STATE OF MINNESOTA

IN SUPREME COURT

A17-0136

Court of Appeals

Gildea, C.J.
Concurring, Lillehaug, McKeig, JJ.

State of Minnesota,

Appellant,

vs.

Filed: May 15, 2019
Office of Appellate Courts

Danny Lee Zinski,

Respondent.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant Washington County Attorney, Stillwater, Minnesota, for appellant.

Cathryn Middlebrook, Chief Appellate Public Defender, Saint Paul, Minnesota; and

Melissa Sheridan, Assistant State Public Defender, Eagan, Minnesota, for respondent.

S Y L L A B U S

1. Because the law at the time of respondent's appeal did not clearly require that the district court sua sponte instruct the jurors on the proper use of relationship evidence admitted under Minn. Stat. § 634.20 (1996), the district court did not commit an error that was plain in failing to give a limiting instruction.

2. If a district court admits relationship evidence under Minn. Stat. § 634.20 (2018), over a defendant's objection that the evidence is not admissible under that statute,

the court must sua sponte instruct the jurors on the proper use of such evidence, unless the defendant objects to such action by the court.

Reversed.

O P I N I O N

GILDEA, Chief Justice.

The question presented in this case is whether the district court committed reversible error when the court did not, sua sponte, give a limiting instruction regarding the proper use of relationship evidence admitted under Minn. Stat. § 634.20 (1996).[1] The State charged respondent Danny Lee Zinski with first-degree burglary and fourth-degree criminal sexual conduct. At trial, the district court admitted 634.20 evidence[2] without sua sponte instructing the jurors on the proper use of that evidence. On appeal, Zinski argued that the district court committed an error that was plain when the court failed to sua sponte instruct the jurors on the proper use of 634.20 evidence. The court of appeals agreed with

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[1] The district court applied, and we analyze, for the purposes of plain-error analysis, the version of the statute in effect at the time of the alleged offenses, in 1995. Under that version of the statute, Minn. Stat. § 634.20 (1996), "[e]vidence of similar prior conduct by the accused against the victim of domestic abuse . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice . . . ." Section 634.20 has been amended a number of times since 1996 and now includes evidence of domestic conduct by the accused against "other family or household members." Minn. Stat. § 634.20 (2018). These amendments, however, were not essential to later-decided appellate cases that discuss whether district courts should sua sponte provide a limiting instruction for evidence admitted under section 634.20. Accordingly, we include those cases in our analysis of Zinski's argument that the district court committed reversible plain error.

[2] We refer to evidence admitted under section 634.20 as "634.20 evidence." We use this term to draw a distinction between the general relationship evidence discussed in *State v. Loving*, 775 N.W.2d 872, 879–80 (Minn. 2009), and relationship evidence admitted under Minn. Stat. § 634.20.

Zinski and held that the district court's failure to sua sponte instruct the jurors on the proper use of 634.20 evidence was an error that was plain. Although we announce a new rule that clarifies the law, the relevant law was unsettled at the time of appellate review, and, therefore, the court of appeals erred when the court concluded that Zinski had established an error that was plain. Accordingly, we reverse.

FACTS

The State charged Zinski with burglary in the first degree under Minn. Stat. § 609.582, subd. 1(c) (1996), and criminal sexual conduct in the fourth degree under Minn. Stat. § 609.345, subd. 1(c) (2018), in connection with conduct involving D.S. Zinski and D.S. had been in a romantic relationship, but D.S. had ended the relationship just before the incident that gave rise to the charges.

Zinski pleaded not guilty, and the matter proceeded to trial.[3] At trial, the district court admitted 634.20 evidence.[4] Specifically, D.S. testified that Zinski had repeatedly

[3] Zinski initially pleaded guilty but was later allowed to withdraw his guilty plea. *Zinski v. State*, No. A14-0984, 2015 WL 4171341, at *5 (Minn. App. July 13, 2015). As a result, there is a substantial gap between the date of offense (September 29, 1995) and this appeal.

