1999 WL 993975
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Anthony Maynard NELSON, Appellant.

No. C8-98-1920.

Nov. 2, 1999.

Affirmed, Davies, Judge. Ramsey County District Court, File No. K99827.

Attorneys and Law Firms

Mike Hatch, Attorney General, St. Paul, MN; and Susan Gaertner, Ramsey County Attorney, Darrell C. Hill, Assistant County Attorney, St. Paul, MN, for respondent.

John M. Stuart, State Public Defender, Sharon E. Jacks, Assistant State Public Defender, Minneapolis, MN, for appellant.

Considered and decided by SHUMAKER, Presiding Judge, and DAVIES and WILLIS, Judges.

UNPUBLISHED OPINION

DAVIES.

***1** This appeal is from a judgment of conviction for first-degree assault. *See* Minn.Stat. § 609.221, subd. 1 (Supp.1997). We conclude that any error in excluding evidence of the victim's civil lawsuit against a third party was harmless and the trial court did not abuse its discretion by admitting character evidence and by failing to instruct the jury on defense of dwelling. We therefore affirm.

FACTS

Appellant Anthony Maynard Nelson was convicted of first-degree assault for stabbing Lorenzo Madrid at La Oportunidad, a halfway house in St. Paul. La Oportunidad is a duplex and, in July 1997, two residents, Madrid and Bennie Chapman, lived upstairs. Two other residents and appellant, who was the resident manager at the time, lived downstairs. La Oportunidad served as a program for persons on probation for various offenses. Participation in the program required observing a curfew and several additional rules, including no alcohol on the premises. As the resident manager, appellant was responsible for enforcing the house rules.

On the evening of July 18, 1997, Madrid and Chapman, the upstairs residents, got into a physical conflict after drinking at a neighboring house. The conflict was resolved, but appellant then demanded that Madrid return his key to La Oportunidad.

From this point on, accounts of the evening differ. Madrid claimed that: appellant grabbed him from behind and threw him through the door of the lower-level apartment of La Oportunidad, closed and locked the door, and proceeded to push Madrid, who responded by hitting appellant; as the two continued to fight, Madrid felt a pain in his lower abdomen; feeling lightheaded, Madrid unlocked the door, stumbled down the porch steps, and blacked out. The evidence is clear that he awoke in the recovery room of Regions Hospital with three stab wounds.

Appellant testified differently, claiming that: about a half hour after the initial conflict between Madrid and Chapman, he was on the porch with Chapman when several people from the residence where Chapman had been drinking approached the pair; appellant thought the group was after Chapman so he went inside La Oportunidad, grabbed a knife from the kitchen, and hid it in his pants; when he came back on the porch someone hit him; he began to return to the house and Madrid hit him; as appellant entered the house, Madrid forced his way in, locked the door, and started hitting appellant again; Madrid next got possession of appellant's knife, but appellant knocked it out of Madrid's hand; appellant retrieved the knife after it fell to the floor and told Madrid to leave; Madrid tried to grab the knife from appellant, but appellant stabbed Madrid; Madrid then unlocked the door and went outside; after Madrid left, appellant washed the blood from his hands and threw the knife out the back door.

The four eyewitnesses agree that, as appellant was standing on the front porch, he was hit by either Madrid or someone from the neighboring residence. But the eyewitnesses disagree

as to other events surrounding the assault. Accounts as to how Madrid entered the lower level of La Oportunidad have him either falling in, entering while he was wrestling with appellant, walking in an open door, or walking in after appellant opened the door for him. Once Madrid was inside, the door was closed so none of these witnesses saw what transpired inside the residence. The next thing the witnesses saw was Madrid stumble out after he had been stabbed.

DECISION

***2** Evidentiary rulings are at the discretion of the trial court and will not be reversed absent a clear abuse of discretion. *State v. Willis*, 559 N.W.2d 693, 698 (Minn.1997). A defendant claiming that the trial court erred in admitting evidence has the burden of proving both error and resulting prejudice. *State v. Grayson*, 546 N.W.2d 731, 736 (Minn.1996). Reversal is warranted only when trial court error substantially influences the jury's decision. *Id.*

I.

Appellant claims the trial court abused its discretion and committed prejudicial error by denying him the opportunity to cross-examine Madrid about his pending civil lawsuit against La Oportunidad. In a criminal trial, defense counsel may generally "cross-examine a prosecuting witness to show the *pendency* of a civil action for damages by the witness against the *accused*." *State v. Goar*, 311 Minn. 560, 561, 249 N.W.2d 894, 895 (1977). The theory behind this rule is that "such a suit indicates possible bias on the witness' part and is relevant to the witness' state of mind when testifying." *Id.*

In the instant case, defense counsel sought to elicit evidence of Madrid's suit for damages against La Oportunidad. The prosecutor's motion to limit such an inquiry was granted because the trial court found that the criminal prosecution was not relevant to the issues in the third-party civil suit. The trial court erred in this determination because a conviction of appellant would label appellant as a dangerous person and provide a better opportunity to prove that La Oportunidad was negligent in hiring and retaining Madrid. For this reason, the trial court committed error by not allowing appellant to cross-examine Madrid about his civil suit against La Oportunidad. This error was harmless, however, in light of the other evidence reflecting on Madrid's credibility and in light of all the other evidence of appellant's guilt. *State v. Starkey*, 516 N.W.2d 918, 927 (Minn.1994) (harmless error test is whether there is reasonable doubt that result would have been different if evidence had not been admitted).

II.

Appellant argues that the trial court abused its discretion by improperly admitting character evidence. Generally, the prosecution may not attempt to establish the bad character of a defendant unless the defendant has put character at issue by offering evidence of good character. *State v. McCorvey*, 262 Minn. 361, 364, 114 N.W.2d 703, 705 (1962). Such evidence "is inadmissible to prove the character of a defendant in order to show that the defendant acted in conformity with that character in committing the offense with which he or she is charged." *State v. Buggs*, 581 N.W.2d 329, 336 (Minn.1998). *See also* Minn.R.Evid. 404(b).

***3** What appellant contends was improperly admitted as character evidence was evidence that appellant: (1) regularly consumed alcohol at the halfway house in violation of the rules; (2) used crack cocaine at the halfway house; (3) kept several knives at the halfway house; (4) threatened to use a knife to keep residents in line; (5) swung a stick at a resident; (6) was controlling; and (7) was paranoid. Character evidence may be admitted when the defendant "opens the door." *See State v. Gardner*, 328 N.W.2d 159, 161 (Minn.1983) (defense counsel opened door to evidence concerning defendant's character during cross-examination); *State v. Willis*, 559 N.W.2d 693, 699 (Minn.1997) (when defense counsel specifically asks whether criminal act is out of character for accused, defense counsel opens door to introduction of character evidence). When an issue is raised in defendant's opening statement the prosecution may properly respond. *State v. Blair*, 402 N.W.2d 154, 157 (Minn.App.1987) (finding admission of defendant's unemployment proper when issue was raised in defense's opening remarks).

In this case, defense counsel stated in opening remarks:

> You're going to hear testimony that's going to establish that this is not a house

> of angels. You're going to hear testimony that [appellant] has convictions, he has felony convictions. You're going to hear testimony that Mr. Madrid has felony convictions. You're going to hear testimony that other witnesses have felony convictions. You're going to hear testimony about what's referred to as control, house rules. This is a transitional housing situation. *House rule[s] focus on order, discipline, non-consumption of alcohol. You're going to hear testimony about how those house rules were walked upon and thrown out the door.* You're going to hear testimony about people involved in this melee consuming alcoholic beverages * * *. *You are going to hear testimony that [appellant] acted as the house leader. And he got into confrontation[s] with individuals about enforcing those rules, drawing a line, saying this is how you behave, this is how you conduct yourself.*

(Emphasis added.) Defense counsel also discussed the La Oportunidad rules and the confrontations appellant had with other residents regarding these rules.

Appellant, thus, brought up his own violations of the rules and his controlling personality in his opening statement. Appellant opened the door. It was not error for the court to admit prosecution evidence addressing character.

