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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1197**

State of Minnesota,
Respondent,

vs.

Jasmine Nicole Jones,
Appellant

**Filed July 3, 2017
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-14-30832

Michael O. Freeman, Hennepin County Attorney, Cheri A. Townsend, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges her second-degree intentional murder conviction, arguing that the district court abused its discretion by failing to exclude eyewitness testimony as a sanction for a discovery violation and by granting the jury's request to review surveillance

video during deliberations. Appellant also argues that the district court erred by allowing a single juror to direct how the surveillance video was replayed. We affirm.

FACTS

On October 18, 2014, at 1:08 a.m., appellant Jasmine Nicole Jones shot and killed L.N. at Augie's Cabaret, a Minneapolis nightclub. Jones fired a single shot from a handgun. The bullet struck L.N. below her left eye and traveled through her brain. The shooting and surrounding events were captured by surveillance cameras.

L.N., her sister T.N., and several of their friends were dancing at Augie's in the early morning hours of October 18. Surveillance video from camera 19 shows Jones approach L.N., T.N., and their friends at approximately 1:07:19. She walks around to the back of the group. At approximately 1:07:45, Jones, standing next to L.N., turns and faces the group and says something. Jones then turns away. At this point, L.N. puts her fist up in the air, moves towards Jones, and starts swinging. Jones punches back, and L.N. pushes Jones towards the back corner of the club and out of view of camera 19. T.N. and L.N.'s friends follow Jones and L.N. into the corner.

Surveillance video from camera 22 shows the back corner of the club. As Jones and L.N. move into the corner, R.G., an Augie's security guard, heads towards the fight. At approximately 1:08:08, a large group of people appear to be scuffling in the corner. There is a door in that corner of the club for a hallway that leads to a smoking patio. Camera 28 looks back on the door from the hallway. At approximately 1:08:08, someone opens that door and camera 28 shows multiple people swinging their fists in the corner of the club.

At approximately 1:08:14, R.G. can be seen in the corner on camera 22, and the fighting appears to have stopped. At about 1:08:17, Jones is pushed out of the corner. She stumbles back, stands, and then pulls something out of her shirt. No one is fighting or restraining Jones at this point. She walks back towards the corner. At 1:08:24, there is a flash of light next to where Jones is standing. While everyone else in the club ducks down, Jones stumbles backwards and then walks towards the door to the smoking patio. L.N. is lying in front of the door. L.N.'s friend M.B. is crouched down in front of L.N., and T.N. is standing over L.N.'s body. Jones walks around M.B., pushes T.N. out of the way, and bends down over L.N. She then flees the club through the door to the smoking patio.

Several hours after the shooting, Jones turned herself in. She gave police the handgun she used to shoot L.N. and the clothing she was wearing at the time of the shooting. She was subsequently charged with second-degree intentional murder.

The first day of jury selection Jones moved to exclude the testimony of security guard R.G. Jones argued that R.G. gave a statement to the prosecutor in October 2015 and that the state violated discovery rules by failing to disclose the statement and R.G.'s name until the week prior to trial. The district court acknowledged the late disclosure as "significant" but said that suppression of R.G.'s testimony was not the proper remedy. The district court further stated that it would grant a continuance for Jones's attorneys to deal with the late disclosure in whatever way they deemed necessary. The district court advised the attorneys to discuss the matter and let the district court know how they wanted to proceed. The next day, Jones's attorneys indicated that they wished to interview R.G., and the district court granted a half-day continuance to allow them to do so. An investigator

working for Jones interviewed R.G. on January 15, 2016. There was no renewed request for any future continuance.

T.N. testified at Jones's trial. T.N. and Jones went to high school together. L.N. and Jones knew each other through T.N. On the morning of October 18, 2014, Jones approached T.N. at Augie's and said, "What up, b--ch.?" T.N. did not respond. Soon after, L.N. started swinging her fists at Jones. The fight moved into the back corner. T.N. followed the fight to the corner. L.N. and Jones were punching each other and everyone else was trying to break up the fight. R.G. intervened and separated Jones and L.N. He positioned himself so that Jones was on one side of him and L.N. was on the other. T.N. was directly behind L.N., who had stopped fighting. M.B. was in front of L.N. Jones reached over R.G. and M.B. and shot L.N.