[4] Section 634.20 regulates the admission of evidence, which is delegated exclusively to the judicial branch, but "courts may . . . apply and enforce statutory rules of evidence as a matter of comity." *State v. McCoy*, 682 N.W.2d 153, 160 (Minn. 2004). In *McCoy*, we addressed a separation-of-powers challenge to Minn. Stat. § 634.20, as well as the argument that evidence introduced under section 634.20 should be established by clear and convincing evidence as required by Minn. R. Evid. 404(b). 682 N.W.2d at 158–61. We rejected both arguments and, as a matter of comity, "expressly adopt[ed] Minn. Stat. § 634.20 as a rule of evidence for the admission of evidence of similar conduct by the accused against the alleged victim of domestic abuse." *Id.* at 160–61. In *State v. Fraga*, 864 N.W.2d 615, 627 (Minn. 2015), we explicitly extended that adoption to the amended version of Minn. Stat. § 634.20.

verbally and physically abused her during their relationship. Two neighbors and friends of D.S. testified that they had seen Zinski verbally abuse D.S. And L.S., who is D.S.'s son, testified that Zinski verbally and physically abused D.S.

Zinski did not ask for, and the district court did not give, a limiting instruction on the proper use of 634.20 evidence, either when the evidence was introduced or in the final jury instructions. The jury found Zinski guilty on both counts.

On appeal, Zinski argued that the district court committed an error that was plain when it failed to sua sponte instruct the jurors on the proper use of 634.20 evidence. In support of his argument, Zinski cited *State v. Word*, 755 N.W.2d 776, 785 (Minn. App. 2008), for the proposition that the failure to sua sponte instruct the jurors on the proper use of 634.20 evidence is an error that is plain. While Zinski's appeal was still pending in the court of appeals, the court of appeals issued its opinion in *State v. Melanson*, 906 N.W.2d 561 (Minn. App. 2018). In *Melanson*, the court of appeals held that "the district court did not plainly err in failing to provide a limiting instruction sua sponte to the jury regarding the admission of [634.20] evidence." *Id.* at 568.

Despite the apparent conflict between *Word* and *Melanson*, the court of appeals held that the district court's failure to sua sponte instruct the jurors on the proper use of 634.20 evidence in Zinski's case was a plain error that entitled him to a new trial. We granted the State's petition for review.

ANALYSIS

Because Zinski did not ask the district court to instruct the jurors on the proper use of the 634.20 evidence and did not object to the court's final jury instructions, he has

forfeited appellate review of the jury-instruction issue. *See State v. Goodloe*, 718 N.W.2d 413, 422 (Minn. 2006) ("Failure to request specific jury instructions or to object to instructions given generally results in forfeiture of the issue on appeal."). But, under the plain-error doctrine, an appellate court has the discretion to consider a forfeited issue if the defendant establishes (1) an error, (2) that was plain, and (3) that affected his substantial rights.[5] *Id.*; *see State v. Matthews*, 779 N.W.2d 543, 548 (Minn. 2010). Under our precedent, "[a]n error is plain if it 'contravenes case law, a rule, or a standard of conduct.' " *State v. Hayes*, 831 N.W.2d 546, 555 (Minn. 2013) (quoting *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)).

On appeal, the State asks us to reverse the court of appeals' conclusion that the district court's plain error entitles Zinski to a new trial. According to the State, relevant precedent was unclear at the time of Zinski's appeal on whether a limiting instruction was required concerning 634.20 evidence, and so the district court's failure to give the instruction cannot have been an error that was plain. For his part, Zinski relies on case law as it existed at the time of his trial and argues that we should affirm the court of appeals. We agree with the State.

[5] If the first three prongs are satisfied, the appellate court considers whether reversal is required to ensure " 'the fairness, integrity, or public reputation of judicial proceedings.' " *State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013) (quoting *State v. Scruggs*, 822 N.W.2d 631, 642 (Minn. 2012)).

I.

Turning to the first prong of the plain-error analysis, the State argues that the district court did not err in failing to sua sponte give a limiting instruction. Zinski disagrees. Even if we assume that the district court erred by failing to sua sponte instruct the jurors on the proper use of 634.20 evidence, Zinski is not entitled to relief because he failed to establish that the alleged error was plain.[6]

A plain error is an error that "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. According to Zinski, the district court's failure to sua sponte instruct the jurors on the proper use of 634.20 evidence clearly contravened relevant case law. We disagree. Based on our review of the relevant decisions issued by our court and the court of appeals, we conclude that the law at the time of appellate review does not clearly require a district court to sua sponte instruct the jurors on the proper use of 634.20 evidence.

