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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0865**

State of Minnesota,
Respondent,

vs.

Quincy Darnell Harris,
Appellant.

**Filed April 10, 2017
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CR-15-5125

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Reilly, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant requests a new trial and reversal of his convictions of possession of controlled substances with intent to sell. Appellant argues that the district court abused its

discretion in denying his motion to exclude the state's expert testimony, which was not disclosed until the first day of trial, in violation of the rules of criminal procedure. Because appellant fails to demonstrate prejudicial error, we affirm.

FACTS

Testimony from trial established that on February 21, 2015, while on patrol in a marked SUV squad car, two police officers saw appellant Quincy Harris drive his car across an intersection and pull over to the side of the road without signaling. After stopping at the curb, Harris quickly exited the car. Without activating the emergency lights, the officers pulled up next to Harris and told him that they were stopping him because he did not signal. The officer on the passenger side of the squad car asked Harris for identification, but Harris said that he did not have any. Harris also said that his name was Warren Virgil Harris. The officer ran a computer search for Warren Virgil Harris, found an active arrest warrant, and arrested Harris. The officers searched Harris's pockets and found a photo identification card for Quincy Harris. Harris confirmed this was his true identity. Harris also had an active arrest warrant, so the officers placed him in the back of the squad car.

An officer testified that, before placing Harris in the squad car, he checked the seat, floor, and surrounding area of the back seat but found nothing. During the ten-minute car ride to the jail, the officers heard Harris "moving around a lot, scooting back and forth with his behind" and heard Harris's handcuffs rattling against the plastic seat. Officer testimony

established that it is typical to hear movement in the back seat of the squad car when an arrestee is trying to hide or dispose of incriminating evidence.¹

After Harris exited the squad car at the jail, the officers found two plastic baggies containing suspected controlled substances on the floorboard underneath the seat on which Harris had been sitting. One baggie contained eight smaller individually-packaged bindles of suspected controlled substances, each weighing between .368 and .393 grams. The second baggie contained ten smaller individually-packaged bindles, each weighing between .161 and .204 grams. The Bureau of Criminal Apprehension analyzed 9 of the 18 bindles; all 9 tested bindles were positive for heroin.²

The state charged Harris with second-degree sale of heroin and third-degree possession of heroin.³ Harris served the state with a discovery demand, requesting “all disclosures required by Rule [of Criminal Procedure] 9.01,” including the names and

¹ Although the squad car was equipped with video technology that could have recorded the back seat, the officers did not activate the video during Harris’s arrest.

² The total weight of the 9 bindles containing heroin was 3.253 grams—just above the minimum weight of 3 grams needed for second-degree sale and third-degree possession of heroin. Minn. Stat. § 152.022, subd. 1(1) (2014) (second-degree sale of heroin); Minn. Stat. § 152.023, subd. 2(a)(1) (2014) (third-degree possession of heroin). The Bureau of Criminal Apprehension’s standard procedure is to test the minimum amount of suspected controlled substances necessary to reach the next statutory charging level. Because the total weight of all 18 bindles would not have reached the next statutory charging level, the remaining 9 bindles were not tested for heroin.

³ The state also charged Harris with giving a false name to a peace officer. Through counsel, Harris admitted at trial that he gave a false name to the officer, but did not plead guilty. The charge was submitted to the jury.

addresses of all potential witnesses, including expert witnesses. The state responded by disclosing the names and addresses of five potential witnesses.

On the morning of the first day of trial, the state notified defense counsel that it would call Sergeant Thomas Peterson as an expert witness who would testify that Harris possessed the drugs with the intent to sell. The state had not previously disclosed the sergeant's name on its pretrial witness lists or provided any expert disclosures.

Harris moved to exclude the sergeant's expert testimony, in part, as a sanction for the untimely disclosure. In response, the state acknowledged that it had not received "the specifics" related to the sergeant's qualifications until that morning and that it had not "written down this information and passed it or disclosed it to the defense." But the state contended that its late disclosure did not require exclusion of the sergeant's testimony because the case had "been charged as possession with intent to sell since day one" and "it's not particularly unfamiliar" to have expert narcotics testimony when "dealing with a case like this."

The district court denied Harris's motion to exclude the sergeant's testimony because narcotics expert testimony "is very standard and typical type of testimony in these cases where it has been charged and there has been notice provided by virtue of the charge that it's a possession with intent to distribute." The parties proceeded through voir dire during the remainder of the first day and then recessed.