M.B. testified that she did not see anyone other than L.N. strike Jones. She also testified that the fight stopped when R.G. separated Jones and L.N. Jones was behind R.G., M.B. was in front of R.G., and L.N. was behind M.B. M.B. heard someone say, "[T]hey got a gun." She dropped to the ground. Then she heard the gunshot.

R.G., the security guard, began testifying January 20, 2016, and was cross-examined the next day. He testified that on October 18, 2014, there was a brawl at Augie's. Many people were fighting. R.G., however, did not see anyone other than L.N. strike Jones. He recognized Jones because she was a regular at Augie's. He started separating people and eventually made his way to Jones and L.N. He physically separated the women by pulling them apart and stepping in between them. He turned towards L.N. and put his hands on her torso. Jones was behind him. When he got between L.N. and Jones, the fight ended.

L.N. initially tried to get through him to Jones, but then realized that was not possible and stopped. At that point, R.G. heard the gunshot. The shot came from behind him.

The defense called F.M. He knows Jones and T.N. from high school. In the early morning hours of October 18, 2014, he was at Augie's. He was standing near where T.N., L.N., and their group were dancing. Jones turned to talk to him right before L.N. attacked her. When L.N. came after Jones, Jones grabbed L.N.'s head and said, "Get her." The women that were with L.N. then rushed towards the fight. Security also rushed towards the fight but were not able to stop it. He heard the gunshot before the fight stopped.

Jones testified in her own defense. She claimed that prior to October 18, 2014, L.N. threatened her multiple times. She walked past the area of the club where T.N., L.N., and the rest of their group were dancing to say hello to F.M. As she walked by, L.N. said something threatening. Then Jones said to T.N. and the rest of L.N.'s group, "Ya'll get her," meaning that the group should keep L.N. away from Jones. Jones continued to walk toward F.M. As she was saying hello to F.M., she saw L.N. coming towards her. She was eventually able to get L.N. off of her, but other people in the crowd closed in and started to punch and kick her. No security or anyone else came to her aid. She pulled out her gun, closed her eyes, and fired once. She testified that she did not intend to kill L.N. and that she fired in self-defense because she was frightened and wanted the assault to end.

During deliberations, the district court granted several jury requests to review the surveillance video. Every replay of the video was done in the courtroom, and each time the jury was brought into the courtroom for a replay, they were instructed to suspend deliberations until they returned to the jury room.

First, the jury asked for camera 28 and camera 22 each to be replayed separately five times. They also asked to have camera 28 and camera 22 replayed side-by-side twice. With the agreement of the parties, the district court granted the requests.

Later that day, the jury asked to have camera 22 replayed three times. On the second replay, it asked that the video be zoomed in and panned into the corner to put Jones in the center of the screen. Jones did not object to the request but asked that camera 28 be played at least once so as not to overemphasize camera 22. Camera 22 was played once, camera 28 was played once, and then camera 22 was played twice more. Camera 22 was zoomed in twice and panned to the upper-right hand corner on one of these plays.

The next morning, the jury asked to replay camera 22 seven more times, some full-speed, some frame-by-frame, and some zoomed in. The jury also asked if they could point at things on the video during the replays. With agreement of the parties, the district court denied the request to point at the screen because it would impinge on the secrecy of jury deliberations. The jury indicated that they still wanted to see the video again and asked if they would be permitted to direct the replays by saying “stop and go back a few frames.” Jones objected to any more replays of camera 22, claiming that it would overemphasize the evidence. Jones also argued that by focusing on the video the jury was “disregarding the burden of proof that’s placed upon the [s]tate.” In addition, Jones objected to allowing the jury to have the video stopped and rewind, saying that would be “invading the deliberations of the jury” and allowing the jury to deliberate in open court.

The district court overruled the objections. It, however, limited the number of replays of camera 22 to three and granted a defense request to also have cameras 19, 22,

28, and 36 played together, side-by-side once. During the replays of camera 22, the video was zoomed in six times and panned to the upper-right corner as much as possible. After the replays, the district court reread an instruction on the burden of proof. In addition, the district court gave the following instruction: “I do want to remind you that you’ve heard testimony from many witnesses over the course of the trial and that you’ve received many exhibits, all of which are relevant to your determination of the factual issues in this case.”

During the frame-by-frame replay of camera 22, one juror made several requests to stop the video, go back two or three frames, and then continue frame-by-frame. No other jurors spoke or made any indicative motions while the videos were played.

The jury found Jones guilty. The district court subsequently sentenced Jones to 144 months in prison. This appeal followed.