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[6] In *State v. Kelley*, 855 N.W.2d 269, 277 (Minn. 2014), we held "that for purposes of applying the plain-error doctrine the court examines the law in existence at the time of appellate review, not the law in existence at the time of the district court's error, to determine whether an error is plain." At oral argument, Zinski argued that we should apply a different rule in his case. According to Zinski, the time-of-appellate-review rule from *Kelley* should apply only when the law has changed in favor of the defendant. When the law changes in favor of the State while the case is on appeal, Zinski argues that the law in effect at the time of trial should control the plain-error question. We are not persuaded. To hold as Zinski advocates would undermine the basic principles that animated our analysis in *Kelley*. More specifically, carving out an exception to the time-of-appellate-review rule whenever the law changes in the State's favor would not only undermine the basic principle that an appellate court must apply the law in effect at the time it issues its decision, an exception would also complicate the law by adopting a standard that is no longer unified. We therefore hold that, under a plain-error analysis, a court must examine the law as it exists at the time of appellate review regardless of whether the law has changed in favor of the defendant or the State.

In urging us to reach a different conclusion, Zinski relies on *State v. Bauer*, 598 N.W.2d 352 (Minn. 1999). But that reliance is misplaced because it is unclear whether our analysis in that case even dealt with 634.20 evidence. In *Bauer*, the defendant argued that the trial court committed plain error by failing to sua sponte give the jurors any limiting instructions regarding the use of "relationship evidence." *Id.* at 365. In addressing the defendant's argument, we said, "[a]s a general rule, even absent a request by the defense, such instructions should be given prior to the admission of *404(b) evidence* and again at the end of trial to help ensure that the jury does not use the evidence for an improper purpose." *Id.* (emphasis added). At no point in *Bauer* did we ever cite, much less discuss, section 634.20. *Id.* at 365–66. Instead, *Bauer* uses the term "relationship evidence" interchangeably with the term "404(b) evidence." *Id.* For example, in deciding that the district court's failure to give a limiting instruction was not plain error, we noted that "in its closing argument, the [S]tate prefaced its summary of the relationship evidence by pointing out that the evidence was relevant to show *motive*, a permissible use." *Id.* (emphasis added). Rule 404(b) specifically states that "proof of motive" is a permissible use. Section 634.20, by contrast, does not list permissible uses because the evidence is presumptively admissible *unless* the probative value is substantially outweighed by other concerns. Accordingly, because *Bauer* referred to "relationship evidence" and "404(b) evidence" interchangeably, *Bauer* did not create a clear requirement for a district court to sua sponte instruct the jurors on the proper use of 634.20 evidence.

Moreover, even if *Bauer* had clearly dealt with 634.20 evidence, as Zinski contends, the guidance we provided in *Bauer* was equivocal. After noting "that the trial court did not

provide any limiting instructions to the jury regarding the use of the relationship evidence," we stated that "[a]s a *general rule*, even absent a request by the defense, such instructions *should* be given prior to the admission of 404(b) evidence and again at the end of trial to help ensure that the jury does not use the evidence for an improper purpose." *Id.* at 365 (emphasis added). Our use of the words "general rule" and "should" can hardly be read as creating a clear requirement that a district court sua sponte give a limiting instruction to the jurors for any type of relationship evidence.

Zinski's reliance on *State v. Williams*, 593 N.W.2d 227 (Minn. 1999), is misplaced for the same reason. In *Williams*, we discussed the failure of the district court to give limiting instructions as to the proper use of evidence of the defendant's past abuse. *Id.* at 236. *Williams* addressed relationship evidence that was admitted under Rule 404(b)—and refers to it as "404(b) evidence"—but we acknowledged in a footnote that the evidence was also relevant under section 634.20. *See id.* at 236-37, 236 n.1. We stated that "although the failure to give limiting instructions [for relationship evidence] in certain circumstances may constitute plain error, we hold that it does not do so in this case." *Id.* at 237. Like *Bauer*, *Williams* cannot be read as creating a clear requirement that a district court sua sponte give a limiting instruction for 634.20 evidence.[7]

[7] Although not cited by the parties, our decision in *State v. Fraga* also does not squarely address the issue of whether limiting instructions *must* be given for 634.20 evidence. *See* 864 N.W.2d 615, 626–27 (Minn. 2015). After clarifying that evidence of the defendant's assault of a family member fell under section 634.20, we said, "[i]n a new trial, precisely how such evidence is offered, its probative value, the possibility of unfair prejudice, and *the necessity of cautionary instructions to the jury will, of course, depend on the context*." *Id.* at 627 (emphasis added).