On the second day of trial, the state filed a second amended witness list, disclosing the sergeant as a potential witness, and began presenting evidence. The sergeant testified that the value of one gram of heroin is roughly \$100; a typical heroin user purchases

between 0.1 and 0.3 grams of heroin; and heroin users often employ implements to consume the drug, including heating devices, lighters, tin foil, cotton swabs, spoons, pipes, and needles.

The sergeant also testified that, in his opinion, there was a pattern in the packaging of the heroin found in the squad car; all of the heavier bindles were packaged together in one baggie and all of the lighter bindles were packaged together in a second baggie. The sergeant testified that it is common for drug sellers to divide bindles by weight to accommodate purchasers. Based on the packaging, the sergeant concluded that possession of 18 similarly weighted bindles of heroin was consistent with intent to sell heroin and inconsistent with personal use of heroin.

The jury found Harris guilty of all charged counts, and the district court sentenced him to 67 months in prison on the drug-sale conviction. This appeal follows.

D E C I S I O N

I. The state violated the discovery rules.

Whether a party has violated the discovery rules is a legal issue which this court reviews de novo. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). Minnesota has an “open-file” policy in criminal proceedings. *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992). “The rules are intended to give the parties complete discovery subject to constitutional limitations.” Minn. R. Crim. P. 9.05, cmt.

Minnesota Rule of Criminal Procedure 9.01 sets out the state’s discovery obligations. Relevant to this appeal, the state must disclose “[t]he names and addresses of witnesses who may be called at trial, along with their record of convictions, if any, within

the prosecutor’s actual knowledge.” Minn. R. Crim. P. 9.01, subd. 1(1)(a). Additionally, if the state intends to have “[a] person who will testify as an expert but who created no results or reports in connection with the case,” it must disclose “a written summary of the subject matter of the expert’s testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert’s qualifications.” *Id.*, subd. 1(4)(c).

The state’s initial rule 9.01 disclosures must be made upon the defense’s request, without court order, and before the Rule 11 omnibus hearing. *Id.*, subd. 1. The state has a “continuing duty of disclosure before and during trial.” Minn. R. Crim. P. 9.03, subd. 2(c). If a party learns of additional discoverable information after initial compliance with any discovery rules or orders, it must “promptly” disclose the information to the other party. *Id.*, subd. 2(b). All discoverable information “must be disclosed in time to afford counsel the opportunity to make beneficial use of it.” *Id.*, subd. 2(a).⁴

In Harris’s case, the state violated rule 9.01 when it failed to disclose the sergeant as a potential expert witness before trial and did not provide expert disclosures. While we recognize that the state is not required to disclose information it does not possess, the record

⁴ The state appears to argue that Harris forfeited his objection to the state’s discovery violations because he did not cite specific discovery rules in the district court and his arguments for exclusion of the state’s testimony were based primarily on evidentiary rules. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (“This court generally will not decide issues which were not raised before the district court.”). Harris’s failure to cite specific discovery rule violations in the district court does not result in forfeiture. Harris objected to the sergeant’s testimony because the state’s disclosure was untimely. This argument clearly stated the issue that is now pursued on appeal even if Harris failed to cite the relevant procedural rule in his oral motion in limine. *See generally State v. Brown*, 792 N.W.2d 815, 820 (Minn. 2011) (providing that an objection to admission of evidence must state a “specific ground . . . unless the ground for the objection is clear from the context of the objection” (citing Minn. R. Evid. 103(a))).

establishes that the state knew the sergeant was a potential witness before trial. *Cf. State v. Carlson*, 328 N.W.2d 690, 695 (Minn. 1982) (holding that the state did not violate rule 9.01 by supplementing its witness disclosures as soon as it discovered a new witness, whose identity the state did not discover until after trial began). According to the state’s memorandum opposing Harris’s pretrial motions, the sergeant’s name appeared on a police report in relation to the chain of custody.⁵ At the very least, the state should have identified the sergeant as a chain-of-custody witness. Also, narcotics expert “testimony is ‘typical’ in cases involving possession with intent to sell,” as the state acknowledges. Presumably, the state was also cognizant that the arresting officers did not witness an actual sale. The state therefore should have anticipated well before trial that it would call an expert witness regarding the intent element of the state’s case.

At trial, the state claimed that it did not disclose its expert earlier because it did not know the sergeant’s “specific” qualifications until the morning of trial. The state explained that “the way we do things in Hennepin County” is to “elicit” information about a narcotics expert’s qualifications “when we learn a case is actually going to go to trial.” This does not justify the state’s discovery violation. Under the applicable rules, the state should have identified its expert witness before the morning of trial, especially because this trial was continued once, giving the state extra time to complete its discovery obligations.⁶

⁵ The state’s memorandum referred to a police report, which stated that Sergeant “Tommy” Peterson “picked up the controlled substances from the BCA and returned them to property inventory.”