D E C I S I O N

R.G.’s testimony

Jones first argues that the district court abused its discretion by failing to exclude R.G.’s testimony. Although the prosecutor interviewed R.G. in October 2015, R.G.’s name and statement were not disclosed to Jones until the week prior to the January 2016 trial. In his statement, R.G. indicated that L.N. was “fully contained” at the time she was shot. The state does not claim that the late disclosure was not a discovery violation. Instead, it argues that exclusion of R.G.’s testimony was not the proper remedy.

“The imposition of sanctions for violations of discovery rules and orders is a 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). Accordingly, we will not disturb the district court's ruling "absent a clear abuse of discretion." *Id.* (quotation omitted).

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. . . . To establish prejudice a defendant must show that a reasonable probability exists that the outcome of the trial would have been different [if the discovery violation had not occurred]. This determination rests within the discretion of the trial judge, whose determination will only be reversed when the discovery violation, viewed in the light of the whole record, appears to be inexcusable and so prejudicial that the defendant's right to a fair trial was denied.

State v. Boldman, 813 N.W.2d 102, 109 (Minn. 2012) (citations omitted).

When considering sanctions for discovery violations, the district court should "take into account: (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). "Preclusion of evidence is a severe sanction which should not be lightly invoked." *Id.* at 374.

While the district court found that the late disclosure was "significant" and the statement was "a significant piece of information, and, obviously, important for the defense to have," it concluded that the remedy was not preclusion of R.G.'s testimony, signaled that it would grant a continuance to rectify any prejudice, and asked Jones's attorneys to decide how they wanted to proceed. The attorneys decided they wanted to interview R.G., and the district court granted a continuance to allow them to do so. The district court's thoughtful analysis demonstrates that it considered the *Lindsey* factors and determined that preclusion was not necessary because any prejudice could be remedied by a continuance.

Jones argues that the district court abused its discretion because the *Lindsey* factors weighed in favor of precluding the state from calling R.G. to testify. She argues that the state's failure to disclose R.G.'s statement was "egregious and willful." The district court did not make any determination as to the reason for the late disclosure, but there is nothing in the record to support Jones's argument that the untimely disclosure was willful. In fact, one of Jones's trial attorneys conceded that the late disclosure was not intentional. The attorney said, "I understand how this goes, everybody is overworked, everybody is busy." The attorney later said, "I know [the prosecutor] has been in good faith." The attorney's statements indicate that the late disclosure was an unintentional oversight caused by the prosecutor's heavy workload. Nevertheless, bad faith is not required to exclude evidence, and nothing in the record justifies the late disclosure. *See Lindsey*, 284 N.W.2d at 373 (affirming district court's preclusion of evidence based on discovery violation where violation "may not have been motivated by bad faith" but no "justification" existed).

Jones argues that the second *Lindsey* factor favors preclusion because she suffered significant prejudice as a result of the late disclosure. She claims that if she had known R.G. would testify that he had contained L.N. at the time the shot was fired,¹ she "could have called another witness—someone who also saw what happened in the corner—to rebut [R.G.]'s testimony." But both T.N. and M.B. also testified that R.G. separated Jones and L.N. before the shot was fired and that the fighting stopped before the shot was fired. Their testimony is supported by the surveillance video. Therefore, notwithstanding R.G.'s

¹ We note that R.G. did not specifically testify that L.N. was "fully contained." He testified that he was between L.N. and Jones and had his hands on L.N.'s torso.

statement, Jones had every incentive to seek out and call any witness who could rebut the claims that R.G. separated Jones and L.N. before the gunshot and that the fight stopped before the gunshot. In fact, Jones called F.M., who testified that security was unable to stop the fight and that the fighting continued up until the gunshot. Jones's claims about additional witnesses who could have rebutted R.G.'s testimony are pure speculation. Jones has not identified any specific witness whom she would have called or anything else she would have done differently had the state timely disclosed R.G.'s name and statement.

Moreover, Jones testified at trial that she had seen R.G. at Augie's multiple times prior to October 18, 2014. R.G. also testified that he knows Jones and recognized her that night because she is a regular at Augie's. Accordingly, Jones likely knew that R.G. witnessed the shooting because she either saw him and recognized him at the club on October 18, 2014, or recognized him from reviewing the surveillance video. Nothing prevented Jones from attempting to interview R.G. prior to the state's late disclosure.