The parties also rely on decisions from the court of appeals. But the case law from the court of appeals at the time of appellate review also does not clearly require a district court to sua sponte instruct the jurors on the proper use of 634.20 evidence. In some cases, the court of appeals has held that a district court's failure to sua sponte instruct the jurors on the proper use of 634.20 evidence is an error that is plain. *See State v. Barnslater*, 786 N.W.2d 646, 654 (Minn. App. 2010) (stating that "[i]n light of [its] decisions in *Word* and *Meldrum*, the district court's error in failing to instruct the jury regarding the proper use of [634.20] evidence was plain" but concluding that this error did not affect the defendant's substantial rights), *rev. denied* (Minn. Oct. 27, 2010); *State v. Word*, 755 N.W.2d 776, 785 (Minn. App. 2008) (stating that "[i]n light of our decision in *Meldrum*, the district court should have issued cautionary instructions related to the proper use of [634.20] evidence, and the failure to do so represented error that was plain" but concluding that "the lack of an instruction was not prejudicial and did not affect [the defendant's] substantial rights"); *State v. Meldrum*, 724 N.W.2d 15, 21–22 (Minn. App. 2006) (stating that "[u]pon admittance of [634.20] evidence, even in the absence of a request from counsel, the district court should provide a cautionary instruction when the evidence is admitted, and again during its final charge to the jury" but concluding that defendant was not entitled to a new trial after analyzing the third prong of the plain-error test), *rev. denied* (Minn. Jan. 24, 2007).

But more recently, the court of appeals has held that a district court's failure to sua sponte instruct the jurors on the proper use of 634.20 evidence is not an error that is plain.[8] *Melanson*, 906 N.W.2d at 568. Because *Melanson* was released two weeks before the court of appeals issued its decision in Zinski's case, the court of appeals' case law at the time of appellate review was unsettled.

In sum, the law at the time of appellate review did not clearly require a district court to sua sponte instruct the jurors on the proper use of 634.20 evidence. Accordingly, the court of appeals erred when it concluded Zinski had established an error that was plain.

II.

As explained above, there is a lack of clarity in the case law regarding whether the district court's failure to sua sponte give a limiting instruction is error that is plain. We

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[8] In *Melanson*, the court of appeals relied on our decision in *State v. Taylor*, 869 N.W.2d. 1 (Minn. 2015). *See* 906 N.W.2d at 567–68. *Taylor* addressed the defendant's argument that he was entitled to a new trial because the district court permitted the State to impeach him with two prior felony convictions but failed to give a limiting instruction sua sponte. *See* 869 N.W.2d at 17. *Taylor* discussed an analogy between evidence of prior convictions and *Spreigl* evidence. *Id.* at 18; *see generally* Minn. R. Evid. 404(b); *State v. Asfeld*, 662 N.W.2d 534, 542 (Minn. 2003) (defining *Spreigl* evidence as "evidence of a defendant's prior crimes, wrongs, or acts, which would otherwise be inadmissible, but which the [S]tate can seek to have admitted for the limited purpose of showing motive, intent, absence of mistake, identity, or a common scheme or plan"). *Taylor* concluded that "[b]ecause *Bissell* [a case addressing limiting instructions for evidence of prior convictions] and analogous *Spreigl* cases do not require a limiting instruction to be given sua sponte, the district court did not err, much less plainly err." 869 N.W.2d at 18. *Melanson*, in turn, applied *Taylor* to 634.20 evidence, stating "[w]e believe that *Taylor*'s analogy to *Spreigl* evidence is even more apt in the context of relationship evidence." 906 N.W.2d at 568. *Melanson* acknowledged "the strong preference that a district court give a limiting instruction for relationship evidence." *Id.* But, applying *Taylor* to 634.20 evidence, the court of appeals concluded that the district court did not commit an error that was plain by failing to provide a limiting instruction sua sponte regarding 634.20 evidence. *Id.*

take this opportunity to resolve that conflict and clarify the law. *See State v. Milton*, 821 N.W.2d 789, 807–08 (Minn. 2012) (clarifying the law after holding that the defendant failed to establish an error that was plain because our court had not yet clearly required district courts to give the jury instruction in question).

