STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1310

State of Minnesota,
Respondent,

vs.

Joseph Ntambwe Mukokolo,
Appellant.

Filed May 27, 2014
Reversed and remanded
Hudson, Judge

Wright County District Court
File No. 86-CR-12-4796

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

Thomas N. Kelly, Wright County Attorney, Aaron D. Duis, Assistant County Attorney, Buffalo, Minnesota (for respondent)

Richard L. Swanson, Chaska, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Hudson, Judge; and Rodenberg, Judge.

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

HUDSON, Judge

Appellant challenges the district court's denial of a motion for continuance to secure the presence of a witness who failed to appear for trial. We reverse and remand.

FACTS

The state charged appellant Joseph Mukokolo with first-degree burglary, making terroristic threats, and fifth-degree assault. The alleged victim, R.E., is appellant's neighbor and has a child with appellant's brother. At trial, R.E. testified that, on August 17, 2012, appellant broke into her house, threatened to kill her, and struck her. Appellant's sole defense was that he did not do any of those things.

At a jury trial held in February 2013, R.E. testified to the following. On the night of August 17, she was drinking alcohol in her garage with appellant and her two roommates: her sister, J.B., and R.E.'s boyfriend, G.W. After J.B. went to bed, appellant suggested going to a bar and left, after which R.E. and G.W. argued about joining him. Eventually, G.W. left for the bar and did not return until morning, while R.E. remained at home. Over an hour after G.W. left, R.E. heard someone calling her name, went downstairs, and saw appellant through the window. Appellant claimed that he left his phone in R.E.'s house and asked her to let him inside to search for it. After R.E. refused, appellant broke down the door, rushed inside, threatened to kill her, and struck her once or twice. R.E. testified that appellant left without his phone when R.E. told him that she would call the police.

J.B. testified at trial that she did not hear anything before R.E. woke her up after the alleged incident. A responding officer testified that police arrived within a few minutes of R.E.'s 911 call, that officers obtained a search warrant and arrested appellant about four hours after the 911 call, that appellant was sleeping when he was arrested, and

that appellant had his cell phone on the bed next to him. Another responding officer testified that appellant had cuts on his forehead and on one knuckle.

On Friday, February 15, appellant attempted to call G.W. as a witness in his case-in-chief. On February 14, around 4:00 p.m., appellant's counsel spoke with G.W., who had been subpoenaed by the defense. G.W. assured counsel that he would be present at 9:00 a.m. the next morning. When G.W. did not appear the next morning, the district court issued a warrant for G.W.'s arrest at around 9:30 a.m. and recessed for two hours. Just before reconvening, the district court stated that, if G.W. did not arrive by 11:30 a.m., the jury would be brought in for instructions. Appellant moved for a continuance until Tuesday, February 19 (Monday was President's Day), arguing that G.W.'s testimony was essential evidence of an alternate perpetrator because R.E. admitted that G.W. was present on the night of the offense, G.W. sent a text message indicating that he did not join appellant at the bar and instead stayed home all night, and G.W.'s criminal record included making terroristic threats and first-degree assault.

The district court took the motion under advisement until about 1:00 p.m., when it denied the continuance. Even though the district court found that G.W. was likely to give substantive evidence, it denied the motion based on its finding that G.W. was unlikely to be arrested over the long weekend, and that a continuance would "be a significant disadvantage to the state" because the testimony of the state's witnesses would be several days old when the trial resumed. Although the district court had previously expressed concern that appellant had not noticed an alternative-perpetrator defense, it did not

mention lack of notice when it made its ruling. The jury convicted appellant of all charges. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion when it denied his motion for a continuance to secure G.W.'s testimony. Because the decision to grant or deny a motion for a continuance is within the discretion of the district court, we will not reverse absent an abuse of that discretion. *State v. Turnipseed*, 297 N.W.2d 308, 311 (Minn. 1980).

