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**STATE OF MINNESOTA
IN COURT OF APPEALS
A04-2066**

State of Minnesota,
Appellant,

vs.

Marvin Haynes, Jr.,
Respondent.

**Filed April 5, 2005
Reversed and remanded
Toussaint, Chief Judge**

Hennepin County District Court
File No. 04035635

Mike Hatch, Attorney General, 1800 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Dietzen, Judge.

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

The state challenges the district court’s pretrial ruling excluding the testimony of two witnesses due to late disclosure. Because the state disclosed the witnesses in good faith and with due diligence, and no substantial prejudice resulted to respondent, we reverse and remand.

FACTS

Appellant, the state, alleges that on the morning of May 16, 2004, respondent Marvin Haynes, Jr., attempted to rob Jerry’s Flower Shop in north Minneapolis and shot the shop attendant, Harry

Sherer, killing him at the scene. In June 2004, the state charged Haynes with first-degree murder. On September 23, the district court issued a pretrial scheduling order requiring both sides to disclose all witnesses by September 30. Jury selection ended on October 18. **On that date, the state indicated that it had found a bloodstained jacket belonging to Haynes. The district court granted a continuance to conduct a DNA test on the jacket.**

On the third and final day of the continuance, when the negative DNA results were revealed, the state proffered the testimony of two new witnesses, J.C. and A.T. The state indicated that J.C. would testify that Haynes had told her around the time of the incident that he had killed a white person. A.T. was expected to testify that she had seen Haynes carry a silver-colored revolver that matched an eyewitness's description of the weapon that killed Sherer. Because the deadline to disclose all witnesses had passed, Haynes moved to exclude the testimony of J.C. and A.T., and the district court granted the motion. The state moved for reconsideration, which the district court denied. The state now challenges this pretrial ruling.

DECISION

On appeal from a pretrial ruling, the state must show clearly and unequivocally that (1) the district court erred in its judgment, and (2) the error will have a “critical impact” on the trial's outcome unless reversed. Minn. R. Crim. P. 28.04, subd. 2(2); *State v. Martin*, 591 N.W.2d 481, 484 (Minn. 1999). To establish that the ruling will have a critical impact, the state need not show that exclusion of the evidence completely destroys its case, but merely that it reduces the likelihood of a successful prosecution. *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987). Without a showing of critical impact, an appellate court will not review a pretrial order. *In re Welfare of L.E.P.*, 594 N.W.2d 163, 168 (Minn. 1999).

I.

When analyzing whether evidence suppression meets the critical impact standard, we first examine all of the state's admissible evidence to determine the impact of the excluded evidence. *Id.*

We then examine the “inherent qualities of the suppressed evidence itself, its relevance and probative force, its chronological proximity to the alleged crime, its effect in filling gaps in the evidence viewed as a whole,

its quality as a perspective of events different than those otherwise available, its clarity and amount of detail[,] and its origin.”

Id. (citations omitted). Evidence that is particularly unique in nature and quality is more likely to meet the critical impact test. *Id.*

Here, the state argues that suppression of J.C.’s and A.T.’s testimony will have a critical impact because of the importance of witness testimony in a case lacking any physical evidence. Moreover, the state contends that the evidence it planned to introduce through its remaining witnesses has limited value because **several of them are impeachable or have refused to testify.**

We conclude that exclusion of the testimony of the two newly discovered witnesses has a critical impact on the state’s case. **J.C. is expected to describe events close in time to the incident, i.e., that on the same afternoon or the next day,** Haynes told her he shot a white man. I.H., who originally indicated that he heard Haynes make the same statement, is expected to refuse to testify, making J.C.’s evidence unique in nature and quality.

Likewise, A.T. is expected to testify that she saw Haynes carry a silver-colored revolver, similar to the weapon an eyewitness to the murder described, on six or seven occasions close to the incident date. J.D., the only disclosed witness who might testify about the revolver, stated that he saw Haynes with a similar weapon five or six months before the incident. A.T.’s expected evidence is thus superior in chronological proximity and gap-filling effect, and unique in nature and quality if J.D. refuses to testify. We conclude that suppression of J.C.’s and A.T.’s testimony has a critical impact on the state’s likelihood of a successful prosecution.

II.

“If subsequent to compliance with any discovery rule or order, a party discovers additional material, information or witnesses subject to disclosure, that party shall promptly notify the other party of the existence of the additional material or information and the identity of the witnesses.” Minn. R. Crim. P. 9.03, subd. 2(a). Evidentiary rulings will not be reversed unless the district court clearly abused its discretion. *State v. Shannon*, 583 N.W.2d 579, 583 (Minn. 1998). To ascertain the harm caused by a discovery violation, the district court should consider the following factors: “(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the

feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors.” *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979).

Here, the district court made specific findings pursuant to the *Lindsey* factors: (1) that the new witnesses were disclosed almost one month after the discovery deadline; (2) that Haynes had completed preparation of his case; (3) that the jury had originally been told that the case would end before it actually began; and (4) that the state already had been granted a three-day continuance for DNA testing on the jacket.

After analyzing the district court’s findings and the circumstances of the late disclosure, we conclude that because the state acted in good faith and with due diligence, the testimony should be admitted. Minn. R. Crim. P. 9.03, subd. 2(a) requires that if a party identifies new witnesses after the discovery deadline, it must immediately disclose that information to the other party. Here, the state complied with this rule. Although the state had information that J.C. existed before the discovery deadline, it could not locate her. When a search led police to her and then to A.T. after the deadline, the state immediately disclosed that information to Haynes and the district court. Further, because J.C. and A.T. are expected to testify regarding matters about which previously disclosed witnesses were expected to testify, any prejudice to Haynes by their introduction would be minimal at most. A brief continuance of a day or two would have allowed Haynes to adequately prepare for the new witnesses and would eliminate any potential prejudice. Moreover, because the trial has not yet begun, this continuance would not have disrupted the trial sequence. I.H.’s and J.D.’s potential unavailability also favors admitting the new witnesses’ testimony. Accordingly, the district court clearly erred in excluding the testimony of J.C. and A.T.

Reversed and remanded.