In *State v. McCoy*, we said that "we have treated evidence that illuminates the history of the relationship between a victim and the accused differently from other, *Spreigl* evidence, although not consistently." 682 N.W.2d 153, 159 (Minn. 2004). Specifically, we said that "[e]vidence of prior domestic abuse against the alleged victim may be different from [*Spreigl* evidence of an unrelated crime against a different person] for at least two reasons." *Id.* First, "it is evidence of prior conduct between the accused and the alleged victim." *Id.* Second, "it may be offered to illuminate the history of the relationship, that is, to put the crime charged in the context of the relationship between the two." *Id.* We adopt a new rule today in light of these differences, in order to ensure that any 634.20 evidence admitted is used for its proper purpose.

For trials held after the release of this opinion, we adopt the following rule: when a district court admits relationship evidence under Minn. Stat. § 634.20, over a defendant's objection that the evidence does not satisfy section 634.20, the court must sua sponte instruct the jurors on the proper use of such evidence, unless the defendant objects to the instruction by the court.[9]

[9] The concurrence objects to the rule we adopt for 634.20 evidence, contending that the rule conflicts with Minnesota Rule of Evidence 105 and arguing that we ought to send the question to the Advisory Committee on the Rules of Evidence. As a matter of comity,

In adopting this new rule, we are mindful that requiring a district court to sua sponte instruct the jurors on the proper use of 634.20 evidence arguably impacts two important interests. First, this requirement could undermine the interests embodied in the doctrine of forfeiture—encouraging all trial participants to seek a fair and accurate trial the first time around. *See State v. Kelley*, 855 N.W.2d 269, 278 (Minn. 2014) (noting that encouraging objections in the district court allows errors to be "corrected before their full impact is realized"). Second, requiring a district court to sua sponte provide such an instruction could undercut the strategic interests of defendants—not drawing attention to potentially prejudicial issues. *See State v. Vance*, 714 N.W.2d 428, 443 (Minn. 2006) ("[C]ourts are hesitant to *sua sponte* give an instruction because an instruction may draw additional attention to potentially prejudicial issues.").

The rule we adopt today minimizes the impact on these two important interests and provides needed clarity. By requiring a defendant to object to the admission of relationship evidence under Minn. Stat. § 634.20 before a district court is required to provide a cautionary instruction, the rule encourages criminal defendants to seek a fair and accurate trial the first time around. And because the rule only requires a district court to sua sponte

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we have adopted section 634.20 as a rule of evidence. *McCoy*, 682 N.W.2d at 161. We did so under our supervisory powers without sending the question to the Advisory Committee. Indeed, we held that 634.20 evidence is not subject to other provisions in the Rules of Evidence. *See id.* at 160–61 (rejecting contention that 634.20 evidence was subject to requirements of Minn. R. Evid. 404(b) and stating that "we believe we may appropriately exercise our supervisory power over Minnesota courts by adopting a reasonable statute regulating the admission of evidence even if it does directly conflict with a rule of evidence"). The rule we announce today is consistent with the approach we took in *McCoy*.

instruct the jurors on the proper use of 634.20 evidence if the defendant does not object to such action by the court, the rule protects the defendant's strategic interests.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals.

Reversed.

C O N C U R R E N C E

LILLEHAUG, Justice (concurring)

I join Part I of the opinion of the court, which decides the case by reversing the decision of the court of appeals. I write separately because I respectfully disagree with Part II of the opinion, which is not necessary to resolve the case.[1] Part II announces two new rules. The first is that, when relationship evidence under Minnesota Statutes § 634.20 (2018) is admitted over a defendant's objection, the court *must* (not just should) sua sponte instruct the jurors on the proper use of that evidence. The second rule is that, notwithstanding the first rule, the court *must not* give such an instruction if the defendant objects.

