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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0316**

State of Minnesota,
Appellant,

vs.

Robert Lawrence Lathrop,
Respondent.

**Filed September 10, 2018
Reversed and remanded
Bratvold, Judge**

Dakota County District Court
File No. 19HA-CR-17-3653

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

James C. Backstrom, Dakota County Attorney, Tori K. Stewart, Assistant County Attorney, Hastings, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for respondent)

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

UNPUBLISHED OPINION

BRATVOLD, Judge

The state appeals the district court's decision to stay adjudication of a domestic assault conviction against respondent Robert Lawrence Lathrop. Because the district court

abused its discretion by staying adjudication of Lathrop's conviction without determining that the prosecutor abused her charging discretion, we reverse and remand for resentencing consistent with this opinion.

FACTS

On September 1, 2017, police responded to a call about an assault. At the residence, police found Lathrop's wife (wife) unconscious. Lathrop's daughter (daughter), who was 17 years old at the time of the incident, told police that she and Lathrop had an argument and Lathrop slapped her in the face. The slap caused daughter to suffer a "small abrasion on her right eye lid," and "her blood vessels in her eye had popped."

Daughter told police that she "pushed and slapped" Lathrop, who pushed her back. Daughter also said that wife stepped between them "to deescalate the situation." Lathrop pushed wife "out of the way, which caused her to fall and hit her head" on the ground. Police noted that wife had "a large bump on the back of her head." Daughter's boyfriend confirmed daughter's account in his statement to police. Investigators were unable to speak to wife, who was hospitalized, "because she was in and out of consciousness." Police arrested Lathrop, who spent four days in jail. Lathrop told police that he slapped daughter and "was unsure" how wife fell.

On September 4, 2017, wife wrote a letter to the district court stating that Lathrop did not push her but acknowledging that Lathrop slapped daughter. Wife's letter stated that she had tripped, leading to her injuries.

On September 5, 2017, the state charged Lathrop with third-degree assault (count I), under Minn. Stat. § 609.223, subd. 1 (2016), and domestic assault (count II), under Minn.

Stat. § 609.2242, subd. 1(2) (2016). The state based count I on Lathrop pushing wife and count II on Lathrop slapping daughter.

About the same time, a pretrial release report was filed with the district court along with an addendum, which summarized wife's statement that Lathrop had "pushed their son and slapped their daughter in the past." The summary also stated that wife was not concerned for her safety if Lathrop was released from jail, but that she did not want any contact with Lathrop and wanted a domestic abuse no contact order (DANCO). The same summary included statements from daughter, who said, "I'm very concerned for my mother, because my dad has mentally abused her for a long time."

On September 5, 2017, the district court conditionally released Lathrop and imposed a DANCO, preventing Lathrop from returning home and prohibiting any contact with wife and daughter.

Later that month, wife filed a written motion to modify the DANCO to remove herself as a protected person but did not request any changes regarding the DANCO's protection of daughter. Wife's motion included an affidavit, in which wife described the incident as follows: "I believe that I actually tripped over a door that was leaning against the wall in the hallway next to the doorway into our daughter's room . . . as I tried to pull Robert away, I tripped on this door and fell backward and then hit my head on the wall or doorframe." She continued, "I do not believe that I fell as the result of Robert pushing me in any way." At a hearing addressing the DANCO, wife repeated the statements in her affidavit. The state objected to modifying the DANCO, and the district court denied the motion.

On October 26, 2017, wife and daughter filed new affidavits, asking the district court to cancel the DANCO. Daughter stated that wife could no longer afford house payments because of hotel costs incurred for Lathrop's separate housing and that neither daughter nor wife were afraid of Lathrop. At a November 9 hearing to address wife and daughter's affidavits, the state recognized the financial hardship that the DANCO imposed, but opposed cancellation, citing wife's and daughter's safety. The district court declined to cancel the DANCO, but modified the order to allow contact in "a professional setting," noting that Lathrop had started anger management programming.

On December 18, 2017, the first day of Lathrop's scheduled trial, he entered into a plea agreement with the state. Lathrop pleaded guilty to count II, admitting that he slapped daughter in the face, and the state dismissed count I. The district court cancelled the DANCO and ordered a presentencing investigation (PSI). The PSI report recommended a stay of adjudication and one year of probation.

At sentencing, on February 15, 2018, the state opposed the recommended stay of adjudication and asked for a stay of imposition and one year of probation. The district court ordered a stay of adjudication, imposed one year of probation, and required Lathrop to complete anger management. The state objected to the stay of adjudication and now appeals under Minn. R. Crim. P. 28.04, subd. 1(4).

D E C I S I O N

"Generally, a prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the prosecutor's exercise of that discretion." *State v. Foss*, 556 N.W.2d 540,

540 (Minn. 1996); *see also* Minn. Const. art. III, § 1 (stating that “[n]o person or persons belonging to or constituting one of [the three departments of government] shall exercise any of the powers properly belonging to either of the others except” when explicitly constitutionally authorized). Further, Minnesota law provides that except “upon agreement of the parties, a court may not refuse to adjudicate the guilt of a defendant who tenders a guilty plea” unless an exception applies, as set out in statutes that are not applicable here.¹ Minn. Stat. § 609.095(b) (2016). Based on this statutory provision, we have held that a stay of adjudication usually requires the prosecutor’s consent. *State v. Martin*, 849 N.W.2d 99, 102 (Minn. App. 2014), *review denied* (Minn. Sept. 24, 2014).

