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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1999**

State of Minnesota,
Respondent,

vs.

Gary Stanton Rousey,
Appellant.

**Filed October 26, 2020
Affirmed
Johnson, Judge**

Blue Earth County District Court
File No. 07-CR-18-2421

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

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

Considered and decided by Frisch, Presiding Judge; Johnson, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A Blue Earth County jury found Gary Stanton Rousey guilty of misdemeanor theft based on evidence that he stole several items from a grocery store. Rousey argues that the

district court erred by overruling his objection to the testimony of a store employee who had investigated the theft. He contends that the employee's testimony should have been excluded on the ground that the state did not comply with its discovery obligations. We conclude that the state did not fail to comply with its discovery obligations and, thus, the district court did not err by admitting the store employee's testimony. Therefore, we affirm.

FACTS

In June 2018, the state charged Rousey with one count of misdemeanor theft, in violation of Minn. Stat. § 609.52, subd. 2(a)(1) (2016). The state alleged that, on May 28, 2018, Rousey took three fans and four T-shirts from a Hy-Vee store in Mankato without paying for the items.

The case was tried to a jury on one day in October 2019. The state called three witnesses, including L.W., a Hy-Vee loss-prevention and asset-protection officer. L.W. testified that a customer reported Rousey's conduct to a store manager, who referred the matter to him the following day. L.W. reviewed Hy-Vee's surveillance video-recordings and determined that Rousey put three fans in his cart, left the store without paying for the fans, returned to the store, put four T-shirts under the shirt he was wearing, and left the store without paying for the T-shirts. The state introduced the video-recordings into evidence.

During L.W.'s testimony, he stated that he determined that Rousey did not pay for the fans or the T-shirts because he had referred to the store's "electronic journal." Rousey objected to L.W.'s testimony on the ground that the state had not disclosed the existence

of an electronic journal. The prosecutor stated that she also was unfamiliar with the electronic journal, and she sought permission to inquire further into that subject. L.W. explained that the store's electronic journal records all transactions at the store's cash registers and that the electronic journal did not contain any record of a purchase of either the fans or the T-shirts that Rousey removed from the store. Rousey renewed the objection. The district court overruled the objection.

During the defense case, Rousey testified that he went to Hy-Vee that day to purchase fans. He testified that he brought two fans to a cash register but, before paying, decided that he wanted to buy a third fan, so he arranged with the cashier to pre-pay for the third fan. He testified that he paid for three fans in cash, took a receipt, went back to pick up the third fan, and left the store with the three fans. Rousey also testified that, before he left the store's parking lot, a friend who was a Hy-Vee employee called him and asked him to take possession of T-shirts that the employee had purchased for the employee's children, who were nearby. Rousey testified that he went back into the store, met his friend, took delivery of two (not four) T-shirts and a receipt, placed them under his own shirt, and left the store.

The jury found Rousey guilty. The district court sentenced Rousey to 90 days in jail, with 30 days stayed, and ordered him to pay restitution in the amount of \$181. Rousey appeals.

DECISION

Rousey argues that the district court erred by overruling his objection to L.W.'s testimony on the ground that the state had not satisfied its pre-trial discovery obligations by disclosing the existence of Hy-Vee's electronic journal.

In a criminal case, the state has an obligation to make certain disclosures to the defendant, either voluntarily or in response to a request by the defendant. *See generally* Minn. R. Crim. P. 9; *see also id.* cmt. If the state fails to comply with its discovery obligations, the district court has discretion to exclude evidence as a sanction. *State v. Palubicki*, 700 N.W.2d 476, 489-90 (Minn. 2005); *State v. Freeman*, 531 N.W.2d 190, 197-98 (Minn. 1995); *State v. Schwantes*, 314 N.W.2d 243, 245 (Minn. 1982); *State v. Lindsey*, 284 N.W.2d 368, 373-74 (Minn. 1979). In exercising that discretion, "the court should consider all relevant factors, including the reason why notice was not given and the extent to which the violation prejudiced the opposing party." *Freeman*, 531 N.W.2d at 198. This court applies a *de novo* standard of review to a district court's determination that a discovery violation occurred and an abuse-of-discretion standard of review to a district court's decision concerning whether to impose a sanction. *Palubicki*, 700 N.W.2d at 489.

In this case, Rousey contends that the state violated certain provisions of rule 9.01, subdivision 1, on the ground that the state did not disclose "statements" or "documents or tangible objects." In response, the state notes that Rousey was charged with a misdemeanor. Indeed, the discovery rules that apply in a misdemeanor prosecution are different from those that apply in a prosecution for a gross misdemeanor or a felony. The

caption of Rule 9.01 states that it applies only in a prosecution for a gross misdemeanor or a felony. *See* Minn. R. Crim. P. 9.01. In a prosecution for a misdemeanor, rule 9.04 sets forth the state's discovery obligations. *See* Minn. R. Crim. P. 9.04.

Under rule 9.04, the state must make three types of disclosure on "request" of a defendant: it must "permit the defendant or defense counsel to inspect the police investigatory reports," "disclose any material or information within the prosecutor's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged," and "provide[] a copy of the police investigatory reports." Minn. R. Crim. P. 9.04. "Any other discovery must be by consent of the parties or by motion to the court." *Id.*

To resolve Rousey's argument, we first must determine whether the state complied with its discovery obligations in rule 9.04. There is no indication in the record that the parties agreed to any discovery that is not required by the text of rule 9.04 or that Rousey sought discovery by filing a motion in the district court. Thus, Rousey can establish a violation of the state's discovery obligations only if he can show that the state did not produce something that he requested. *See* Minn. R. Crim. P. 9.04. The record is not well developed on that issue because, at the time of Rousey's objection, neither party provided any information to the district court concerning what was requested and what was disclosed, and the district court did not discuss that issue when ruling on Rousey's objection. We note that the file maintained by the district court administrator includes a letter from Rousey's trial attorney to an assistant county attorney, sent soon after the complaint was filed, requesting "copies of the applicable police reports, statements, audio

and video tapes, and other discovery.” The district court administrator’s file also includes a subsequent letter from the assistant county attorney to the district court that makes reference to “the investigative reports and other materials that were previously provided to defense counsel.” But at trial, Rousey did not provide the district court with any information concerning his discovery requests or the state’s response. Likewise, Rousey’s brief does not describe the state’s response to his discovery request. Consequently, this court has no information concerning whether the state’s response to Rousey’s discovery requests included any reference to Hy-Vee’s electronic journal or whether the state’s response otherwise complied with its discovery obligations. Given this record, Rousey has not established that the state failed to comply with its discovery obligations in rule 9.04.

Thus, the district court did not err by overruling Rousey’s objections to L.W.’s testimony.

Affirmed.