STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0839

State of Minnesota,
Appellant,

vs.

Michael Wayne Moreland,
Respondent.

Filed November 25, 2013
Appeal dismissed
Schellhas, Judge

Rice County District Court
File No. 66-CR-13-278

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

G. Paul Beaumaster, Rice County Attorney, Terence Swihart, Assistant County Attorney, Faribault, Minnesota (for appellant)

David Hvistendahl, Mary L. Hahn, Hvistendahl, Moersch, Dorsey & Hahn, P.A., Northfield, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Hudson, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges a dismissal of an indictment, arguing that the district court erred by concluding that the instructions submitted to the grand jury were erroneous. Because the state has not satisfied the critical-impact test, we dismiss the appeal.

FACTS

A Rice County grand jury returned an indictment against respondent Michael Moreland, finding "probable cause to believe that . . . Moreland caused the death of [K.M.] as a result of operating a motor vehicle in a grossly negligent manner" in violation of Minn. Stat. § 609.21, subd. 1(1) (2010). Two prosecutors conducted the grand-jury proceeding in front of 20 jurors. The grand jury returned an indictment of criminal vehicular homicide against Moreland.

Moreland moved for dismissal of the indictment under Minn. Stat. § 628.12 (2010) and Minn. R. Crim. P. 17.02, subd. 2. The district court denied his motion. Moreland then moved for dismissal of the indictment due to alleged prosecutorial errors, including the presentation of inadmissible evidence and the provision of inadequate jury instructions. Respondent State of Minnesota opposed the motion. The district court dismissed the indictment on the basis that Moreland was prejudiced by erroneous jury instructions.

This appeal follows.

D E C I S I O N

The state appeals from the district court's dismissal of the indictment against Moreland for criminal vehicular homicide. "The state may appeal as a matter of right a pretrial order dismissing an indictment." *State v. Eibensteiner*, 690 N.W.2d 140, 148 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005); *see* Minn. R. Crim. P. 28.04, subd. 1(1) ("The prosecutor may appeal as of right to the Court of Appeals . . . in any case, from any pretrial order."). But "[t]he ability of the State to appeal is limited." *State v. Borg*, 834 N.W.2d 194, 197 (Minn. 2013) (quotation omitted). Under rule 28.04, subdivision 1(1), the state's appeal rights "are restricted in a number of ways," and, "for the appeal to be considered, as a threshold matter the state must clearly and unequivocally show both that the trial court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Barrett*, 694 N.W.2d 783, 787 (Minn. 2005) (quotations omitted).

Although, in its statement of the case, the state claims that, unless reversed, the dismissal of the indictment will critically impact its ability to successfully prosecute Moreland for criminal vehicular homicide, the state's brief contains no critical-impact argument, and the omission appears to be intentional. At oral argument, the state maintained that it need not satisfy the critical-impact test as a jurisdictional requirement. We disagree.

Although some of our past opinions involving appeals from dismissals of indictments have not discussed the state's jurisdictional burden under the critical-impact test, *see, e.g.*, *Eibensteiner*, 690 N.W.2d at 148; *State v. Flicek*, 657 N.W.2d 592, 596

(Minn. App. 2003); *State v. Plummer*, 511 N.W.2d 36, 38 (Minn. App. 1994); *State v. Serstock*, 390 N.W.2d 399, 401–02 (Minn. App. 1986), *aff'd in part, rev'd in part on other grounds*, 402 N.W.2d 514 (Minn. 1987), "[r]ule . . . 28.04 requires the State to show critical impact in *all* pretrial appeals," *State v. Underdahl*, 767 N.W.2d 677, 679 (Minn. 2009) (emphasis added). *See State v. Gradishar*, 765 N.W.2d 901, 902 (Minn. App. 2009) ("Critical impact is a threshold showing that must be made in order for an appellate court to have jurisdiction."); *see also State v. Obeta*, 796 N.W.2d 282, 294–95 (Minn. 2011) (Stras, J., dissenting) (characterizing critical-impact requirement as jurisdictional). No authority relieves the state of its burden to satisfy the jurisdictional requirement of establishing critical impact in appeals from orders dismissing indictments.

We conclude that the state must satisfy the jurisdictional requirement of the critical-impact test, and we proceed to determine whether the state has "clearly and unequivocally show[n] both that the [district] court's order will have a critical impact on the state's ability to prosecute [Moreland] successfully and that the order constituted error." *See Barrett*, 694 N.W.2d at 787 (quotations omitted).