Appellant also submitted a pro se brief in this case. In his pro se brief, appellant challenges the trial court's evidentiary ruling regarding the exclusion of certain character evidence. All of these evidentiary rulings fall within the discretion of the trial court, which did not abuse its discretion. *See State v. Griller*, 583 N.W.2d 736, 742-43 (Minn.1998) (district court has great latitude in making evidentiary rulings and will not be reversed absent abuse of discretion).

III.

***4** Appellant also contends that, although he did not request jury instructions on defense of dwelling, the trial court committed plain error by failing to instruct the jury on this defense sua sponte. Decisions on jury instructions lie within the discretion of the trial court and no error results if no abuse of discretion is shown. *State v. Blasus*, 445 N.W.2d 535, 542 (Minn.1989).

By failing to object to the trial court's jury instructions, a defendant generally waives any challenge to the instructions. *See State v. Fox*, 340 N.W.2d 332, 334-35 (Minn.1983) (failing to properly object to omission of statutory element of offense in jury instruction forfeits challenge on appeal). But, even if there was no objection to the jury instructions, an appellate court can reverse if the instruction given is plain error affecting substantial rights. *Griller*, 583 N.W.2d at 740. An instruction is plain error and prejudicial "if there is a 'reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury.' " *Id.* (quoting *State v. Glidden*, 455 N.W.2d 744, 747 (Minn.1990)).

Here, the instruction on self-defense was followed by an instruction on appellant's duty to retreat. Appellant contends the trial court erred when it included the duty-to-retreat instruction. His argument is based on *State v. Carothers*, 594 N.W.2d 897 (Minn.1999) (holding duty to retreat does not attach to defense-of-dwelling claim). But the record shows that the jury was instructed that it should acquit appellant if it believed that he reasonably and in good faith considered himself in danger from Madrid's actions. The duty to retreat was not a significant issue in this case. The prosecutor did not argue that under the facts appellant had a duty to retreat. Given the evidence, the duty-to-retreat instruction had no impact on the jury's decision. Therefore, giving the duty-to-retreat instruction was not prejudicial.

Affirmed.

All Citations

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Gonzalo Gallegos-OLIVERA, Appellant.

A19-0023

|

Filed December 23, 2019

Hennepin County District Court, File No. 27-CR-18-12917

Attorneys and Law Firms

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Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Florey, Judge; and Klaphake, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge *

***1** In this direct appeal from final judgment, appellant Gonzalo Gallegos-Olivera argues that his conviction of making threats of violence must be reversed because the district court abused its discretion by allowing a defense witness to be cross-examined about possible immigration consequences appellant might suffer as a result of this offense. We affirm.

DECISION

The scope of cross-examination is left largely to the district court's discretion and will not be reversed absent a clear abuse of discretion. *State v. Parker*, 585 N.W.2d 398, 406 (Minn. 1998). Appellant bears the burden of establishing that the district court abused its discretion and that he was prejudiced by the evidentiary ruling. *State v. Griffin*, 834 N.W.2d 688, 693 (Minn. 2013); *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant "must prove that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (quotation omitted).

Gallegos-Olivera was arrested after a road-rage incident and charged with making threats of violence in violation of Minn. Stat. § 609.713, subd. 3(a)(1) (2016), for pointing a BB gun out the passenger window at another car. Before trial, J.R., the driver of the vehicle, submitted a sworn affidavit that he (J.R.) was the one who pointed the BB gun at the driver of the other car. He also expressed concern to officers about Gallegos-Olivera's immigration status, should he be charged with a crime. Prior to voir dire, the judge reviewed a previous off-the-record conversation regarding the admissibility of Gallegos-Olivera's immigration status. He said that Gallegos-Olivera's immigration status may be relevant to show bias or motivation if J.R. testified that he was the one who pointed the BB gun at the victim's car. The judge notified the parties that if the subject of immigration arose during cross-examination, he would give a limiting instruction. Additionally, Gallegos-Olivera's attorney informed the judge and the state that he was currently in immigration removal proceedings.

At trial, J.R. testified in conformity with his statement that he was the one who pointed the BB gun at the other vehicle. And in cross-examination the state brought up Gallegos-Olivera's immigration status to show J.R.'s potential bias or motivation for testifying.

Gallegos-Olivera argues that the evidence of potential immigration implications was not relevant because it did not go to the elements of the charged offense. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Here, the evidence was admitted to show that J.R. had motivation to lie on the stand

and went to potential bias for his testimony. "[P]artiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974) (quotation omitted). The fact that J.R. was concerned about his friend's immigration status goes directly to determining why he may have testified the way he did. Therefore, Gallegos-Olivera's immigration status was relevant.

***2** Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. When balancing the probative value against the potential prejudice, unfair prejudice "is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

In deciding what effect the admitted evidence had on the verdict, this court considers "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether the defense effectively countered it." *Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002).

The evidence of Gallegos-Olivera's immigration status was brought up during a brief portion of the cross-examination of J.R., a defense witness. The purpose of the evidence was to show that J.R. had a motive to fabricate his testimony. The cross-examination was short and the defense did not redirect any questions on the matter. To reduce the prejudicial effect of the testimony, the court gave a limiting instruction before it allowed the state to cross-examine J.R. regarding his belief of Gallegos-Olivera's immigration status. Gallegos-Olivera had an opportunity to give input on the jury instruction prior to the state's cross-examination, and did not object on the record to the instruction. The limiting instruction directed the jury that it could only use the evidence to assess the credibility of J.R.'s testimony. This court presumes that the jury followed the district court's limiting instruction. *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005).

Immigration came up a second time during cross-examination of the detective that received J.R.'s sworn statement. The state asked the detective what J.R. said to him regarding Gallegos-Olivera's immigration status. The defense attorney did not object to this line of questioning. Finally, neither party discussed immigration in their closing argument. Therefore, the probative value of Gallegos-Olivera's immigration status is not substantially outweighed by its prejudicial effect. And, even if the evidence was erroneously admitted, it is unlikely that it had a substantial effect on the jury.

Gallegos-Olivera argues that the probative value of the evidence regarding his immigration status is substantially outweighed by its prejudicial value because evidence of a defendant's immigration status is always unfairly prejudicial and should be excluded. This court has addressed the prejudicial effect of admitting testimony regarding immigration benefits for a crime victim. *See State v. Guzman-Diaz*, No. A17-1231, 2018 WL 352055 at *2-4 (Minn. App. July 23, 2019), *review denied* (Minn. Oct. 16, 2019). Additionally, this court has addressed the prejudicial effect of courts inappropriately considering a defendant's immigration status during sentencing. *See State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), *review denied* (Minn. April 16, 2002). However, these cases are distinguishable from the current case because they do not concern evidence that was admitted for the purpose of showing bias, prejudice, or motivation for a witness's testimony. Gallegos-Olivera also relies on a nonbinding Washington state supreme court case for the premise that immigration status is a "politically sensitive issue" that is highly prejudicial as to outweigh the probative value of the testimony. *Salas v. Hi-Tech Erectors*, 230 P.3d 583, 586-87 (Wash. 2010). None of the cited Minnesota cases support the idea that such a bright line rule exists. Nor has this court ever held that there is such a bright line rule, and we decline to adopt one here.

***3** Gallegos-Olivera also claims that the state could have used evidence of J.R.'s relationship with his sister to show potential bias, prejudice, or motivation. He argues that the state was required to use this evidence instead of his immigration status because this evidence was the least prejudicial evidence. This court has noted that there is no requirement in Minnesota that the state use the least prejudicial evidence. *State v. Rawson*, No. A18-0773, 2019 WL 2332493, *6 n.2 (discussing that Minnesota has neither adopted nor rejected the holding in *Old Chief v. United States* 519 U.S. 172, 182-85, 117 S. Ct. 644, 651-52 (1997) that the probative value of a piece of evidence is discounted if there is other, less-prejudicial evidence available to the state on the same point). Therefore, it was not necessary that the state only use J.R.'s relationship with Gallegos-Olivera's sister instead of his immigration status.

Because the evidence of Gallegos-Olivera's immigration status was relevant to show a witness's potential bias, the testimony did not substantially outweigh its prejudicial effect, and the court gave a limiting instruction, the court did not abuse its discretion in allowing this testimony.

Affirmed.