Finally, any prejudice that could have resulted from the late disclosure was remedied by the continuance. The continuance allowed an investigator for Jones's attorneys to interview R.G. prior to opening statements in Jones's trial. R.G. was not cross-examined by defense counsel until nearly a week after this interview took place, and Jones did not request any further continuances to allow additional investigation or any other remedy after the interview. As the district court found in an order denying Jones's post-verdict motions, any prejudice from the discovery violation "was cured."

The *Lindsey* factors did not favor preclusion of R.G.'s testimony and, in light of the continuance and opportunity to interview R.G., Jones failed to show any prejudice as a

result of the late disclosure. By allowing Jones a continuance to interview R.G., the district court reached a prudent resolution that preserved each side's right to a fair trial. The district court did not abuse its discretion by allowing R.G. to testify.

Review of surveillance video during deliberations

Jones next argues that the district court abused its discretion by allowing the jury to watch several replays of the surveillance video from camera 22 during deliberations. Jones contends that the repeated replays of camera 22 “unduly emphasized the most critical piece of the state’s evidence.”

As a threshold matter, Jones claims that she objected to the jury’s second and third requests to review camera 22. We disagree. After the jury’s second request to review the video, Jones’s attorney requested that camera 28 be played at least once to avoid overemphasizing camera 22. The district court granted this request, and Jones made no further objection to the second group of camera 22 replays. Because Jones did not object to the jury’s second request to replay camera 22, we focus our analysis on the district court’s decision to replay camera 22 three times following the jury’s final request to review the video. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts generally do not address matters not argued to and considered by the district court).

The Minnesota Rules of Criminal Procedure permit the jury to review video evidence during deliberations and specify how this review must take place:

(2) Requests to Review Evidence. The court may allow the jury to review specific evidence.

(a) If the jury requests review of specific evidence during deliberations, the court may permit review of that

evidence after notice to the parties and an opportunity to be heard.

(b) Any jury review of depositions, or audio or video material, must occur in open court. The court must instruct the jury to suspend deliberations during the review.

(c) The prosecutor, defense counsel, and the defendant must be present for the proceedings described in paragraphs (a) and (b), but the defendant may personally waive the right to be present.

(d) The court need not submit evidence beyond what the jury requested but may submit additional evidence on the same issue to avoid giving undue prominence to the requested evidence.

Minn. R. Crim. P. 26.03, subd. 20(2). The district court has discretion to allow the jury to review evidence, and we will not reverse the district court's decision absent an abuse of discretion. *State v. Everson*, 749 N.W.2d 340, 345 (Minn. 2008). In determining whether to grant a jury's request to review evidence, the district court should consider the following factors: "(i) whether the material will aid the jury in proper consideration of the case; (ii) whether any party will be unduly prejudiced by submission of the material; and (iii) whether the material may be subjected to improper use by the jury." *State v. Kraushaar*, 470 N.W.2d 509, 515 (Minn. 1991) (quotation omitted).

The district court scrupulously complied with the procedural requirements of rule 26.03, subd. 20(2), and carefully and thoughtfully considered each *Kraushaar* factor. As to the first factor, the district court determined that the video would aid the jury because it captures the relevant events. This is undoubtedly true. Camera 22 was the only video that showed the shooting itself. The video was not of the highest quality, but both parties agreed

that Jones was visible on the video and that it captured the shooting. Because of the video's relatively low quality and the crowded group of people it depicted, it was necessary for the jury to review the video several times to fully comprehend what it portrayed. The video from camera 22 was clearly helpful to the jury in evaluating the two most important issues at trial: whether Jones acted in self-defense and whether Jones intended to kill L.N.

Second, the district court determined that neither party would be unduly prejudiced by additional replays of the video. Unlike a statement from a particular witness or other subjective evidence, the video objectively shows the pivotal events. The video from camera 22 does not have audio and so there are no statements on the video that favor either side. Both parties played the video repeatedly during witness testimony. In addition, the jury had already reviewed the video several times during deliberations without defense objection. There was no reason to believe that reviewing this objective and pivotal evidence three additional times would unduly prejudice Jones.

Finally, the district court determined that viewing the video three more times would not subject the evidence to improper use by the jury. The district court compared the soundless video to a series of photographs. Had the video been spliced into separate photographs, the jury would have been permitted to take the photographs with them to the jury room and review them as many times as they deemed necessary. *See Minn. R. Crim. P. 26.03, subd. 20(1)* (stating that the district court “must permit received exhibits or copies, except depositions and audio or video material, into the jury room”). Accordingly, there was nothing improper about replaying the video several times during deliberations.

