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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1027**

State of Minnesota,
Respondent,

vs.

Moses Ray Whirlwind Horse,
Appellant.

**Filed July 23, 2012
Affirmed
Wright, Judge**

Aitkin County District Court
File No. 01-CR-10-878

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

James P. Ratz, Aitkin County Attorney, Lisa Roggenkamp Rakotz, Assistant Aitkin
County Attorney, Aitkin, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Muehlberg,
Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant challenges his conviction of first-degree driving while impaired (DWI)—having an alcohol concentration of .08 or more within two hours of driving—based on his contention that the district court erred by excluding testimony regarding appellant’s affirmative defense of postdriving consumption. He also seeks reversal of his conviction of gross misdemeanor driving after cancellation because, he argues, the district court misinterpreted his stipulation and erroneously adjudicated him guilty. We affirm.

FACTS

On October 16, 2010, police officers attempted unsuccessfully to execute an arrest warrant for appellant Moses Ray Whirlwind Horse at his home. The officers ultimately located Whirlwind Horse, who appeared intoxicated, at a bar in Tamarack where he was arrested on the warrant and for DWI. Whirlwind Horse refused to submit to field sobriety tests, but he agreed to provide a urine sample for testing. Two test results reported an alcohol concentration of .225 and .226, respectively.

Whirlwind Horse was charged with two counts of first-degree DWI, a violation of Minn. Stat. § 169A.20, subs. 1(1) (driving under the influence of alcohol), 1(5) (having an alcohol concentration of .08 or more as measured within two hours of driving) (2010), and one count of gross misdemeanor driving after cancellation as inimical to public safety, a violation of Minn. Stat. § 171.24, subd. 5 (2010).

At a pretrial hearing on November 15, Whirlwind Horse pleaded not guilty and demanded a speedy trial. On December 21, Whirlwind Horse raised the affirmative DWI defense of postdriving consumption. *See* Minn. Stat. § 169A.46, subd. 1 (2010). The state moved to exclude any evidence regarding this affirmative defense because Whirlwind Horse failed to provide notice of the affirmative defense before the pretrial hearing. *See id.* (providing that such evidence is inadmissible at trial unless notice is given to prosecution before pretrial hearing). After a hearing, the district court denied the state’s motion, reasoning that although Whirlwind Horse failed to comply with the statute, the state did not establish prejudice and “the State can hardly claim ambush or surprise” in light of the complaint, which states that Whirlwind Horse told the police that he drank “a lot” after he arrived at the bar where he was arrested.

The state moved for reconsideration of its motion to exclude the postdriving-consumption evidence, and Whirlwind Horse moved to bifurcate the trial into one trial addressing his driving-after-cancellation charge and one trial addressing his DWI charges. The district court denied these motions, and the case proceeded to trial the following day.

Before the jury was impaneled, Whirlwind Horse waived his right to a jury trial on certain elements of the driving-after-cancellation charge. After the jury was sworn, Whirlwind Horse notified the state that S.S. would testify regarding Whirlwind Horse’s postdriving consumption.¹ The state objected and moved to exclude this testimony. As a

¹ Before this disclosure, it was anticipated that S.S. would testify that she, not Whirlwind Horse, drove on the date of the incident. S.S. ultimately testified in this manner.

sanction for late disclosure of discoverable evidence, the district court granted the state's motion.

The jury found Whirlwind Horse guilty of both counts of first-degree DWI. The district court subsequently imposed concurrent sentences of 72 months' imprisonment and five years' conditional release for having an alcohol concentration of .08 or more within two hours of driving and 365 days' incarceration for driving after cancellation. This appeal followed.

D E C I S I O N

I.

The constitutional right to due process, U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7, requires a person accused of an offense to be afforded fundamental fairness and a meaningful opportunity to present a complete defense. *State v. Quick*, 659 N.W.2d 701, 712 (Minn. 2003). Under Minnesota law, postdriving consumption before the collection of blood, breath, or urine for alcohol-concentration testing is an affirmative defense to having an alcohol concentration of 0.20 or more within two hours of driving. Minn. Stat. § 169A.46, subd. 1. But evidence of this defense is admissible only if “notice is given to the prosecution prior to the omnibus or pretrial hearing in the matter.” *Id.*

Whirlwind Horse argues that the district court erred by excluding S.S.'s testimony about Whirlwind Horse's affirmative DWI defense as a sanction for violating the district court's discovery order. Whether to exclude testimony is a decision that rests within the district court's sound discretion and will not be disturbed on appeal absent an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). We apply this standard of

review even when the defendant maintains that the exclusion of evidence deprived the defendant of the constitutional right to present a complete defense. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006).