Dismissal of Indictment for Alleged Noncurable Defects

Moreland argues that the record reveals noncurable defects in the indictment proceeding due to gross prosecutorial misconduct. He claims that the prosecutors "trampled on their duties to advise the grand jury accurately" and "attempt[ed] to hood-wink the grand jury." We disagree.

Dismissal of an indictment "for *noncurable* defects will unquestionably have a critical impact on the outcome since it will prevent reindictment, therefore eliminating

the possibility of successful prosecution." *State v. Roers*, 520 N.W.2d 752, 755–56 (Minn. App. 1994) (emphasis added), *review denied* (Minn. Oct. 14, 1994). "[P]ermanent dismissal is an extreme sanction to be applied in the 'rare case where a prosecutor abuses the system such that the wrong to the defendant or the system cannot be cured.'" *Id.* at 756 (quoting *State v. Dwire*, 409 N.W.2d 498, 501 (Minn. 1987)). "Whether facts show misconduct so outrageous that it bars prosecution is a question of law that we review de novo, looking at the totality of the circumstances." *Id.*

The Minnesota Rules of Criminal Procedure do not define "what constitutes a curable or noncurable defect." *State v. Pettee*, 538 N.W.2d 126, 136 n.4 (Minn. 1995) (Coyne, J., dissenting). We therefore look to caselaw for guidance. In *Dwire*, the supreme court disagreed with this court's conclusion that the presence of an unauthorized person in a grand-jury room was a noncurable defect. 409 N.W.2d at 501 & n.3 ("Generally, federal cases hold that grand jury abuses and irregularities can be cured by reindictment unless the abuse is outrageous and provided the new grand jury would not be affected by prior government improprieties."). The *Dwire* court explained that the defect could be cured by convening "a new grand jury . . . without the unauthorized individual present." *Id*. at 501. In *State v. Johnson*, by ordering as their remedy "representment," the supreme court implicitly concluded that the following errors by the prosecution were curable: "[t]hreatening members of the grand jury that they could be picked up by police, handing out instructions from previous grand jurors, and giving inaccurate instructions on probable cause and the effect of a failure to indict." 441 N.W.2d 460, 466 (Minn. 1989); *see also Roers*, 520 N.W.2d at 757 (discussing *Johnson*, stating that remedy chosen by

supreme court "was not permanent dismissal, but an order for representment to a new grand jury"). In *Roers*, this court concluded that, although "[t]he errors the state committed . . . affect[ed] the grand jury's view of the facts . . . , . . . [they did] not affect [Roers]'s ability to receive a fair trial, and thus could be cured by convening a new grand jury." 520 N.W.2d at 757–59 (noting errors that included prosecutors' potential failure to adequately address juror misconduct and introduction of evidence that "improperly focused guilt on" Roers).

Our research reveals only one case in which a Minnesota appellate court concluded that indictment errors were noncurable—and with which the supreme court did not disagree. *See State v. Grose*, 396 N.W.2d 874, 877 (Minn. App. 1986) (*Grose II*), *distinguished in Dwire*, 409 N.W.2d at 502 n.4, *review denied* (Minn. Jan. 16, 1987); *see also State v. Grose*, 387 N.W.2d 182 (Minn. App. 1986) (*Grose I*), *cited with approval in State v. Penkaty*, 708 N.W.2d 185, 197 (Minn. 2006), *Johnson*, 441 N.W.2d at 462, 466, *and State v. Inthavong*, 402 N.W.2d 799, 802 (Minn. 1987).

In the *Grose* litigation,

> [t]he prosecutor's conduct . . . included some nineteen violations, among which were improper comments on respondent's Fifth Amendment rights, improper comments on respondent's refusal to waive the statute of limitations, reference to possible punishment, misstatement of the law of scienter, no evidence taken on the last allegation before the vote to indict, improper instructions that the indictment could be based on actions beyond the statute of limitations, insufficient indictments, and an inadequate showing that twelve jurors concurred in the indictments.

Roers, 520 N.W.2d at 757 (discussing *Grose I* and *Grose II*); *accord Grose I*, 387 N.W.2d at 187–90. We noted in *Roers* that, "[w]hile, arguably, these errors might have been cured by presenting the case to another grand jury, it was the *Grose* prosecutor's intentional and continuous egregious conduct manifesting a bad faith pursuit of a perjury indictment that required imposing the strongest possible remedy." 520 N.W.2d at 757; *see also Johnson*, 441 N.W.2d at 469 (Simonett, J., dissenting) (describing *Grose* proceeding as including "egregious misconduct and obvious bias by the county attorney").

