy.” We agree that, even assuming that the district court abused its discretion, there was no prejudice to Thomas’s right to a fair trial because he received ample time to review the evidence and prepare. His case is unlike many other discovery-violation cases in which the alleged discovery error affects the fairness of the trial. *See, e.g., Palubicki*, 700 N.W.2d at 489 (failure to disclose witness communications and calling unnoticed witnesses); *Lindsey*, 284 N.W.2d at 372 (preclusion of testimony at trial as sanction for calling unnoticed witnesses).

Even if we entertained Thomas’s argument concerning his right to a speedy trial, his argument fails. We review a claimed speedy-trial violation de novo. *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015). But beyond a bald allegation that his speedy-trial right was violated, Thomas fails on appeal to address the appropriate four-factor analysis we apply to determine whether a defendant’s right to a speedy trial was violated. We consider: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether the delay was prejudicial. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (citing *Barker v. Wingo*, 407 U.S. 514, 530–32, 92 S. Ct. 2182, 2192–93 (1972)).

The length of the delay is only the *preliminary* factor which necessitates further review. *See Windish*, 590 N.W.2d at 315. Even if we consider Thomas’s alleged prejudice in the *Barker*-factor context, we still discern no actual prejudice. We consider three interests to determine whether a defendant suffers prejudice as the result of a delay: (1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired. *Id.* at 318. The first two concerns do not demonstrate prejudice because Thomas was under hold in other counties. *See id.* (“The first two concerns regarding prejudice do not apply . . . as *Windish* was already in custody for another offense.”). More importantly, Thomas does not indicate how the actual delay impeded his ability to defend himself.

Thomas’s pro se reply brief argues that he was prejudiced because he had no opportunity to have an expert present for testing of the phone case. We are unconvinced because defense counsel elected not to have an expert present for testing of the cartridge casings, which could have produced DNA evidence (though they ultimately did not), and because Thomas had the opportunity to review the evidence, cross-examine the state’s expert, and call the DNA evidence into question.

We are not unsympathetic to the choice Thomas faced when the district court denied his motion to suppress. But he has not demonstrated how the district court’s decision prejudiced him when he was able to continue his trial and prepare for the state’s presentation of the DNA evidence. Because Thomas fails to demonstrate that he was prejudiced, we are unable to grant him relief.

IV.

Thomas raises several issues in his pro se brief which we broadly categorize as: (A) prosecutorial misconduct; (B) irregularities in the proceedings; and (C) evidentiary challenges. None of his arguments compel us to reverse his convictions.

A. *Prosecutorial Misconduct*

Thomas argues that the state attempted to nullify the district court's decisions through frivolous filings (a petition for a writ of prohibition and a pretrial appeal). Though we ultimately denied the state's petition for a writ of prohibition, the denial does not suggest that the state's arguments were meritless or intended to delay the proceedings. We did not consider the merits of the state's subsequent pretrial appeal because the state voluntarily dismissed it. Thomas claims that the second matter, in which the state sought a continuance for a material witness, was frivolous because the witness did not want to testify. We reject this argument because a witness's unwillingness to testify does not preclude the state from subpoenaing a witness.

Thomas also claims the state misrepresented to the jury that Harris witnessed Thomas shoot K.D.L. Unobjected-to prosecutorial misconduct is subject to modified plain-error review. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). We observe no error, let alone a plain error, in the state's closing argument. And we do not address Thomas's argument regarding the state's candor with the district court concerning the DNA discovery because we have decided the ultimate question.

Lastly, Thomas argues that the state exhibited a general lack of respect for the district court, opposing counsel, and discovery requirements. Thomas's claims are

insufficiently developed and identify no basis for relief, but even then, our review of the record demonstrates no basis for ordering a new trial.

B. *Irregularities in the Proceedings*

Thomas identifies numerous issues that he believes deprived him of the right to a fair trial: (1) the district court reversed its initial DNA-evidence ruling; (2) he was pressured to decide between his right to a speedy trial and his right to effective assistance of counsel; (3) his attorney expressed particular frustration with the judicial system and process for Thomas's case; (4) his trial was not blocked to the same judge who heard the pretrial matters; (5) one of his attorneys went into labor and was not at trial; (6) the first jury paneled was released; (7) there were initially insufficient jurors for the second paneling attempt; and (8) the state filed frivolous petitions for writs of prohibition. We do not address those issues that relate to issues previously decided. As for the other issues, Thomas received the assistance of counsel, his case was heard by a jury, and a judge oversaw his case. We are not entirely unsympathetic to Thomas's dissatisfaction that his trial was transferred to a different judge. We think practical interests are better served when judges familiar with a case conduct the trial. Nonetheless, the issue is insufficient to warrant a new trial.

C. *Evidentiary Challenges*

Thomas argues that the evidence was insufficient to support his conviction and that Harris's testimony was insufficiently corroborated. Neither argument has merit.

"A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission

of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.” Minn. Stat. § 634.04 (2014). Thomas argues that “[n]o reasonable jury could have concluded that [Harris’s] testimony was sufficiently corroborated to result in [him] being convicted” He claims that Harris could not identify certainly who the shooter was, or who drove the red Ford Explorer.

First, Harris *did* testify that she saw Thomas “doing the shooting.” And when shown a photograph of the red Ford Explorer, Harris said the vehicle belonged to Thomas, and that he was “always driving it.” It was only on cross-examination that Harris claimed she merely “guessed” that it was Thomas who was shooting. She also claimed that she did not know who was driving the red Ford Explorer on the night of August 19, 2014.

But Thomas was later arrested in a red Ford Explorer and the DNA from the phone case placed him at the scene of the shooting. Corroboration is sufficient if it “reinforces the truth of the accomplice’s testimony and points to the defendant’s guilt in some substantial degree.” *State v. Bowles*, 530 N.W.2d 521, 532 (Minn. 1995). Especially in light of the DNA evidence linking Thomas to the scene, there is sufficient corroboration to support Harris’s testimony that Thomas was the shooter.

Thomas also argues that the circumstantial evidence was insufficient to support his conviction. When assessing a challenge to the sufficiency of the evidence, we analyze the record to determine whether the evidence, “when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach their verdict.” *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008). We ordinarily will not reverse a jury’s guilty verdict if it could have reasonably concluded that the defendant was guilty. *State v. Vang*, 847 N.W.2d

248, 258 (Minn. 2014). But when a conviction is based on circumstantial evidence, we apply heightened scrutiny and consider whether the proved circumstances and the reasonable inferences drawn from those circumstances are consistent with a defendant's guilt and inconsistent with any other rational hypothesis inconsistent with guilt. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). We think heightened scrutiny is inappropriate because Harris's testimony was direct evidence of Thomas's involvement in the shooting. And when viewed in the light most favorable to the verdict, there is sufficient evidence in the record supporting Thomas's guilt.

Affirmed.