A defendant's right to call witnesses on his behalf is essential to ensuring due process and fairness at trial. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045 (1973). Under the United States constitution, criminal defendants have the right "to have compulsory process for obtaining witnesses in [their] favor." U.S. Const. amend. VI; *see also Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920 (1967) (incorporating this right to state trials). We "examine the circumstances before the [district] court at the time the motion was made to determine whether the [district] court's decision prejudiced [appellant] by materially affecting the outcome of the trial." *Turnipseed*, 297 N.W.2d at 311 (citation omitted). We generally give greater deference to a district court's denial of a continuance when trial has already begun. *State v. Barnes*, 713 N.W.2d 325, 333 (Minn. 2006).

Under the federal constitution, we apply a five-factor test that considers (1) "the nature of the case and whether the parties have been allowed adequate timing for trial preparation," (2) "the diligence of the party requesting the continuance," (3) whether the

opposing party's conduct or lack of cooperation contributed to the need for the continuance, (4) whether a delay will "seriously disadvantage either party," and (5) whether the reasons for the continuance include "sudden exigencies and unforeseen circumstances." *United States v. Kopelciw*, 815 F.2d 1235, 1238–39 (8th Cir. 1987). Other considerations may include whether the moving party showed that the witness would be available and would provide necessary testimony. *United States v. Little*, 567 F.2d 346, 349 (8th Cir. 1977).

Here, the record indicates that appellant's counsel made substantial efforts to secure G.W.'s testimony, including subpoenaing G.W. and phoning him the night before appellant's case-in-chief to confirm that G.W. would be present. G.W.'s failure to appear was thus an unforeseen circumstance unrelated to defense counsel's diligence in attempting to secure G.W.'s presence. Furthermore, the inability to secure G.W.'s presence in the span of a few hours is no indication that G.W. was unavailable to testify, especially in the absence of any record indicating that reasonable efforts to locate him had failed. The only factor weighing in the state's favor is the prejudice of a three-day delay. But a three-day delay, especially in a case like this involving fairly simple issues and testimony, does not "seriously disadvantage" the state so as to outweigh appellant's right to present a complete defense. *See Kopelciw*, 815 F.2d at 1238–39.

We now turn to whether G.W.'s absence materially affected the outcome of the trial. *See Turnipseed*, 297 N.W.2d at 311. Although appellant's trial had already begun when the district court denied the motion for a continuance, the record shows, and the district court found, that G.W.'s testimony was likely to yield substantive evidence.

According to R.E.'s testimony, G.W. left to join appellant at the bar immediately before the alleged incident. But appellant's counsel made an offer of proof that G.W. texted appellant at 1:50 a.m., about 20 minutes before the 911 call, saying that he could not come to the bar. This evidence, taken at face value, suggests that G.W. may not have been where R.E. said he was, and casts doubt on R.E.'s version of events. Furthermore, appellant made an offer of proof that G.W. had prior convictions for domestic assault and terroristic threats, implying that G.W. may have been the true perpetrator. Even if G.W. had refused to testify to these events by exercising his Fifth Amendment right against self-incrimination, his non-answers could have introduced reasonable doubt in the minds of the jurors. This record does not establish beyond a reasonable doubt that the jury, had it heard this evidence, would still have convicted appellant. *See State v. Sailee*, 792 N.W.2d 90, 95 (Minn. App. 2010), *review denied* (Minn. Mar. 14, 2011) (holding that denying evidence of an alternative perpetrator was not harmless error when it would have been unreasonable for a jury not to convict absent alternative-perpetrator evidence).[1] We therefore conclude that G.W.'s absence materially prejudiced appellant.

Because the prejudice to the state does not outweigh appellant's right to present a complete defense, and because G.W.'s absence materially affected the outcome of

[1] Generally "[t]he defense must inform the prosecutor in writing of any defense, other than not guilty, that the defendant intends to assert," Minn. R. Crim. P. 9.02, including an alternative-perpetrator defense, *Sailee*, 792 N.W.2d at 93-94. But a district court must make its ruling to exclude evidence based on a lack of notice after weighing the four factors outlined in *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Here, because the district court did not make *Lindsey* findings, we do not further address the lack of notice.

appellant's trial, we conclude that the district court abused its discretion by denying the continuance, and we reverse and remand for a new trial.[2]

Reversed and remanded.

[2] Because we reverse and remand on the denial of appellant's motion for a continuance, we decline to reach appellant's challenge to his sentencing.