⁶ The district court scheduled a jury trial for November 17, 2015. On the first day of trial, counsel for both sides appeared in court, but Harris failed to appear. The trial was

Moreover, the state cannot circumvent the discovery rules by failing to apprise itself of information in law enforcement's possession. *See Kaiser*, 486 N.W.2d at 387 ("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.").⁷

Because Harris made a timely demand for expert-witness disclosures, the onus was on the state to promptly disclose its anticipated expert witness "to afford [Harris] the opportunity to make beneficial use of" the disclosure. Minn. R. Crim. P. 9.03, subd. 2(a); *see Palubicki*, 700 N.W.2d at 490 (providing that the state's discovery obligations are mandatory). Accordingly, the state violated the discovery rules.

II. Harris is not entitled to a new trial because the error was harmless beyond a reasonable doubt.

Harris argues that he is entitled to a new trial because the district court's failure to sanction the state for its discovery violation prejudiced him. This court reviews a district court's decision whether to impose a sanction for a discovery violation for an abuse of discretion. *Palubicki*, 700 N.W.2d at 489. "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

rescheduled for January 19, 2016. Before the second trial date, the state filed a first amended witness list, adding two new potential witnesses, but not the sergeant.

⁷ The United States Supreme Court also has stated that the prosecution is not excused from its discovery obligations just because law enforcement (and not the prosecution) possesses discoverable information. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 1568 (1995) (discussing state's *Brady* obligations). The Court has directed that large prosecution offices must establish "procedures and regulations" to ensure compliance with discovery rules "and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972) (same).

a continuance, or enter any order it deems just in the circumstances.” Minn. R. Crim. P. 9.03, subd. 8.

“[F]or discovery to achieve its intended purposes the rules must be complied with, and this requires that adequate sanctions exist for their enforcement.” *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). In *Lindsey*, the supreme court provided three factors for determining whether a court should impose sanctions for a discovery violation: “(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; [and] (3) the feasibility of rectifying that prejudice by a continuance.” *Id.*⁸ A continuance is the “preferred course of procedural conduct” to remedy a late witness disclosure. *State v. Hatton*, 389 N.W.2d 229, 236 (Minn. App. 1986), *review denied* (Minn. Aug. 13, 1986). “Preclusion of evidence is a severe sanction which should not be lightly invoked.” *Lindsey*, 284 N.W.2d at 374.

The district court did not apply the *Lindsey* factors because it determined that Harris had sufficient notice of the expert testimony “by virtue of the charge.” On appeal, Harris contends that the *Lindsey* factors weighed in favor of a sanction and, therefore, “[t]he district court should have precluded [the sergeant] from testifying or, at a minimum, continued the trial to allow Harris time to prepare a response to the proposed expert testimony.” The state responds that *Lindsey* does not require the district court to impose a

⁸ *Lindsey* also approved a fourth factor, “any other relevant factors.” 284 N.W.2d at 373. The fourth factor is not relevant in this appeal.

sanction.⁹ We conclude that the district court abused its discretion by failing to apply the *Lindsey* factors to determine whether to exclude the state’s expert testimony. *See State v. Sailee*, 792 N.W.2d 90, 95 (Minn. App. 2010) (holding that a district court’s “failure to consider the *Lindsey* factors is an abuse of discretion”), *review denied* (Minn. Mar. 15, 2011).

Despite this error, Harris is not entitled to a new trial if the error was harmless beyond a reasonable doubt. *Lindsey*, 284 N.W.2d at 374. An error is 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). Harris asserts that he was “significantly prejudiced” by the state’s late disclosure because he was unable to prepare an effective cross-examination of the sergeant and the last-minute addition of an expert “deeply affected” his ability to defend the second-degree sale charge. For the reasons that follow, we conclude that the district court’s failure to consider the *Lindsey* factors in deciding to admit the sergeant’s testimony was harmless beyond a reasonable doubt.