Rarely, a district court may order a stay of adjudication over the prosecutor’s objection. *State v. Lee*, 706 N.W.2d 491, 496 (Minn. 2005). Doing so requires that the district court find the prosecutor clearly abused her discretion “in the exercise of the charging function.” *Id.* (quotation omitted). “This standard is not satisfied by a district court’s ‘mere disagreement . . . with the prosecutor’s exercise of the charging discretion.’” *State v. Strok*, 786 N.W.2d 297, 303 (Minn. App. 2010) (quoting *Foss*, 556 N.W.2d at 541). Additionally, before ordering a stay of adjudication over a prosecutor’s objection, the district court must find “special circumstances,” specifically, injustices resulting from the

¹ Section 609.095(b) refers to two exceptions to the general rule that a district court may not grant a stay of adjudication over the prosecutor’s objection. First, it refers to Minn. Stat. § 152.18 (2016), which applies to certain first-time drug offenders. Second, it refers to Minn. Stat. § 609.375 (2016), which provides that a person may not be charged with a crime regarding nonsupport of a spouse or child unless there “has been an attempt to obtain a court order holding the person in contempt for failing to pay support or maintenance.” Minn. Stat. § 609.375, subd. 2b. Neither exception applies here.

prosecutor's abuse of discretion. *Foss*, 556 N.W.2d at 540-41. Whether a district court has exceeded its authority by ordering a stay of adjudication over the prosecutor's objection raises a question of law, which we review de novo.² *Strok*, 786 N.W.2d at 303.

The state argues the district court erred in ordering a stay of adjudication over the state's objection because the district court did not find that the prosecutor abused her charging discretion. Instead, the district court stated, "With regard to the stay of adjudication, I do find under special circumstances, given the statement that [wife] has provided regarding the history and the circumstances of this case." We agree with the state; the district court did not find that the prosecutor abused her discretion and, as a result, erred in ordering a stay of adjudication over the state's objection.

Lathrop suggests the district court implicitly determined that the prosecutor abused her charging discretion. Even assuming, without deciding, that the district court made the required finding, the record does not support it. The supreme court has stated "evidence of selective or discriminatory prosecutorial intent" shows prosecutorial abuse of discretion sufficient to support a stay of adjudication over the state's objection. *Lee*, 706 N.W.2d at 496 (quotation omitted). While this is only one example, the example sets a high bar.

² Lathrop disagrees with this standard of review, relying on *State v. Angotti*, in which this court applied a discretionary standard of review to a district court's decision to grant a stay of adjudication over the state's objection. 633 N.W.2d 554, 556 (Minn. App. 2001). But more recent decisions have held that de novo review applies. See, e.g., *Martin*, 849 N.W.2d at 105 ("This court applies a *de novo* standard of review to a district court order that precludes adjudication of a defendant's guilt."); *Strok*, 786 N.W.2d at 303 (applying de novo review to determine if district court erred in granting continuance for dismissal and citing caselaw about stays of adjudication).

Lathrop contends the record supports a finding of prosecutorial abuse of discretion for three reasons, which we consider in turn.

First, Lathrop argues the prosecutor abused her discretion because, shortly after the incident occurred and charges were filed, wife insisted Lathrop did not push her. But the state dismissed count I, which is the only count based on allegations that Lathrop pushed wife. As a result, we conclude wife's statements that Lathrop did not push her are not relevant in determining whether the prosecutor abused her charging discretion.

Second, Lathrop argues the prosecutor abused her discretion because neither wife nor daughter wanted the state to prosecute Lathrop. Lathrop relies on an opinion in which the supreme court upheld a stay of adjudication, citing *State v. Krotzer*, 548 N.W.2d 252, 256 (Minn. 1996). *Krotzer* refers to three reasons: the victim did not wish to press charges,³ the district court "strongly disagreed" with the prosecutor's decision to file charges, and "justice would not be served by giving [defendant] a criminal record as a predatory sex offender." *Id.* at 254-55.

We agree that *Krotzer* appeared to hold that the previously described facts were "special circumstances" that justified the stay of adjudication. *See id.* But since *Krotzer* was issued, the supreme court has issued subsequent opinions clarifying the applicable standard: district courts must find a clear abuse of prosecutorial charging discretion *in addition* to "special circumstances." *See Lee*, 706 N.W.2d at 496. *Krotzer* did not suggest

³ The supreme court did not specifically note that the victim and her family did not want the state to prosecute Krotzer, but this court's opinion made note of that fact. *State v. Krotzer*, 531 N.W.2d 862, 867 (Minn. App. 1995), *aff'd in part, rev'd in part on other grounds*, *State v. Krotzer*, 548 N.W.2d 252, 256 (Minn. 1996).

that charging the defendant over the victim's objection was an abuse of prosecutorial discretion. The prosecutor's wide charging discretion does not hinge on the victim's approval. *See Strok*, 786 N.W.2d at 303 ("A prosecutor justifiably may choose to charge or not charge a person based on a report of criminal conduct, and may choose to pursue or not pursue an alleged offense, based on many legitimate factors . . .").

Third, Lathrop argues that the prosecutor abused her discretion by prosecuting the case and by objecting to cancelling the DANCO, despite the financial hardship experienced by wife. Lathrop cites no legal authority supporting his claim that a prosecutor abuses her discretion in this circumstance. Further, Lathrop does not dispute that the prosecutor had statements from wife, daughter, and daughter's boyfriend that established probable cause for count II, the domestic assault of daughter. Moreover, Lathrop pleaded guilty to count II. Additionally, the district court considered modifying the DANCO, yet repeatedly refused to do so based on the entire record. Given probable cause to support count II, Lathrop's guilty plea to count II, and the district court's determination that a DANCO was warranted, we reject Lathrop's argument that this record supported a finding that the prosecutor abused her discretion.

Reversed and remanded.