Jones argues that the district court's decision to zoom in camera 22 six times for the final three replays made the replays unlike a series of still pictures. But, at trial, Jones agreed that zooming in the camera six times did not significantly distort the image, and Jones does not argue on appeal that the magnification misled the jury in any way. Jones argues only that the magnification and replays in general gave the evidence undue prominence. As stated above, the video from camera 22 provided an objective depiction of the shooting itself. It was the most pivotal evidence presented. It allowed the jury to view for themselves what happened that night and, in doing so, also assisted them in assessing the credibility of Jones and other witnesses. Allowing the jury to view the video three additional times did not give undue prominence to this vital evidence.

Moreover, the district court took precautionary steps to prevent the jury from focusing solely on camera 22. Although the jury requested seven replays, the district court only allowed three replays of camera 22. At defense request, the district court also played all four cameras side-by-side after the three replays of camera 22. In addition, the district court reminded the jury that all of the evidence was relevant to their factual determinations.

The district court fully complied with rule 26.03, subd. 20(2), and diligently considered and applied the *Kraushaar* factors. By limiting the number of replays, replaying videos from other cameras, and reminding the jury of other evidence in the case, the district court also took sensible steps to prevent the jury from placing undue emphasis on camera 22. The district court did not abuse its discretion by granting the jury's final request to review camera 22 and allowing three additional replays.

Juror directions during final replay

Finally, Jones argues that the district court erred by allowing one juror to direct the frame-by-frame review of camera 22 during the final group of replays. She argues that the juror's directions to stop, go back two or three frames, and continue frame-by-frame constituted impermissible deliberations in open court. She also argues that the juror improperly presented evidence and relieved the state of its burden of proof.

As stated above, when the jury reviews video evidence in open court, the district court must instruct the jury to "suspend deliberations during the review." Minn. R. Crim. P. 26.03, subd. 20(2)(b). The presence of nonjurors during deliberations "violate[s] the cardinal principle that the deliberations of the jury shall remain private and secrete in every case." *State v. Crandall*, 452 N.W.2d 708, 710 (Minn. App. 1990) (quotation omitted); see also Minn. Stat. § 631.09 (2016) (prohibiting nonjurors from speaking with jurors during deliberations or listening to deliberations).

Here, prior to the video replays, the jury was instructed to suspend deliberations. Only one juror spoke during the frame-by-frame replay of camera 22, and the juror gave only mechanical instructions to stop, go back two or three frames, and continue going through the video frame-by-frame. Those instructions were given to the prosecutor, who was controlling the video, not to another juror. Accordingly, there was no communication about the case between jurors and no deliberations took place in open court.

Jones claims that the juror's statements constituted deliberations because they "divulge[d] what part of the evidence [the jury] was focusing on." But any jury request to

review evidence necessarily reveals the evidence the jurors are focused on, and rule 26.03, subd. 20(2) allows the district court to grant jury requests to review specific evidence.

Jones also argues that by requesting to stop, rewind, and start the video the juror interfered with the state's burden of proof and improperly presented evidence. She compares the juror's directions to a juror questioning a witness. Juror questioning is not permitted in criminal trials because of concerns that it distorts the adversarial process, interferes with the neutrality and impartiality of the jury, and may assist the state in meeting its burden of proof by allowing jurors to elicit testimony that proves an element of the crime. *State v. Costello*, 646 N.W.2d 204, 211, 214 (Minn. 2002). These concerns, however, are not present here. The juror neither presented new evidence nor advocated for a particular interpretation of the evidence. The juror's mechanical directions simply facilitated the review of an exhibit that was already in evidence and that the jury had already reviewed several times. Moreover, to ensure that there was no confusion about the burden of proof, the district court reinstructed the jury after the video was played that it is the state's burden to prove the defendant guilty beyond a reasonable doubt.

The district court did not err by allowing a juror to direct when a video was stopped, rewound, and continued. The directions did not constitute deliberations, did not relieve the state of its burden of proof, and did not amount to the improper presentation of evidence.²

Affirmed.

² Jones also argues that the cumulative effect of the district court's errors deprived her of a fair trial. Because we conclude that there was no error, we do not address this argument.