All Citations

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Footnotes

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

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Nithara XAYSANA, Appellant.

No. C5-00-1102.
|
July 10, 2001.

Attorneys and Law Firms

Mike Hatch, Attorney General, and Susan Gaertner, Ramsey County Attorney, Jeanne L. Schleh, Assistant County Attorney, St. Paul, MN, for respondent.

John M. Stuart, State Public Defender, Jodie L. Carlson, Assistant Public Defender, Minneapolis, MN, for appellant.

Considered and decided by WILLIS, Presiding J., HALBROOKS, and HANSON, JJ.

UNPUBLISHED OPINION

HALBROOKS.

***1** Appellant challenges his conviction of first-and second-degree criminal sexual conduct, arguing that the trial court erred by allowing the jury to take copies of a transcript of the victim's videotaped interview into the jury room and by responding to the jury's request to review the videotape without first notifying counsel. Appellant also argues that the prosecutor committed prejudicial misconduct by eliciting inadmissible testimony, injecting her personal opinion of the victim's veracity in closing argument, denigrating the defense theory, and shifting the burden of proof in closing argument. We hold that the trial court abused its discretion by permitting the transcript to go to the jury room and by communicating with the jury without consulting counsel. But because, on this record, the errors did not result in prejudicial error and there was no prejudicial prosecutorial misconduct, we affirm.

FACTS

In 1990, appellant Nithara Xaysana moved into his sister-in-law's home. While he lived there, he slept in the bedroom of his nieces, then eight-year-old complainant P.S. and her younger sister, sharing the same bed for a period of time.

When P.S. was approximately 12 years old, she told her cousin K.X. that appellant was sexually abusing her. P.S. spoke softly and cried when K.X. asked if she had been raped. K.X. told her parents about the abuse, and they told P.S.'s mother and stepfather. Appellant moved out at P.S.'s mother's request, when P.S. was about 12 years old. P.S.'s mother later denied that anyone told her about any sexual abuse.

In the fall of 1998, P.S. experienced depression and was referred to the school social worker, Vicky Uhr. Uhr suggested that P.S. join a support group at school for Asian girls. P.S. told Uhr that her mother was very strict, hit her, and took her paychecks. P.S. also told Uhr about the past sexual abuse by appellant. Uhr did not report the abuse because it had happened more than five years earlier and P.S. had not seen appellant and did not feel threatened at that time.

In the spring of 1999, P.S. saw appellant again. When P.S. told Uhr that she had been frightened by seeing him, Uhr responded that she was now legally required to report the matter. Uhr contacted the school's liaison officer, St. Paul police officer Steve Stoll. Stoll interviewed P.S. and later testified at trial that P.S. was visibly upset and that she stated that she was afraid to go home because appellant had approached her in her home and tried to hug her. P.S. told Stoll she was afraid that appellant would rape her again. Stoll made arrangements for P.S. to stay in a shelter. After a week at the shelter, she returned home.

On April 12, 1999, P.S. was interviewed and physically examined by Kimberly Martinez, pediatric nurse at the Midwest Children's Resource Center. In the videotaped interview that was later transcribed, a tearful P.S. described the abuse in detail.

Sex-crimes investigator Heidi Hinzman interviewed P.S., K.X., and appellant. When Hinzman asked appellant, through an interpreter, why he moved out of his sister-in-law's house, he said that it was because "he had sexually done something to [P.S.]." Later, he said he moved out because he had done something bad. He also said that P.S. was angry with him

because he found, and then had taken away, notes from her friends.

*2 After the jury was empaneled, appellant objected to the admission of the videotape and transcript of P.S.'s interview with Martinez. Respondent argued that the videotape should be admitted either as statements made for the purpose of medical diagnosis or as a prior consistent statement. The court deferred ruling on the issue until after opening statements and ultimately admitted the videotape and transcript as a prior consistent statement because appellant's trial counsel commented adversely on P.S.'s credibility in his opening statement.

At trial, the jury heard testimony from K.X. about her conversation with P.S. P.S.'s sister testified that she remembered seeing appellant on top of P.S. once when they were all sleeping in the same bed.

P.S. described the abuse by appellant. She testified that appellant had also hit her when he had lived with them and enforced her mother's strict rules. P.S. also described her contentious relationship with her mother. Cross-examination revealed minor inconsistencies in her story.

Martinez testified about her interview with P.S. On direct, the prosecutor asked Martinez if she believed appellant, and, before defense counsel could object, Martinez answered affirmatively. In addition, Martinez testified that she had reviewed a transcript of the interview and found it to be substantially true and accurate. Before the jury was given the transcript, the court cautioned it that

> [t]here was no court reporter present at the time of this interview. And under court rules the party offering the tape prepares a transcript. And this is done based upon one person's hearing with a little help from others attempting to make sure they picked up every word. Again, there was no court reporter there to interrupt when a word was misunderstood. So this is the best transcript we have available.

The jury watched the videotaped interview in court, with a copy of the transcript in hand.

Respondent called Carolyn Levitt, M.D., medical director of the Midwest Children's Resource Center. Dr. Levitt testified that delayed reporting of sexual abuse was common. While Dr. Levitt testified that she believed that P.S.'s demeanor in her interview with Martinez indicated that there had been sexual abuse, she conceded that she could not rule out other causes for P.S.'s depression, sadness, and visible stress.

Appellant's theory of the case was that P.S. lied about the abuse because she wanted to get out of her mother's restrictive home. Appellant's expert, Robert Barron, Ph.D., testified that, although most reports of child abuse are truthful, his review of the videotape, police reports, and social worker's notes led him to conclude that there were indications in this case that the allegations were false. He based this conclusion on P.S.'s conflict with her mother and appellant, P.S.'s history of running away from home, and the inconsistencies in her allegations.

Appellant testified through an interpreter. He admitted that when he had lived with the family, he slept in the bedroom of P.S. and her sister. He denied any inappropriate touching of either girl. He testified that he had numerous conflicts with P.S. about house rules and had taken "love letters" from her backpack. He believed that he was asked to leave the apartment because his sister-in-law thought he was hitting the girls. He also stated that P.S.'s mother thought he was "forcing" the children. The interpreter explained that in Laotian, the word used for "forcing" may mean either forcing somebody to do something; a person with more power than someone else; beating someone up; killing somebody; or "forcing somebody sexually." Appellant acknowledged seeing P.S. before her birthday and said he did not go to the party because he could not afford the gift she wanted.

*3 During deliberations, the jury requested a VCR and television in order to review portions of P.S.'s videotaped interview with Martinez. Without consulting counsel, the trial court decided not to provide the videotape, but directed the jury to the transcript. Before the verdict was accepted, the court told counsel about the jury's request and its response. Appellant expressed surprise that the jury had been given the transcript, which he believed had not been entered into evidence and moved for a mistrial. Appellant's counsel's motion was denied. The jury found appellant guilty of criminal sexual conduct in the first and second degree.

For a period of time after trial, appellant was held at the Washington County jail. A fellow inmate told authorities that appellant had confessed to the sexual abuse. The informant's information was disclosed to the trial court before sentencing.

On March 30, 2000, the court granted respondent's motion for an upward departure and sentenced appellant to 90 months. The court departed from the sentencing guidelines because of various aggravating factors, including appellant's lack of remorse, the fact the abuse occurred in P.S.'s bedroom-her "zone of privacy," and the position of authority appellant held over P.S. The trial court specifically noted that "the testimony of the jailhouse snitch * * * doesn't even need to be considered by the court as an aggravating factor." This appeal follows.

DECISION

I.

Appellant argues that admitting the transcript and permitting it to go to the jury room was erroneous because there was a question as to its accuracy and because the person who prepared the transcript did not testify. This court applies a deferential standard when reviewing a district court's evidentiary rulings. *State v. Olkon*, 299 N.W.2d 89, 101 (Minn.1980). The supreme court has stated that "[t]ranscripts should not ordinarily be admitted into evidence unless both sides stipulate to their accuracy and agree to their use as evidence." *Id.* at 103 (quoting *United States v. McMillan*, 508 F.2d 101, 105-06 (8th Cir.1974) (citation omitted), *cert. denied*, 421 U.S. 916, 95 S.Ct. 1577 (1975)). *Olkon* set forth guidelines for the use of transcripts of audiotape recordings, such as having the preparer of the transcripts lay a foundation for their use.

