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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1817**

State of Minnesota,
Respondent,

vs.

Mark Thomas McGowan,
Appellant.

**Filed July 9, 2018
Affirmed
Cleary, Chief Judge**

Stearns County District Court
File No. 73-CR-16-2881

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Kevin W. DeVore, DeVore Law Office, P.A., Woodbury, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Cleary, Chief Judge;
and Connolly, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Appellant Mark Thomas McGowan challenges his convictions of theft by swindle and diversion of corporate property, arguing that: (1) the district court erred in excluding

certain evidence as a discovery sanction; (2) he received ineffective assistance of counsel; (3) the district court's determination of guilt was based on an incomplete record; and (4) the district court erred in denying his motion for a new trial. We affirm.

FACTS

Until 2015, appellant was a member and 50% owner of an a cappella singing group, formed in 1994 as an Iowa limited liability corporation (the band). Appellant also served as the band's chief financial officer until 2010. In that capacity, he opened a bank account for the band, obtained credit cards and oversaw the financial aspects of the band, including bookkeeping and payroll responsibilities. Appellant and the other co-owner of the band received guaranteed payments twice per month. Appellant paid his co-owner via paper check and electronically transferred his own payments directly from the band's account into his personal account each month. Eventually the band hired a bookkeeper, who had access to the band's accounting software. In September of 2010, the bookkeeper observed appellant changing dates of payments made from the band to himself late at night on the band's accounting software. The other members of the band reviewed the financial records and discovered that appellant made \$21,850 in unauthorized transfers and misused the band's credit card for unsanctioned personal expenses in the amount of \$2,984.34 in 2010.

After a confrontation between the bandmates, safeguards were put in place to prevent further misuse and misappropriation of funds, and appellant agreed to pay back the \$21,850 to the band. Appellant continued to misuse the band credit card and spent an additional \$2,320.55 on personal expenses between 2011 and 2014. Appellant left the band in 2015 after a second confrontation about his misuse of the band's credit card. Later that

year, his bandmates filed a police report detailing the misuse of the credit card and misappropriation of funds.

Appellant was charged with theft by swindle and diversion of corporate property in 2016. On May 9, 2016, the state made its required disclosures and served appellant with a demand for discovery. Appellant's trial counsel (hereinafter "trial counsel") requested and received multiple continuances in order to obtain corporate records from the band. The district court eventually scheduled trial for May 1, 2017. Trial counsel was unsuccessful in compelling any discovery from the band and held a meeting on April 24, 2017 with the prosecutor, a police officer, and appellant to discuss additional discovery. The purpose of the meeting was for trial counsel to disclose electronic records that were on appellant's computer and other financial documents in his possession. The meeting ended without trial counsel making any disclosures.

Between April 24 and 26 of 2017, trial counsel disclosed hundreds of pages of documents, including emails between appellant and other members of the band and financial documents. The documents were on appellant's computer during the discovery process or were newly created by appellant himself. Instead of starting trial on May 1, the district court held an evidentiary hearing to address the admissibility of the newly disclosed documents. At the hearing, the parties agreed that the newly disclosed documents would be "pare[d] down" to a manageable level and provided to the state no later than 2:00 p.m. that afternoon.

Trial counsel then produced a set of documents that included new, yet-to-be-disclosed information more than two hours after the district court's deadline. The next day,

the district court addressed the late disclosures prior to trial. It was established that the documents trial counsel produced were in appellant's possession "all along." Trial counsel explained that he was not aware of everything appellant sent to the state and was not aware that his subsequent disclosure contained new information. But he stated he was ready "to go ahead with trial" because "realistically almost all of this information that's in [his] exhibit list" could be produced "from [the state's] witnesses." The district court excluded all of appellant's late disclosures after determining that exclusion was the proper discovery sanction under *State v. Lindsey*, 284 N.W.2d 368 (Minn. 1979). At trial, trial counsel referenced some of the documents that were excluded due to late disclosure, but was unable to introduce the documents through the state's witnesses due to objections by the state. Trial counsel was permitted to cross-examine multiple witnesses about the possibility that the alleged illegal transactions were a result of appellant taking funds to cover a corporate tax liability, and that the use of the credit card was actually permissible for personal purchases.

Appellant did not testify at trial and his trial counsel did not present any witnesses. In his closing argument, trial counsel argued that the state failed to prove the elements of theft by swindle because the transfers were not done with the intent to defraud and that appellant was entitled to these distributions based on his tax liability as a partner for the previous year. He argued that the state failed to meet its burden of proof with respect to the credit-card purchases because it failed to prove that appellant was the purchaser or that the purchases were made for personal expenses. The district court found appellant guilty on both counts.

Prior to sentencing, appellant retained new counsel. Appellant's newly retained counsel filed a motion for a new trial on August 16, 2017. The motion for a new trial was denied as untimely. Appellant received a stay of imposition and was ordered to pay restitution in the amount of \$13,010.89. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in excluding the untimely disclosures as a discovery sanction.