Generally, "no one may disclose matters occurring before the grand jury unless directed to do so by the court in connection with a judicial proceeding." Minn. R. Crim. P. 18.07; *see Dwire v. State*, 381 N.W.2d 871, 875 (Minn. App. 1986) ("A detailed inquiry into prejudice inevitably frustrates the secrecy of grand jury testimony."), *review denied* (Minn. Apr. 11, 1986). Therefore, our analysis here is abridged. We have thoroughly considered Moreland's arguments and reviewed the record. Although Moreland alleges numerous prosecutorial errors, the record reveals only two errors. The other alleged errors are not errors. And none of the prosecutorial errors and alleged errors was intentional or material, nor did the prosecutors engage in prosecutorial misconduct, let alone misconduct so outrageous that it bars further prosecution.

We conclude that the record does not support Moreland's argument that any alleged defects in the grand-jury proceeding were noncurable.

Alleged Curable Defects in Grand-Jury Proceeding

In this case, the district court dismissed the indictment against Moreland for criminal vehicular homicide because the court believed that the jury instructions that the prosecutors submitted to the grand jury were erroneous as a matter of law. "If the dismissal is . . . for a defect that could be cured or avoided by an amended or new indictment or complaint, further prosecution for the same offense will not be barred." Minn. R. Crim. P. 17.06, subd. 4(3); *see also* Minn. R. Crim. P. 18.06 ("[T]he dismissal of the [grand jury's] charge does not prevent the case from again being submitted to a grand jury as often as the court directs."); *Pettee*, 538 N.W.2d at 130 ("[A]fter an indictment is dismissed for a curable defect, . . . a grand jury may return a second indictment charging the defendant with an offense."); *Plummer*, 511 N.W.2d at 38 ("[T]he state often has the opportunity to seek another indictment.").

The state argues that we must reverse the district court's dismissal of the indictment because the state otherwise will be assigned the same district court judge and, consequently, forced to submit instructions to a grand jury consistent with the district court's order, which it argues is incorrect, if it seeks a new indictment. *Cf. State v. Dunson*, 770 N.W.2d 546, 550 (Minn. App. 2009) (stating that "[d]ismissal of a complaint based on a question of law satisfies the critical impact requirement" and "district court judges recognize that it is not their function to overrule their colleagues' legal rulings, and it is therefore highly unlikely that a prosecuting attorney could reinstate a case dismissed solely on a question of law"), *review denied* (Minn. Oct. 20, 2009); *State v. Diedrich*, 410 N.W.2d 20, 23 (Minn. App. 1987) (stating, as to dismissal

of complaint, that "further prosecution is effectively blocked" because "the dismissal was based on errors of law"). But, even if the district court's dismissal order would effectively require the state to submit jury instructions to a grand jury in compliance with the district court's order, whether or not correct, we cannot conclude that the state's ability to successfully prosecute Moreland for criminal vehicular homicide is critically impacted.

We conclude that the state cannot satisfy the critical-impact test by asserting speculative arguments about the impact of the district court's order on a new indictment. *Cf. State v. Pero*, 590 N.W.2d 319, 326 (Minn. 1999) ("The grand jury is not intended to be a tool of the prosecution or the defense. It is an arm of the judiciary and, as such, it shall be used in a fair, impartial and independent manner or not at all." (quotation omitted)). Because the state has not satisfied the critical-impact test, we lack jurisdiction to address the merits of the appeal and therefore dismiss the appeal. *See State v. Joon Kyu Kim*, 398 N.W.2d 544, 550 (Minn. 1987) (indicating that supreme court dismisses state appeals absent critical impact); *State v. Jones*, 518 N.W.2d 67, 71 (Minn. App. 1994) (dismissing appeal when "[t]he state ha[d] not shown the district court's order ha[d] critical impact"), *review denied* (Minn. July 27, 1994).[1]

Appeal dismissed.

[1] Prior to oral arguments in this case, Moreland filed a motion for attorney fees and costs that is still pending in this court. Any supplemental affidavit for fees is due within 15 days after the filing of this opinion. *See* Minn. R. Civ. App. P. 139.03, 139.06, subd. 1. The state's response, if any, is due within 10 days after service of the supplemental affidavit. *See* Minn. R. Civ. App. P. 139.06, subd. 2. An order on Moreland's motion for fees will follow, based on timely submissions made to this court.