Here, the transcription was from the videotaped interview of P.S. by Martinez. Before playing the videotape to the jury, Martinez testified that she had reviewed the transcript and found it to be "substantially true and accurate." As a participant in the interview, her attestation to the accuracy of the transcript lays the proper foundation. In addition, the court informed the jury that there had been no court reporter at the interview and that the transcript had been created by listening to the videotape itself. While appellant's counsel argued in opposition to admission of the transcript that it contained "inaccuracies," no record of any errors in transcription was made. The trial court ultimately admitted the transcript into the "court record" as a prior consistent statement in light of appellant's counsel's strategy in his opening statement. Given the trial court's discretion, Martinez's foundational testimony to its accuracy, and the court's cautionary instruction, we conclude that providing the jury with the transcript for use during trial was not error.

***4** Appellant also argues that the trial court erred by allowing the transcript to go to the jury room because the court failed to comply with the requirements of Minn.R.Crim.P. 26.03, subd. 19(1), and "placed undue prominence on [P.S.'s] testimony in a case where credibility was the only issue."

Minn.R.Crim.P. 26.03, subd. 19(1), provides:

> The court shall permit the jury, upon retiring for deliberation, to take to the jury room exhibits, which have been received in evidence, or copies thereof, except depositions and may permit a copy of the instructions to be taken to the jury room.

A trial court has broad discretion in determining which exhibits can be taken to the jury room. *State v. Kraushaar*, 470 N.W.2d 509, 514-15 (Minn.1991). When making this determination, the court should consider whether the exhibit will "aid the jury in proper consideration of the case," unduly prejudice either party, or be subjected to improper use by the jury. *Id.* at 515 (citation omitted).

One of the issues on appeal in *Kraushaar* was whether it was prejudicial error for the trial court to permit the jury to have unrestricted use during deliberations of a videotaped interview with an alleged victim of sexual abuse. *Id.* at 514. The majority held that a videotaped interview is not a deposition or so akin to a deposition within the meaning of Minn.R.Crim.P. 26.03, subd. 19(1), so as to be barred by the rule. *Kraushaar*, 470 N.W.2d at 515. While that case involved videotape and not a transcript of the interview, the court referenced the rationale behind the rule as stated in section 5.1(a), *ABA Standards Relating to Trial by Jury* (1st ed.1968). The rationale is the concern that permitting depositions

> to be taken to the jury room would result in the jury rereading them and examining them and thus either giving them greater emphasis or subjecting them to closer criticism than the testimony of the witnesses who appeared in court.

Kraushaar, 470 N.W.2d at 515 (quotation omitted). Appellant's argument in this matter raises exactly that concern.

The facts in this case differ significantly from *Kraushaar* in that appellant's trial counsel here did object to the admission of the videotape and the transcript. When the transcript was admitted, the trial court characterized it as becoming part of the "court record." While the record is not clear, appellant's trial counsel seemed to assume that that meant the jury would have the transcript for use during the time the videotape was played in court, but would not have the transcript in the jury room. On this record, we hold that it was error for the trial court to have permitted the transcript to go into the jury room.

But even if allowing the transcript to be used during deliberations was error, we conclude that any error was harmless. In *Kraushaar*, the supreme court held that allowing the jury to view the videotaped testimony of a child sexual-assault victim in the jury room was non-prejudicial error. *Id.* at 516. Here, the court allowed the jury to re-read the transcript of an interview. The transcript was consistent with a significant amount of other evidence, and it is doubtful that reading the transcript of a videotape they had already viewed caused the jury to convict where it otherwise would not have done so. *See id.* (holding that these same factors led to non-prejudicial error).

II.

***5** Next, appellant argues that the trial court committed prejudicial error when it communicated with the jury during deliberations about the review of certain evidence without notifying the parties. If, during deliberations, the jury requests a review of certain testimony or other evidence, the court may permit the jury to reexamine the requested evidence once the parties have been notified. Minn.R.Crim.P. 26.03, subd. 19(2)(1). The judge and jury should not communicate during deliberations except "in open court and, where practicable, in the presence of counsel * * * and in criminal cases in the presence of the defendant." *State v. Schifsky*, 243 Minn. 533, 543, 69 N.W.2d 89, 96 (1955). A defendant is not entitled to a new trial for improper or ex parte communication, however, where "the error was harmless beyond a reasonable doubt." *State v. Kelly*, 517 N.W.2d 905, 908 (Minn.1994) (citing *State v. Ware*, 498 N.W.2d 454, 457-58 (Minn.1993)).

Here, when the jury requested equipment to allow it to view the videotaped interview, the trial court told them to look at the transcript of the interview instead. None of these interactions occurred on the record. The court later told counsel that:

> [c]ase law would indicate that since the tape was played during the course of the trial, that I could have honored that request and allowed them to watch the video tape. And it would have been my judgment at the time, it would have been more prejudicial to put the tape on to once again watch the very teary-eyed alleged victim in this case.

Where a trial court's communication with a jury is "neutral and nonsubstantive" or where it "presumably would have been the same" had counsel been consulted first, reviewing courts have found no prejudice. *State v. Hudspeth*, 535 N.W.2d 292, 295 (Minn.1995); *State v. Kindem*, 338 N.W.2d 9, 16-17 (Minn.1983). Thus, although the court should have informed counsel of the jury request, this error did not prejudice appellant.

III.

Appellant argues that the prosecutor committed misconduct when she elicited inadmissible evidence and made improper statements in closing arguments. Determination of whether the prosecutor engaged in prejudicial misconduct is within the trial court's discretion. *State v. Robinson*, 604 N.W.2d 355, 361 (Minn.2000). Reversal is warranted only where the alleged misconduct, examined within the context of the entire

record, is so prejudicial that an appellant's right to a fair trial is impaired. *Id.* When credibility is a central issue, reviewing courts will pay "special attention" to statements that may inflame or prejudice the jury. *State v. Porter*, 526 N.W.2d 359, 363 (Minn.1995).

Appellant first contends that the prosecutor elicited improper testimony when she asked Martinez if she believed P.S. The state concedes that it was inappropriate to ask a witness her opinion about the victim's veracity. But this improper question occurred only once. Moreover, the court gave the jury a cautionary instruction to disregard the testimony. We will assume that the jury followed the court's instructions. Therefore, the jury instruction cured any misconduct. *State v. Ferguson*, 581 N.W.2d 824, 833 (Minn.1998).

***6** Appellant's second argument is that the prosecutor engaged in misconduct when she failed to caution a witness against referring to P.S. as the "victim," despite the pretrial order prohibiting witnesses from referring to P.S. as the "victim." Our review of the record reveals that there was only one instance during the trial that a witness referred to P.S. as the "victim." Officer Hinzman referred to P.S. as the "victim" in response to a question about how she located appellant. It is error for a prosecutor to elicit evidence ruled inadmissible. *State v. Harris*, 521 N.W.2d 348, 354 (Minn.1994). But it does not appear the prosecutor elicited this testimony. In addition, immediately after Hinzman answered, defense counsel objected and the witness was told to identify P.S. as the "alleged victim." The prosecutor also apologized. This occurrence does not constitute misconduct.

Next, appellant argues that the prosecutor committed misconduct in her closing argument by expressing her personal belief about the veracity of the witnesses, shifting the burden of proof, denigrating appellant and his theory of the case, and misstating the meaning of proof beyond a reasonable doubt. A prosecutor "must proceed with care in closing argument," only arguing matters that may be fairly drawn from evidence that is introduced during trial. *State v. Bright*, 471 N.W.2d 708, 713 (Minn.App.1991), *review denied* (Minn. Aug. 1, 1991). Defense counsel has a duty to object to improper statements during closing arguments and seek a curative instruction. *State v. Brown*, 348 N.W.2d 743, 747 (Minn.1984). But even if the defense counsel does not object, a conviction may be reversed on appeal if statements made in closing arguments are egregious and prejudicial. Minn.R.Crim.P. 28.02, subd. 11; *State v. Gunn*, 299 N.W.2d 137, 138 (Minn.1980) (finding that even if the attorney failed to object at trial, to preserve the issue, the supreme court could review if error is sufficiently egregious).