The district court excluded the untimely disclosed evidence after determining that the late disclosures violated Minn. R. Crim. P. 9.03 and that exclusion of the evidence was the proper sanction under *State v. Lindsey*, 284 N.W.2d 368 (Minn. 1979). Appellant argues that the exclusion of the evidence as a sanction deprived him of the right to present a defense. We disagree.

Minnesota Rule of Criminal Procedure 9.03 governs the regulation of discovery in criminal trials. All parties have a continuing duty to make timely disclosures. The “[d]iscovery rules are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.” *Lindsey*, 284 N.W.2d at 372 (quotation omitted). The rules are “designed to enhance the search for truth.” *Id.* (quotation omitted). District courts may sanction a party for failing to comply with discovery rules or orders and “may, on notice and motion, order the party to permit discovery, grant a continuance, or enter *any* order it deems just in the circumstances.” Minn. R. Crim. P. 9.03, subd. 8 (emphasis added).

“Trial courts have broad discretion in imposing sanctions for violations of the discovery rules.” *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998). Determining which sanction to impose for “violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the trial court” and “we will not overturn its ruling absent a clear abuse of discretion.” *Lindsey*, 284 N.W.2d at 373. In *Lindsey*, the supreme court laid out four factors that district courts should consider in determining appropriate sanctions for the nondisclosure of witnesses: “(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.* “[T]he preclusion of evidence is a severe sanction that should not be lightly invoked.” *State v. Freeman*, 531 N.W.2d 190, 198 (Minn. 1995).

The district court found that all four factors favored exclusion as a sanction. With respect to the first factor, the district court found that appellant’s reasons for the late disclosures “were unsatisfactory.” Appellant’s stated reasons for the late disclosures were that he feared he would be accused of altering the financial documents on his computer and he missed the deadline for paring down his disclosures because of other obligations and logistics. As to the second factor, the district court found that the prejudice to the state would be high because of the volume of the late disclosures and the detailed nature of the financial information in the documents. The district court also found that the third and fourth factors weighed in favor of exclusion because of the parties’ “opposition to granting a continuance, the numerous prior continuances during omnibus, and the [trial counsel’s] relative indifference to exclusion of his late disclosures.”

The district court properly applied the *Lindsey* factors in determining that exclusion of the evidence was the proper sanction. Appellant was in possession of the evidence and chose not to disclose hundreds of pages of correspondence and financial documents until days before the trial. In an attempt to rectify this breach of the rules of discovery, the district court gave appellant an extension to pare down the late disclosures to a manageable level. Instead, trial counsel disclosed new material combined with some of the previously identified late disclosures. The reason for the late disclosure weighs heavily against appellant. The second factor also weighs in favor of exclusion because, while the prejudice to the state may have been overstated given the nature of the evidence, the policy interest in preventing surprise still supports the sanction for late disclosure. The third factor also weighs in favor of exclusion as trial counsel stated that a continuance was not necessary.

As to the fourth factor, appellant argues that, unlike in *Lindsey* which involved the late disclosure of witnesses who did not have information related to the “predominant issue in the case,” the evidence he sought to introduce was related to the central issue of the case and had potentially exculpatory value. While the supreme court in *Lindsey* noted that the excluded witnesses did not possess evidence that related to the “predominate issue in the case,” they also noted that the testimony could have been excluded on other grounds and may have been cumulative. 284 N.W.2d at 374. Here, while some of the financial documents were related to the central issue of the case, many of the documents could have been excluded on relevance grounds and others would have been duplicative of the documents produced by the state. Accordingly, we conclude that the district court did not abuse its discretion in excluding the documents as a discovery sanction.

II. The performance of trial counsel did not constitute ineffective assistance of counsel.

Appellant argues that he received ineffective assistance of counsel because his trial counsel failed to investigate the evidence and to timely disclose exculpatory evidence. We disagree.

Criminal defendants have a right to the effective assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. To establish a claim for ineffective assistance of counsel, appellant must prove: “(1) that his counsel’s representation ‘fell below an objective standard of reasonableness’; and (2) ‘there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). The objective standard of reasonableness is defined as “representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). Generally, we need not address both prongs of the *Strickland* test if one is dispositive. *Hawes v. State*, 826 N.W.2d 775, 783 (Minn. 2013). Appellant bears the burden of proving both prongs of the *Strickland* test. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

“Trial counsel’s performance is presumed to be reasonable.” *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014). And this court will “not generally review a claim for ineffective assistance of counsel based on trial strategy.” *State v. Robertson*, 884 N.W.2d

864, 877 (Minn. 2016). Trial strategy includes “the extent of counsel’s investigation and the selection of evidence presented to the jury.” *Vang*, 847 N.W.2d at 267. Appellate courts have rejected ineffective-assistance-of-counsel claims based on the failure to hire a private investigator, *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986); failing to interview prospective witnesses, *Id.*; failing to call prospective witnesses, *Scruggs v. State*, 484 N.W.2d 21, 27 (Minn. 1992); and failing to pursue a theory of an alternative perpetrator, *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). “Such trial tactics should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight.” *Jones*, 392 N.W.2d at 236. Trial counsel “must have the discretion and flexibility to devise a trial strategy that best serves the client.” *State v. Brocks*, 587 N.W.2d 37, 43 (Minn. 1998).