The Minnesota Rules of Criminal Procedure govern discovery. Minn. R. Crim. P. 9.03. In relevant part, these rules require discovery evidence to be “disclosed in time to afford counsel the opportunity to make beneficial use of it.” *Id.*, subd. 2(a). When this rule is violated, the district court may, on notice and motion, impose a sanction that it deems just under the circumstances. *Id.*, subd. 8. The exclusion of evidence is an available, albeit severe, sanction that should not be invoked lightly. *State v. Lindsey*, 284 N.W.2d 368, 374 (Minn. 1979). We will not reverse the district court’s decision to do so, however, absent a clear abuse of the district court’s broad discretion. *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998).

A.

Whirlwind Horse argues that, because he disclosed the evidence that supports his affirmative defense “as quickly as [he] could,” he did not violate the rules of discovery. Although Whirlwind Horse obtained the specific evidence only one day before trial, he affirmatively represented to the state and to the district court, on two occasions in the week preceding trial, that he was ready for trial. Whirlwind Horse failed to disclose to the district court or opposing counsel that he was attempting to secure evidence of his affirmative defense. Moreover, although he determined that S.S. would testify about his postdriving consumption one day *before* trial, Whirlwind Horse did not disclose this information to the state until *after* the jury was empaneled. The disclosure of this type of

evidence *after* the jury trial has commenced and jeopardy has attached clearly establishes a discovery violation for which the district court may impose a sanction.

B.

Whirlwind Horse next argues that, even if he violated the rules of discovery, exclusion of this evidence is an overly severe sanction. When imposing a sanction for this type of discovery violation, the district court must consider the reason that disclosure was not made, the extent of prejudice to the opposing party, the feasibility of a continuance to rectify such prejudice, and any other relevant factors. *Lindsey*, 284 N.W.2d at 373. We address each factor in turn.

To explain his late disclosure, Whirlwind Horse argued that S.S. is “somewhat difficult to get ahold of” and he gave the state the information “as quickly as [he] could.” For the reasons discussed in Part I.A., *supra*, we agree with the district court’s conclusion that Whirlwind Horse’s explanation is not compelling.

The district court’s assessment that it is “fundamentally unfair” for the state to have an issue of this significance disclosed, without warning, after the trial has commenced is sound. In light of the timing of the disclosure, the district court appropriately concluded that the prejudice to the state that a continuance would cause could not be feasibly rectified. Moreover, Whirlwind Horse was able to assert the postdriving-consumption defense notwithstanding the exclusion of this evidence. He merely was precluded from using S.S.’s testimony to do so.

In light of these factors, including the limited nature of the sanction, we conclude that the district court did not abuse its discretion by precluding S.S. from testifying about Whirlwind Horse's postdriving consumption.

II.

Whirlwind Horse next argues that the district court erred by conducting a bench trial on his driving-after-cancellation charge without Whirlwind Horse waiving his right to a jury trial on that charge. "Whether a criminal defendant has been denied the right to a jury trial is a constitutional question that we review de novo." *State v. Kuhlmann*, 806 N.W.2d 844, 848-49 (Minn. 2011).

The United States Constitution and the Minnesota Constitution guarantee the right to a jury trial in a criminal case. U.S. Const. amend. VI; Minn. Const. art. I, § 6. This right includes the right to be tried on every element of the charged offense. *State v. Hinton*, 702 N.W.2d 278, 281 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005). But a defendant may waive the right to a jury trial on either the charged offense or, through a stipulation, any particular element of the offense. *State v. Pietraszewski*, 283 N.W.2d 887, 889-90 (Minn. 1979); *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). The Minnesota Rules of Criminal Procedure establish the procedural requirements for waiver of a jury trial. Minn. R. Crim. P. 26.01, subd. 1(2). In relevant part:

The defendant, with the approval of the court, may waive a jury trial on the issue of guilt provided the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel.

Id., subd. 1(2)(a).

Whirlwind Horse does not dispute that he validly waived his right to a jury trial. Rather, the extent of the waiver is disputed here. The state argues that Whirlwind Horse waived his right to a jury trial on the driving-after-cancellation charge, contingent on the jury finding him guilty of DWI. Whirlwind Horse counters that his jury-trial waiver was limited to the first two elements of the driving-after-cancellation charge.²

Our analysis of this issue requires a careful review of the record. Initially, the parties jointly proposed a stipulation that would waive Whirlwind Horse's right to a jury trial on the first two elements of the driving-after-cancellation offense. In response to the proposal, the district court asked, "So the jury at the conclusion of the proceedings, if the matter is submitted to the jury, is going to get that stipulation; is that what's being contemplated?" Whirlwind Horse's counsel responded, "[W]hat we're trying to accomplish, . . . and I believe is the agreement, is that with this stipulation Mr. Whirlwind Horse's driving record wouldn't have to come . . . into the case." The district court sought further clarification. "So if I'm reading this right, then, I wouldn't even tell the

² Under Minnesota law, a person is guilty of driving after cancellation as inimical to public safety if

- (1) the person's driver's license or driving privilege has been canceled or denied under section 171.04, subdivision 1, clause (10); (2) the person has been given notice of or reasonably should know of the cancellation or denial; and (3) the person disobeys the order by operating in this state any motor vehicle, the operation of which requires a driver's license, while the person's license or privilege is canceled or denied.