The prosecutor's remarks that appellant refers to state generally that after "consider[ing] all the factors," the jury should believe P.S. A prosecutor may not express "his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." *State v. Salitros*, 499 N.W.2d 815, 817 (Minn.1993) (quotation omitted). Here, the prosecutor argued that the evidence supported P.S.'s version of the events and that, therefore, the jury "should" believe P.S. None of the comments appellant identifies included the prosecutor's opinion. In this case, the state was offering a permissible interpretation of the evidence rather than a personal opinion as to veracity.

Appellant also argues that the prosecutor shifted the burden of proof and improperly suggested the appellant had a burden to explain how P.S.'s allegations of sexual abuse would help P.S. escape her mother's strict rules. The prosecutor's closing arguments must not "distract the jury from its proper role of deciding whether the state has met its burden." *State v. Ashby*, 567 N.W.2d 21, 27 (Minn.1997) (citation omitted). But rather than shifting the burden, the prosecutor simply argued that there was no evidence to support appellant's theory that P.S. lied about appellant in order to get out of her mother's house.

***7** Next, appellant argues that the prosecutor denigrated him and unfairly attacked the defense theory. He argues the prosecutor personally attacked appellant by stating he got "to choose his prey ." Improper character attacks may constitute prosecutorial misconduct if the prosecutor's references to the defendant's character have the potential for planting in the jurors' minds a prejudicial belief from otherwise inadmissible evidence. *State v. Buggs*, 581 N.W.2d 329, 342 (Minn.1998) (holding that a prosecutor's references to the defendant as a "coward" with a "twisted thought process" were improper) (quotation omitted); *State v. Ives*, 568 N.W.2d 710, 713-14 (Minn.1997) ("would-be punk"); *State v. Washington*, 521 N.W.2d 35, 39 (Minn.1994) ("scorpion" fable); *State v. Merrill*, 428 N.W.2d 361, 372 (Minn.1988) ("an animal").

We conclude that this comment was improper, but harmless. The single reference to P.S. as appellant's "prey" came within a 24-page closing argument. *See* *State v. Glaze*,

452 N.W.2d 655, 662 (Minn.1990) (stating that there is less likelihood of prejudice when the comments are brief and isolated). We remind the prosecutor that she may not seek a conviction at any price. *Salitros*, 499 N.W.2d at 817. We caution the prosecutor against using this type of inflammatory comment in her closings. The prosecutor should function as "a 'minister of justice' whose obligation is 'to guard the rights of the accused as well as to enforce the rights of the public.' " *Id.* (citation omitted).

Appellant further argues that the prosecutor impermissibly suggested that the defense theory was a standard argument. A prosecutor may argue that there is no merit to a particular defense in view of the evidence or no merit to a particular argument. *State v. Kirvelay*, 311 Minn. 201, 202, 248 N.W.2d 310, 311 (1976). But it is improper for a prosecutor to suggest that the arguments of defense counsel are part of a standard argument that the defense makes in "cases of this sort." *Salitros*, 499 N.W.2d at 818. Here, by asserting the defense theory was a common one and her "favorite possible defense argument," the prosecutor's comment was improper. But this comment, by itself, does not justify a reversal.

Finally, appellant argues that even if each instance of misconduct alone is inadequate to require reversal, cumulatively the misconduct was not harmless beyond a reasonable doubt. *See State v. Underwood*, 281 N.W.2d 337, 344 (Minn.1979) (holding that even if an error at trial, standing alone, would not be sufficient to require reversal, the cumulative effect of the errors may compel reversal). Prosecutorial misconduct is harmful, and grounds for reversal, if it played a significant or substantial part in influencing the jury to convict. *State v. VanWagner*, 504 N.W.2d 746, 749 (Minn.1993). The prosecutor's argument "must be taken as a whole to determine if it provides a basis for reversal." *State v. Daniels*, 332 N.W.2d 172, 180 (Minn.1983) (citation omitted).

***8** Here, although the prosecutor stretched the limits of permissible behavior in her closing argument, the strength of the state's case is such that reversal is unwarranted. *See State v. Rose*, 353 N.W.2d 565, 570 (Minn.App.1984) ("Because the evidence against the appellant was substantial, the prosecutor's comments were harmless."), *review denied* (Minn. Sept. 12, 1984). In light of the substantial evidence of appellant's guilt, including the testimony of P.S., her cousin, her sister, the experts, and the police investigators, we hold that this prosecutorial misconduct was harmless beyond a reasonable doubt.

IV.

In his pro se supplemental brief, appellant argues that the trial court erred when it relied on the untruthful statement of a jailhouse informant when sentencing him. This court reviews sentencing departures under an abuse-of-discretion standard. *Cooper v. State*, 565 N.W.2d 27, 34 (Minn.App.1997), *review denied* (Minn. Aug. 5, 1997). Although the trial court generally applies the presumptive sentence, the court has discretion to depart when the offense involves "aggravating or mitigating circumstances." *State v. Best*, 449 N.W.2d 426, 427 (Minn.1989). Here, the court found that multiple aggravating factors made the circumstances of appellant's crime severe, stating explicitly that it need *not* rely on the information given by the informant. Because the court did not rely on any of the information that appellant argues is untruthful, this argument is without merit.

Affirmed.

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Mebrat Belay YEAZIZW, Appellant.

No. CX-02-1486.
|
Aug. 5, 2003.

Hennepin County District Court, File No. 01014419.

Attorneys and Law Firms

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Considered and decided by SHUMAKER, Presiding Judge, WRIGHT, Judge, and FORSBERG, Judge. *

UNPUBLISHED OPINION

WRIGHT, Judge.

*1 In this appeal from her convictions of disorderly conduct and obstructing legal process, appellant argues that (1) the disorderly conduct and obstructing legal process statutes are unconstitutionally vague and overbroad; (2) there was insufficient evidence to support her convictions; (3) the district court abused its discretion in finding probable cause to support the charged offenses; (4) the district court abused its discretion in denying her a hearing on her motion to dismiss for discriminatory enforcement; (5) because of the cumulative effect of several evidentiary rulings, she did not receive a fair trial; (6) the district court erred in denying her motion for a new trial; and (7) the district court erred in denying her motion for a *Schwartz* hearing. The state argues that appellant's brief should be disregarded because it fails to comply with rules of appellate procedure. We affirm in part, reverse in part, and remand.

FACTS

On January 18, 2001, appellant Mebrat Yeazizw was no longer employed by English Rose Suites (ERS), a private residential facility in Edina that provides care for people with dementia and related disorders. She visited the facility to pick up her last paycheck. Yeazizw went to an office on the lower level of the facility and spoke with Geralyn Mornson, a co-owner of ERS, regarding her paycheck. During the conversation, Yeazizw and Mornson began to argue about a discrepancy in the number of work hours reflected in Yeazizw's paycheck. Testimony differs about the argument and subsequent events. Co-owner Jayne Clairmont, whose office was nearby, testified at trial that she asked Yeazizw three times to lower her voice because of the adverse effect it would have on the patients in the facility. After repeatedly asking Yeazizw to leave, Clairmont put her hand on Yeazizw's arm to guide her from her seat. When Yeazizw did not comply with the requests to leave, Clairmont asked Mornson to call the police.

Yeazizw testified that Mornson became angry while recalculating Yeazizw's hours and threw a calculator at Yeazizw, striking her arm and causing it to bleed. Yeazizw also stated that she tried to call the police, but Mornson pulled the telephone away from her and took her earring. Yeazizw testified that Clairmont and another individual restrained her, and she was never asked to leave before the police arrived.

There are also differing accounts of what happened once Edina police officers Kris Eidem, Troy Kemp, and Abagail Hammond responded. Clairmont testified that, after the police arrived, they spoke with Yeazizw and gave her a card explaining how she could pursue a civil lawsuit to recover any money ERS owed her. Clairmont testified that the officers were able to understand Yeazizw [1] and Yeazizw did not ask for an interpreter. The officers also spoke with Clairmont to determine how she was involved in the incident. The officers asked Yeazizw more than once to leave the property. According to Clairmont, on the way up the stairs, Yeazizw

began to flail and resist the officers, such that the officers had to put her against a wall. Eidem, Kemp, and Hammond also testified that, as they walked Yeazizw up the stairs, she was struggling, physically resisting, and screaming in a high tone of voice. Eidem also testified that, once the officers got Yeazizw outside of ERS, Yeazizw started to pull away. Consequently, the officers handcuffed her because they were concerned that she would hurt someone or break a window.