Initially, if we set aside the sergeant’s testimony, the state offered strong evidence proving that Harris possessed the heroin with the intent to sell. *See State v. Jackson*, 770

⁹ Alternatively, the state argues that the district court provided an adequate sanction by expressly allowing defense counsel the opportunity to object to the sergeant’s testimony if the state was unable to lay a proper foundation. We disagree. In the district court, Harris also argued that the sergeant’s testimony should be excluded because the state could not lay a proper foundation to establish that the sergeant was an expert under Minn. R. Evid. 702. The district court ruled that it would admit the sergeant’s testimony if the state laid a proper foundation establishing the sergeant’s expert qualifications. The district court’s comment resolved Harris’s evidentiary objection, which is not at issue in this appeal, and was not a remedy to the state’s discovery violations.

N.W.2d 470, 481 (Minn. 2009) (finding no prejudice from the state's discovery violation when the state's evidence was strong). First, one of the arresting officers testified that no implements for personal drug use were found on Harris during the routine booking search at the jail. The forensic scientist who tested the drugs also testified regarding the weight of each bundle. Additionally, the state submitted the scientist's lab report, showing that the bundles from the first baggie found in the squad car weighed more than the bundles from the second baggie. Each of these facts is circumstantial evidence supporting a finding of Harris's intent to sell the heroin. *See State v. Barajas*, 817 N.W.2d 204, 223 (Minn. App. 2012) (concluding that jury could reasonably infer that appellant possessed methamphetamine with intent to sell based on large quantity of methamphetamine and a digital scale recovered from appellant's apartment), *review denied* (Minn. Oct. 16, 2010).

Additionally, the state's untimely disclosure does not appear to have affected Harris's defense theory at trial, which focused on the state's burden of proof and the lack of evidence that Harris possessed the heroin. Harris has not explained how he would have changed his defense theory had the state disclosed its expert earlier. *See State v. Holmes*, 325 N.W.2d 33, 35 (Minn. 1982) (“[I]t is significant that the defense either has not made an effort to contact [the state's witness] since the trial or, if it has made an effort, has not succeeded. . . . the new trial would [not] be any different than the first one.”).

Moreover, Harris had an opportunity to thoroughly cross-examine the sergeant. *See State v. Jackson*, 773 N.W.2d 111, 127 (Minn. 2009) (holding state's discovery violation was harmless when defendant had opportunity to cross-examine witness about undisclosed evidence). During cross-examination, the sergeant agreed that heroin users can ingest the

drug by snorting it without using implements. He also agreed that there is no “scientifically reliable test” for determining what amount of heroin is consistent with personal use. Finally, the sergeant conceded that some heroin users purchase large quantities of heroin at one time to receive a discount. The trial transcript also shows that Harris objected throughout the state’s direct examination of the sergeant, and the district court sustained two of Harris’s objections.

Harris nonetheless argues that he did not have time to prepare an effective cross-examination because the district court did not grant him a continuance. But because the state did not begin presenting evidence until the second day of trial, Harris effectively received a one-day continuance to prepare for cross-examination. *See Hatton*, 389 N.W.2d at 236 (holding that a “short continuance” is the “preferred” remedy for late witness disclosure).¹⁰ Also, Harris does not explain how he would have cross-examined the sergeant differently had he had more time to prepare.

For these reasons, we conclude that the district court’s error in failing to apply the *Lindsey* factors was harmless beyond a reasonable doubt. Harris contends that this court may grant him a new trial even in the absence of prejudice, relying on the Minnesota

¹⁰ Because Harris did not specifically request a continuance, the state argues that the district court was not required to sua sponte grant one. The state relies on *State v. Pietraszewski*, which noted the defendant’s failure to request a continuance as a factor in determining that the district court did not err in admitting a state witness despite the state’s discovery violation. 283 N.W.2d 887, 891 (Minn. 1979). But *Pietraszewski* was decided before *Lindsey*, which directs a district court to consider granting a continuance to remedy a discovery violation. *See Sailee*, 792 N.W.2d at 95 (holding that a district court’s “failure to consider the *Lindsey* factors is an abuse of discretion”). Thus, because the district court was required to consider a continuance under the *Lindsey* factors, Harris did not need to request a continuance.

Supreme Court's decision to grant a new trial without a showing of prejudice "in the interests of justice" and "in the exercise of [its] supervisory power over the trial court." *State v. Hunt*, 615 N.W.2d 294, 299 n.6 (Minn. 2000). The state, however, correctly notes that these supervisory powers are reserved to the supreme court. *State v. Gilmartin*, 535 N.W.2d 650, 653 (Minn. App. 1995) ("As an intermediate appellate court, we decline to exercise supervisory powers reserved to this state's supreme court."), *review denied* (Minn. Sept. 20, 1995). Accordingly, we decline to grant Harris a new trial.

Affirmed.