Minn. Stat. § 171.24, subd. 5.

jury about the driving after cancelation charge because if they should convict him on the felony DWI charges, in that process they have to find that he was driving or operating or in physical control?” When counsel for both parties stated that their conversation had not contemplated this circumstance, the district court stated, “[T]hat would take that issue . . . away from the jury and they wouldn’t hear anything about the status of his driving record, canceled [as inimical to public safety] or otherwise.” The district court asked Whirlwind Horse’s counsel, “Is that agreeable, first of all, to your client, [counsel]?”

Following a discussion between Whirlwind Horse and his counsel, Whirlwind Horse’s counsel clarified that “if we were to go in that direction, . . . we would only be dealing with the DWI charges.” When the district court confirmed this understanding, Whirlwind Horse’s counsel advised the district court that Whirlwind Horse agreed. After also receiving the state’s consent, the district court conducted the following colloquy:

Q [District Court]: [T]he proposal is, Mr. Whirlwind Horse, that I don’t tell the jury anything about the driving after cancelation charge. And should the jury, should the case ultimately go to the jury, should they convict you of either count one or count two, that you’re agreeing by virtue thereof that you, at the time and place in question, did not have a driver’s license, that it had been canceled because you were revoked as inimical to public safety. Do you understand that?

A [Whirlwind Horse]: Yes.

Q: And have you had enough time to speak with [your counsel] about that issue?

A: Yes.

Q: And do you have any questions about that stipulation or that agreement?

A: No.

Q: And you understand that you have the right to put that charge in front of the jury, also. The county attorney would have to prove your guilt beyond a reasonable doubt. All of the jurors must agree to that verdict; in other words, the

verdict must be unanimous. If you agree that if they find you guilty of the driving offenses in counts one and two, that your license was revoked because you were inimical at the time, then that jury, this jury will never hear anything about that charge. Do you understand that?

A: Yes.

Q: All right. Any questions about any of this, Mr. Whirlwind Horse?

A: No, sir.

The district court did not expressly ask Whirlwind Horse whether he waived his right to a jury trial on every element of the driving-after-cancellation offense. But to determine the scope of the waiver, we may consider the record as a whole. *See Pietraszewski*, 283 N.W.2d at 890. The district court clearly advised Whirlwind Horse that if he agreed to the proposed stipulation, “this jury will never hear anything about that charge.” The day before the waiver, the district court denied Whirlwind Horse’s motion to bifurcate the trial into a trial addressing his DWI charges and a separate trial addressing his driving-after-cancellation charge. Thus, when discussing the waiver, Whirlwind Horse knew it pertained to his driving-after-cancellation charge, which would not be presented to a different jury.

In the discussion immediately preceding Whirlwind Horse’s waiver, his counsel initiated the discussion about avoiding the jury’s consideration of the driving-after-cancellation charge, explaining to the district court “what we’re trying to accomplish . . . is that with this stipulation Mr. Whirlwind Horse’s driving record wouldn’t have to come . . . into the case.” The district court responded that, because a conviction of the felony DWI charges would necessarily include the jury’s finding that Whirlwind Horse was “driving or operating or in physical control” of the vehicle, this element of the

driving-after-cancellation charge also would be met. After conferring with his counsel, Whirlwind Horse accepted the proposed stipulation. Moreover, Whirlwind Horse did not object when his waiver did not address both elements of the parties' initial proposal, when the district court did not instruct the jury regarding the driving-after-cancellation charge, or when the district court adjudicated Whirlwind Horse guilty of driving-after-cancellation.

Our careful examination of the record establishes that Whirlwind Horse knowingly and intelligently waived his right to a jury trial on the driving-after-cancellation charge, contingent on the jury finding him guilty of either DWI offense.³ Accordingly, after the jury found Whirlwind Horse guilty of both DWI offenses, the district court did not err by adjudicating him guilty of driving after cancellation as inimical to public safety.

Affirmed.

³ We observe that Whirlwind Horse's contingent waiver did not articulate what would happen regarding the driving-after-cancellation charge if the jury did *not* find Whirlwind Horse guilty of either DWI offense. But because these facts are not before us, and the parties do not raise this issue, we decline to analyze this aspect of Whirlwind Horse's waiver.