***2** Yeazizw testified that when the police arrived, they went directly to her, handcuffed her, and dragged her out of the facility. She stated that she had difficulty understanding the officers and did not have an opportunity to tell her side of the story.

On February 9, 2001, Yeazizw was charged with disorderly conduct, in violation of Minn.Stat. § 609.72, subd. 1(3) (2000), and obstruction of legal process, in violation of Minn.Stat. § 609.50, subd. 1(1) (2000). After a jury trial, Yeazizw was convicted of both offenses and sentenced to serve 180 days in the workhouse, with 175 days stayed. This appeal followed.

DECISION

I.

Yeazizw contends that the statutes underlying her convictions are unconstitutionally vague and overbroad, both facially and as applied. The constitutionality of a statute presents a question of law, which we review de novo. *State v. Wright*, 588 N.W.2d 166, 168 (Minn.App.1998), *review denied* (Minn. Feb. 24, 1999). "In evaluating constitutional challenges, the interpretation of statutes is a question of law." *State v. Manning*, 532 N.W.2d 244, 247 (Minn.App.1995) (citation omitted), *review denied* (Minn. July 20, 1995).

A. Disorderly Conduct

1. Facial Challenge

Yeazizw argues that Minn.Stat. § 609.72, subd. 1(3) (2000), which proscribes disorderly conduct, is unconstitutional on its face because it is both vague and overbroad. Established precedent holds otherwise. Section 609.72 provides, in pertinent part:

> Whoever does any of the following in a public or private place, * * * knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor:
>
> * * * *
>
> (3) Engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

Minn.Stat. § 609.72, subd. 1(3).

Vague statutes are prohibited under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 7, of the Minnesota Constitution. *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn.1985). A statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983)). "A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn.1998) (citation omitted). In a facial challenge to a statute punishing spoken words, the conduct underlying the conviction is irrelevant. *In re Welfare of S.L.J.*, 263 N.W.2d 412, 419 (Minn.1978). Thus, we need not consider Yeazizw's charged conduct to consider whether the statute is facially constitutional.

***3** Although it narrowed the reach of Minn.Stat. § 609.72, subd. 1(3), in *S.L.J.*, the Minnesota Supreme Court has upheld the facial constitutionality of the statute in terms of both vagueness and overbreadth. *S.L.J.*, 263 N.W.2d at 419; *see also State v. Klimek*, 398 N.W.2d 41, 42 (Minn.App.1986). As to its application to speech, the disorderly conduct statute may only prohibit "fighting words." *In re Welfare of M.A.H.*, 572 N.W.2d 752, 756 (Minn.App.1997) (quoting *S.L.J.*, 263 N.W.2d at 418-19). Prohibiting speech that merely arouses " 'alarm, anger or resentment' is overbroad and vague." *Id.* "Fighting words"

are defined as "those personally abusive epithets which, when addressed to the ordinary citizen, are likely to provoke violent reaction or tend to incite an immediate breach of the peace. Words that merely tend to arouse alarm, anger, or resentment in others are not fighting words." *Klimek*, 398 N.W.2d at 43 (quotation and citation omitted). Thus, "a conviction of disorderly conduct cannot be predicated only on a person's words unless those words are 'fighting words.' " *State v. McCarthy*, 659 N.W.2d 808, 810-11 (Minn.App.2003) (quoting *S.L.J.*, 263 N.W.2d at 419). As Yeazizw points out, the relevant language of Minn.Stat. § 609.72, subd. 1(3), has not changed since *S.L.J.* was decided. Although the reach of the statute has been narrowed, Minn.Stat. § 609.72, subd. 1(3), is facially constitutional.

2. As-Applied Challenge

In examining the conduct of a person accused of disorderly conduct, the words of a defendant are considered as a "package" along with conduct and physical movements. *M.A.H.*, 572 N.W.2d at 757 (citation omitted). Here, Yeazizw's charged conduct included physically resisting the officers and was not merely oral statements. At the least, the disorderly conduct statute's proscription of abusive and boisterous conduct applies to both Yeazizw's speech and her physical conduct. Thus, the application of Minn.Stat. § 609.72, subd. 1(3), to the total "package" of Yeazizw's conduct is constitutional. *Id.*

B. Obstruction of Legal Process

1. Facial Challenge

Yeazizw also contends that Minn.Stat. § 609.50, subd. 1(1) (2000), which prohibits obstruction of legal process, is unconstitutional on its face. The statute prohibits conduct that "obstructs, hinders, or prevents the lawful execution of any legal process, civil or criminal, or apprehension of another on a charge or conviction of a criminal offense." Minn.Stat. § 609.50, subd. 1(1).

The Minnesota Supreme Court has held that section 609.50, subdivision 1(1), is not facially overbroad or vague. *State v. Krawsky*, 426 N.W.2d 875, 879 (Minn.1988); *see also State v. Tomlin*, 622 N.W.2d 546, 548 (Minn.2001) (noting that the *Krawsky* court "held that section 609.50 was not facially overbroad or vague"). In reaching this holding, the *Krawsky* court reasoned that "[p]ersons of common intelligence need not guess at whether their conduct violates the statute" and that the statute does not "encourage arbitrary or discriminatory enforcement by the police." *Krawsky*, 426 N.W.2d at 878. In *State v. Ihle*, 640 N.W.2d 910, 915 (Minn.2002), the Minnesota Supreme Court stated that, in *Krawsky*,

> ***4** [w]ithout making an explicit holding on its constitutionality, we construed the statute narrowly, holding that the statute required the state to prove that the defendant acted intentionally and that the statute was directed at words and acts that have the effect of physically obstructing or interfering with a police officer.

Ihle, 640 N.W.2d at 915. Although *Ihle's* characterization of *Krawsky* leaves doubt as to how explicit *Krawsky's* holding is, it nevertheless makes clear that, on its face, the statute constitutionally prohibits words and acts that physically obstruct or interfere with a peace officer's duties. We thus conclude that this issue has been decided and that Minn.Stat. § 609.50, subd. 1(1), is neither unconstitutionally vague nor overbroad.

2. As-Applied Challenge

"*Krawsky* requires that in order for a violation of Minn.Stat. § 609.50, subd. 1(1) or (2) to exist, there must be a finding that the accused physically obstructed or interfered with a police officer while that officer was engaged in the performance of his official duties." *Tomlin*, 622 N.W.2d at 549. Because the allegations against Yeazizw included physical conduct that interfered with a peace officer, as applied to this case, Minn.Stat. § 609.50, subd. 1(1), is neither unconstitutionally vague nor overbroad. Thus, we conclude that Yeazizw's challenge to the obstruction of legal process statute has no merit.

II.

Yeazizw also challenges the sufficiency of the evidence to support her convictions of disorderly conduct and obstructing legal process. In considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach a guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn.1989). We must assume the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn.1989). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn.1988).

A. Disorderly Conduct

The elements of disorderly conduct are: (1) the defendant "engaged in offensive, obscene, abusive, boisterous, or noisy conduct, or in offensive, obscene, or abusive language tending reasonably to arouse, alarm, anger, or resentment in others;" (2) the defendant "knew, or had reasonable grounds to know, that the conduct would, or could tend to" alarm, anger, or disturb others; and (3) the conduct occurred in a public or private place. Minn.Stat. § 609.72, subd. 1(3); 10 *Minnesota Practice*, CRIMJIG 13.121 (1999). Verbal conduct may be examined along with physical conduct. *M.A.H.*, 572 N.W.2d at 757. As discussed above, "a defendant's words are considered as a 'package' in combination with conduct and physical movements, viewed in light of the surrounding circumstances." *Id.* (citation omitted).