I am aware of no other instance (at least, in a non-constitutional context) where we have either required district courts to give a limiting instruction sua sponte,[2] or granted a party veto power over whether the district court gives an instruction. One would expect

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[1] This separate writing is not a dissent because I agree with the disposition of the case: reversal of the court of appeals' decision. My disagreement is with a portion of the court's opinion that does not affect that disposition.

[2] A limiting instruction helps ensure that the jurors use the evidence only for a permissible purpose. *State v. Broulik*, 606 N.W.2d 64, 71 (Minn. 2000). By contrast, an accomplice-testimony instruction informs the jurors of the statutory prohibition against finding a defendant guilty based on uncorroborated accomplice testimony. *State v. Lee*, 683 N.W.2d 309, 316 n.6 (Minn. 2004). Because there is a qualitative difference between a limiting instruction and an accomplice-testimony instruction, my analysis is not inconsistent with *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002) ("[T]he duty to instruct on accomplice testimony remains regardless of whether counsel for the defendant requests the instruction."), or *State v. Barrientos-Quintana*, 787 N.W.2d 603, 610 (Minn. 2010) (same).

that the reasons for such groundbreaking new rules would be explained at length. But the opinion says little about why section 634.20 relationship evidence requires these unprecedented rules.

In many respects, section 634.20 relationship evidence is similar to *Spriegl* other-bad-acts evidence. *See* Minn. R. Evid. 404(b) (governing the admissibility of "[o]ther crimes, wrongs, or acts"). But in the *Spriegl* context, we have never required a sua sponte instruction[3] or given either party veto power over the district court's decision to give a jury instruction.

Not only are these new rules unprecedented, they directly contradict Minnesota Rule of Evidence 105, which states that, when evidence is admissible for one purpose but not another (a hallmark of section 634.20 evidence), "the court, *upon request*, shall . . . instruct the jury accordingly." (Emphasis added). As the Advisory Committee on the Rules of Evidence explains, "the rule places the burden on the opposing party to request a limiting instruction before a court is required to give such an instruction." Minn. R. Evid. 105 comm. cmt.—1977. This burden is consistent with well-established law. *See State v. DeZeler*, 41 N.W.2d 313, 319 (Minn. 1950) (explaining that in the absence of a request for a limiting instruction, a trial court's failure to provide such an instruction is not prejudicial error). The plain language of Rule 105 neither requires an instruction sua sponte nor gives

[3] Instead, we have simply encouraged the trial court to provide a limiting instruction on *Spreigl* evidence. *See State v. Taylor*, 869 N.W.2d 1, 18 (Minn. 2015) (observing that our "*Spreigl* cases do not require a limiting instruction to be given sua sponte").

a party a veto (much less a unilateral one) over a judge's decision to instruct. Instead, the rule requires an instruction only upon request.

As a practical matter, the two rules announced today amend Rule 105. Instead of amending the rule by announcement in an opinion, the court should have referred the treatment of section 634.20 evidence to the Supreme Court Advisory Committee on the Rules of Evidence. The advisory committee exists so that judges and lawyers, all experienced in evidentiary issues, can weigh the pros and cons of proposals to amend the rules. *See generally* Minn. Stat. § 480.0591, subd. 2 (2018) (explaining the purpose and structure of the advisory committee). It includes both prosecutors and defense lawyers experienced in the use of section 634.20 evidence.

Typically, when the advisory committee makes a recommendation to amend a rule, it files a report that includes a detailed rationale for the proposed amendment. Upon receiving such a report, the court often gives notice to the public and invites its comments. *See generally id.*, subd. 4 (2018) (describing this process). Today's opinion short-circuits that salutary, time-honored process—and for no good reason.[4]

Therefore, I respectfully decline to join Part II of the opinion of the court.

McKEIG, Justice (concurring).

I join in the concurrence of Justice Lillehaug.

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[4] What the majority does here is much different than what we did in *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004). In *McCoy*, we adopted section 634.20 as a new rule of evidence (albeit in conflict with Rule 404(b)) based on the doctrine of comity. *Id.* at 160–61. But comity has nothing to do with today's announcement of two new rules. We should have followed the usual procedures, well-designed for transparency and accountability.