Appellant’s challenge falls squarely within the scope of trial strategy. Appellant argues that trial counsel should have initiated a separate civil suit against the band to compel discovery,¹ made the decision to disclose the documents in appellant’s possession sooner, or advised appellant to testify after the documents were excluded. The record establishes that trial counsel requested and received multiple continuances in order to obtain corporate records from the band but abandoned his attempts to do so shortly before trial. Instead, he chose to disclose documents that had been in appellant’s possession

¹ Trial counsel’s failure to initiate a civil suit cannot be considered ineffective assistance of counsel: “[i]n contrast to the civil rules, the criminal rules allow only limited discovery” and criminal defendants “should not be permitted to circumvent the limited scope of discovery in the criminal proceeding by attempting to use civil-like investigatory tools.” *State v. Deal*, 740 N.W.2d 755, 763 (Minn. 2007).

throughout the discovery process in the days leading up to trial. After these disclosures were objected to, trial counsel made the strategic decision not to request a further continuance because he believed he would be able to elicit the testimony from a different source. Given the facts of this case and the high degree of deference we give to questions of trial strategy, we conclude that appellant has failed to establish that trial counsel's performance fell below the objective standard of reasonableness.

III. The district court did not err in finding appellant guilty based on the record.

Appellant claims that, because of the district court's discovery sanction, its finding of guilt was based on an incomplete record. We disagree.

We review an "erroneous exclusion of evidence that violates the defendant's right to present evidence" for harmless error. *State v. Blom*, 682 N.W.2d 578, 622 (Minn. 2004). We must be satisfied beyond a reasonable doubt that an average jury (i.e., a reasonable jury) would have reached the same verdict "if the evidence had been admitted and the damaging potential of the evidence fully realized." *State v. Greer*, 635 N.W.2d 82, 90 (Minn. 2001) (quoting *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994)).

Even assuming the evidence was excluded in error, the exclusion of the late disclosures was harmless. The evidence against appellant was strong. Testimony established that appellant had no right to the money he transferred into his account surreptitiously and that he misused the band's credit card for personal expenses. Further, testimony established that appellant acknowledged his wrongdoing, agreed to pay the band back, and failed to do so. Most importantly, appellant has failed to identify any specific information or any specific document or set of documents that contained exculpatory

information in the hundreds of pages of documents excluded based on their late disclosure. Therefore, even assuming the late disclosures were excluded in error, any error was harmless.

IV. The district court did not abuse its discretion in denying appellant’s untimely motion for a new trial.

Appellant argues that the district court abused its discretion in denying his motion for a new trial. We disagree.

A district court may grant a new trial in the interests of justice or any of the other six grounds for a new trial found in Minn. R. Crim. P. 26.04, subd. 1(1). The motion “must be based on the record” or a party may submit an affidavit or sworn statement containing pertinent facts not in the record. Minn. R. Crim. P. 26.04, subd. 1(2). The motion for a new trial must be served within 15 days after the verdict and must be heard within 30 days after the verdict, unless the court extends the period for good cause. *Id.*, subd. 1(3). The rules of criminal procedure do not allow a district court to extend the deadline for serving a new-trial motion. Minn. R. Crim. P. 34.02. We review a district court’s denial of a new-trial motion for an abuse of discretion. *State v. Green*, 747 N.W.2d 912, 917 (Minn. 2008).

The district court returned its verdict and written findings on June 16, 2017. After the verdict was returned and before sentencing, appellant retained new defense counsel. Appellant’s new counsel filed a motion for a new trial on August 16—more than a month after the 15-day deadline lapsed. Appellant argues that the district court abused its discretion by not exercising its discretion because it still had jurisdiction over the motion even though it was untimely, relying on this court’s decision in *State v. DeLaCruz*, 884

N.W.2d 878 (Minn. App. 2016). Appellant's reliance on *DeLaCruz* is misplaced. *DeLaCruz* involved a timely filed new-trial motion, followed by an amended motion that included newly discovered evidence, after the 15-day deadline lapsed. 884 N.W.2d at 882. Here, unlike *DeLaCruz*, appellant's untimely motion was not tied to a timely filed motion and therefore the district court did not have discretion to extend the filing deadline.

Moreover, a district court does not abuse its discretion in denying a new-trial motion that "only summarily listed the grounds for a new trial without citing any authority." *State v. Ahmed*, 708 N.W.2d 574, 585 (Minn. App. 2006). Here, appellant's motion for a new trial was approximately one page and did not cite any authority other than rule 26.04. Because appellant's new-trial motion was untimely and summarily listed the grounds for a new trial without citations to the record or to caselaw, the district court did not abuse its discretion in denying the motion.

Affirmed.