***5** The record establishes that Yeazizw's truculent conduct was both physical and verbal. Clairmont testified that, as the officers escorted Yeazizw out of ERS, Yeazizw was flailing and resisting the officers and "yelling and screaming at the top of her lungs." Clairmont's testimony also established the sensitive nature of the residents of ERS. In addition, Eidem, Hammond, and Kemp testified that, while screaming in a high tone of voice, Yeazizw struggled and physically resisted their efforts to walk her up the stairs. A jury could reasonably conclude from the evidence that Yeazizw committed disorderly conduct. Accordingly, there is sufficient evidence to support her conviction.

B. Obstruction of Legal Process

Conduct charged under Minn.Stat. § 609.50, subd. (1), "must rise to the level of a physical obstruction or be words, such as fighting words, that have the effect of physically obstructing or interfering with an officer conducting an investigation." *Tomlin*, 622 N.W.2d at 548. The elements of obstruction of legal process are: (1) that the officers were engaged in the performance of their duties; (2) that the defendant obstructed, hindered, or interfered with the officers in the performance of their duties; and (3) that the defendant acted with intent to obstruct, hinder, prevent, interfere with, or deter the officers. Minn.Stat. § 609.50, subd. 1(1); 10A *Minnesota Practice*, CRIMJIG 24.26 (1999). As discussed above in relation to the disorderly conduct offense, there is ample evidence of Yeazizw's intentional physical and verbal conduct that obstructed and interfered with the officers. Because a jury also could reasonably conclude from the evidence that Yeazizw committed the offense of obstruction of legal process, this challenge to the sufficiency of the evidence also fails.

III.

Yeazizw argues that she was not allowed to challenge probable cause in her case. We construe this statement as an argument that the district court abused its discretion when it denied Yeazizw's motion for a contested probable-cause hearing. Several orders at various stages of the pretrial proceedings addressed probable cause. In its November 13, 2001, order denying Yeazizw's motion to dismiss for lack of probable cause, the district court found that "the trial court has already determined that probable cause existed." Yeazizw moved for an additional probable-cause hearing, and the district court again denied the motion, concluding that probable cause had already been determined two times-first, when Yeazizw was arraigned without objecting to probable cause and again, months later, in the November 13 order. The district court then proceeded to find for a third time that "[a] review of the complaint shows that the facts establishing probable cause to believe an offense has been committed and that the Defendant committed it are included therein."

We are satisfied that the charges were supported by probable cause, as the district court correctly determined each time the issue was raised. Yeazizw's conduct occurred in the presence

of the officers and her former employers. Thus, her identity was never in question. Further, "[w]hile probable cause to arrest requires something more than mere suspicion [of criminal activity], it requires less than the evidence necessary for conviction." *State v. Horner*, 617 N.W.2d 789, 796 (Minn.2000) (citation omitted). Because the existence of probable cause had previously been determined without objection at the time that Yeazizw sought a contested hearing, the district court did not abuse its discretion when it denied the motion for a contested probable-cause hearing. Moreover, because Yeazizw was convicted of the offenses, we conclude that the issue of whether there was probable cause at the time of her arrest is moot.

IV.

*6 Yeazizw also contends that we should order an independent investigation of the conduct that led to her arrest. Because Yeazizw cites no legal authority demonstrating that she is entitled to this remedy or that we are empowered to order it, and because Yeazizw has not directed us to any decision of the district court related to this issue for appellate review, this argument clearly lacks merit.

V.

Yeazizw asserts that the district court erred when it denied her motion to dismiss for discriminatory enforcement. Yeazizw alleges that she was arrested and prosecuted because of her race and ethnicity. Finding that Yeazizw's allegations were frivolous and conclusory, the district court determined that she had not met the threshold requirements for a hearing on discriminatory enforcement. We review de novo the district court's denial of a motion to dismiss. *State v. Linville*, 598 N.W.2d 1, 2 (Minn.App.1999).

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits intentional, discriminatory enforcement of nondiscriminatory laws. *City of Minneapolis v. Buschette*, 307 Minn. 60, 64, 240 N.W.2d 500, 502 (1976) (citation omitted). A criminal defendant may raise the defense of discriminatory enforcement of criminal laws by law enforcement officials at all levels. *Id.* at 66, 240 N.W.2d at 503. Yeazizw has the burden of producing evidence of discrimination by a clear preponderance of the evidence. *Id.* To prove discriminatory enforcement,

> a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional right.

State v. Russell, 343 N.W.2d 36, 37 (Minn.1984) (citation omitted).

Our review of the record establishes that the district court's determination was not erroneous. The proffered evidence does not show that Yeazizw was singled out because of her race or ethnic origin. There is no evidence that the officers knew of her race or ethnic origin before they responded to ERS. Although she was the only black and Ethiopian-born person at ERS who was arrested, she was also the only person who physically resisted the officers. Further, while our careful review of the *Scales* tape from the police station reveals a heated discussion between one of the officers and Yeazizw as to whether she was arrested because of her race, she has not met her burden of showing that her race, ethnicity, or this post-arrest discussion led to Yeazizw's prosecution. Accordingly, the district court properly denied Yeazizw's motion to dismiss for discriminatory enforcement.

VI.

*7 Yeazizw argues that the cumulative effect of several evidentiary rulings by the district court resulted in an unfair trial. Appellate courts largely defer to the district court's evidentiary rulings, which will not be overturned absent a

clear abuse of discretion. *State v. Kelly*, 435 N.W.2d 807, 813 (Minn.1989).

A. Mornson's Medical Records

Yeazizw sought additional discovery after learning that, in March 2002, Mornson had a "psychotic episode" resulting in a traffic fatality.[2] Yeazizw argues that the district court abused its discretion when it declined to conduct an in camera review of Mornson's medical records and denied the discovery motion. Yeazizw contends that evidence of the episode would explain Yeazizw's behavior toward the police. A district court has broad discretion in discovery rulings. *State v. Wildenberg*, 573 N.W.2d 692, 696 (Minn.1998). The district court denied the motion, concluding that the records were not relevant because "they would tend to prove Defendant's version of events *before* the police arrived," rather than after they arrived. (Emphasis in original.) The district court further stated that "[w]hether or not Ms. Mornson was acting erratic with regard to Defendant simply has no bearing on Defendant's interaction with the police." We agree.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. The district court must also recognize that the defendant has a constitutional right to "be afforded a meaningful opportunity to present a complete defense * * *." *Wildenberg*, 573 N.W.2d at 697 (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532 (1984)). While "not all relevant evidence in the hands of the prosecution is discoverable, where it is material to guilt or innocence, or to sentencing, denying access to the defendant unconstitutionally impairs the defense[.]" *Wildenberg*, 573 N.W.2d at 697.

Mornson's medical records were not relevant to the charges against Yeazizw. The offense conduct consists of Yeazizw's actions toward the police, not actions occurring between Mornson and Yeazizw. Any evidence regarding Mornson's mental health would not have addressed the fact questions regarding what happened once police arrived at ERS. While Mornson's mental health may have affected *why* Yeazizw conducted herself the way she did when police arrived, it does not affect the probability of *whether* she committed the charged offenses. We, therefore, conclude that the district court did not abuse its discretion in denying Yeazizw's discovery motion. *See State v. Bakken*, 604 N.W.2d 106, 110-11 (Minn.App.2000) (holding that the district court did not abuse its discretion in ruling that sexual assault victim's social services records "contained nothing relevant or material to [appellant]'s defense"), *review denied* (Minn. Feb. 24, 2000). In the absence of any showing that Mornson's medical records were relevant to Yeazizw's defense, we also conclude that the district court was not compelled to perform an in camera review of the records. *See State v. Hummel*, 483 N.W.2d 68, 72 (Minn.1992) (concluding that petitioner's insufficient showing that the victim's confidential medical records were material and favorable to petitioner's defense did not trigger the need for in camera review).

B. Testimony of Psychological Expert

***8** "The admission of expert testimony is within the broad discretion accorded a trial court, and rulings regarding materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence may be reversed only if the trial court clearly abused its discretion." *State v. Ritt*, 599 N.W.2d 802, 810 (Minn.1999) (quotation and citations omitted). "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704.

Yeazizw argues that the district court prevented her from effectively using her psychological expert at trial. Ferris Fletcher, Ph.D., a licensed psychologist, testified regarding her evaluation and diagnosis of Yeazizw's posttraumatic stress disorder (PTSD). She also described the disorder's characteristics and symptoms. Yeazizw specifically asserts that the district court misapplied Minn. R. Evid. 704 when it "refused to allow Fletcher to opine about whether Yeazizw would be likely to go into a PTSD trigger reaction under conditions present on January 18."

The trial record reveals no reference to Rule 704 by the district court or counsel. After the state objected during Fletcher's direct examination, the district court excluded evidence of prior acts of domestic abuse against Yeazizw. From the record, it appears that the district court's ruling was not, as Yeazizw contends, based on Rule 704. Excluding the expert's opinion testimony on prior domestic abuse was not a clear abuse of discretion because it lacked relevance to the issues of whether Yeazizw engaged in disorderly conduct and

obstructing legal process. Further, the expert was permitted to testify regarding several other aspects of PTSD as it applied to Yeazizw. Contrary to Yeazizw's assertion, the district court did not abuse its discretion in limiting the expert testimony.

C. Testimony of Police Officers

Yeazizw also argues that the district court abused its discretion in limiting appellant's cross-examination of police officers regarding "their incorrect knowledge of criminal statutes" and the civil lawsuit against them. Yeazizw's argument regarding the officers' knowledge of criminal statutes has no merit. She does not identify a decision of the district court for our review. None of her citations to the record reveals any objections to the officers' testimony, and Yeazizw concedes that she did not object at trial. In the absence of an objection before the district court, this issue is not properly before us. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn.1996) (concluding that reviewing court will not consider matters not argued before and considered by the district court).

As to cross-examination about the civil lawsuit that she has filed against them, Yeazizw contends that, because the civil lawsuit may have biased the officers' testimony in the criminal trial, her constitutional right to confront witnesses was violated by the inability to cross-examine them on this topic. The district court ruled that the civil lawsuit was irrelevant to the criminal case. A criminal defendant establishes a violation of the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a *prototypical form of bias* on the part of the witness." *State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn.1995) (emphasis added) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436 (1986) (other quotation omitted)). "Bias is a catchall term describing attitudes, feelings, or emotions of a witness that might affect [the witness's] testimony, leading [the witness] to be more or less favorable to the position of a party for reasons other than the merits." *Id.* (citation omitted).

> ***9** But not everything tends to show bias, and courts may exclude evidence that is only marginally useful for this purpose. The evidence must not be so attenuated as to be unconvincing because then the evidence is prejudicial and fails to support the argument of the party invoking the bias impeachment method.

Id. (citations omitted).

Evidence of the civil lawsuit was attenuated and prejudicial. That Yeazizw has filed a lawsuit is not probative of whether Yeazizw committed the charged offense. It was also prejudicial, inviting a conclusion of wrongdoing based not on evidence, but on the mere commencement of a civil action. *State v. Harris*, 560 N.W.2d 672, 678 (Minn.1997) (citation omitted) (defining "prejudice" as "the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means"). Because the existence of a civil lawsuit was not probative of any of the facts in the criminal case, the district court did not abuse its discretion when it excluded evidence of the civil lawsuit. Minn. R. Evid. 401 (stating that relevant evidence makes consequential facts more or less probable).

D. Testimony of Police Expert

Yeazizw argues that the district court abused its discretion when it barred her expert on police practices. "The imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the trial court." *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn.1979) (citation omitted); *see also* Minn. R.Crim. P. 9.03, subd. 8 (permitting the district court to sanction for discovery violations). We will overturn such decisions only if the district court abused its discretion. *Lindsey*, 284 N.W.2d at 373. In exercising its discretion, the district court should consider "(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." *Id.*

In a pretrial hearing, the district court set the deadline for submission of expert reports and explicitly warned the attorneys that a late submission would likely result in exclusion of the expert testimony. The district court excluded the police expert's testimony because the report was untimely submitted and because the information provided in the report was not sufficient to inform the prosecution of the expert's proposed testimony. In light of the district court's explicit warning and the substantive deficiency of the late report, we

conclude that the district court's decision to exclude the expert testimony was not an abuse of discretion.

E. Arguments Regarding the Interpreter Issues

"Law enforcement officials must provide an interpreter before interrogating or taking a statement from a person handicapped in communication." *State v. Marin*, 541 N.W.2d 370, 373 (Minn.App.1996) (citing Minn.Stat. § 611.32, subd. 2 (1994)), *review denied* (Minn. Feb. 27, 1996). "A person is handicapped in communication if he or she cannot understand legal proceedings because of a difficulty speaking or comprehending English." *Id.* (citing Minn.Stat. § 611.31 (1994)). Thus, the purpose of Minn.Stat. §§ 611.31 and .32 is to protect the rights of people who are being interrogated.

***10** Yeazizw argues that the district court erred when it (1) ruled that prosecution witnesses could render an opinion as to whether Yeazizw needed an interpreter and (2) precluded Yeazizw from questioning police about Minn.Stat. §§ 611.31, .32, which address an arrestee's right to an interpreter. Yeazizw's claims are not supported by the record. The testimony demonstrates that Clairmont, Eidem, Kemp, and Hammond testified regarding Yeazizw's ability to understand the officers, but none of them offered an opinion regarding whether Yeazizw needed an interpreter when interacting with the police. Contrary to Yeazizw's assertion, the issue of whether such opinion testimony was admissible was not raised at trial, and there was no objection to testimony about Yeazizw's ability to understand the officers. Thus, the record does not contain a district court ruling or issue for our consideration. *Roby*, 547 N.W.2d at 357.

Yeazizw's attorney questioned Jeff Long, a supervising officer who spoke with Yeazizw at the police station, about his familiarity with the interpreter statute. The district court sustained the state's objection to this questioning, and we conclude that it was proper to do so. Here, where the basis of Yeazizw's arrest was conduct that occurred in the presence of police and no evidence was obtained or introduced at trial from any interrogation, the applicability of the interpreter statute was not relevant to the contested issues. *See* Minn. R. Evid. 401 (defining relevant evidence). The district court properly sustained the state's objection to questioning regarding the interpreter statute.

VII.

A district court's denial of a motion for a new trial based on alleged prosecutorial misconduct will be reversed only "when the misconduct, considered in the context of the trial as a whole, was so serious and prejudicial that the defendant's constitutional right to a fair trial was impaired." *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn.2000) (citations omitted). The test for determining whether prosecutorial misconduct was harmless depends partly upon the type of misconduct. In cases involving "unusually serious prosecutorial misconduct," we must be certain beyond a reasonable doubt that the misconduct was harmless before we will affirm. *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974). In cases involving less-serious prosecutorial misconduct, the test is whether the misconduct likely played a substantial part in influencing the jury to convict. *Id.* at 128, 218 N.W.2d at 200.

Yeazizw asserts that the district court erred when it denied her motion for a new trial based on prosecutorial misconduct. The district court found Yeazizw's allegations of prosecutorial misconduct unwarranted and "completely lacking in foundation." A review of the record reveals that most of the comments that Yeazizw considers improper disparagement are actually arguments countering Yeazizw's theory of the case, which we conclude were appropriate. Further, the district court sustained some of Yeazizw's objections to misstatements of the law, and the prosecutor corrected his argument. The supreme court has "repeatedly warned prosecutors that it is improper to disparage the defense in closing arguments or to suggest that a defense offered is some sort of standard defense offered by defendants when nothing else will work." *State v. Griese*, 565 N.W.2d 419, 427 (Minn.1997) (citations and quotation omitted). In his closing argument, the prosecutor stated, "So if you don't bite [that] she's the victim, then she has Post Traumatic Stress disorder and I'm not responsible for what I did." The prosecutor's comments addressing Yeazizw's PTSD were improper.

***11** The misconduct in this case, however, was not so serious and prejudicial as to warrant a new trial. *See Griese*, 565 N.W.2d at 428 (concluding that, despite prosecutor's improper conduct, statements were not so prejudicial as to deny appellant a fair trial). Based on the strength of the evidence considered by the jury, any misconduct committed by the prosecutor did not play a substantial part in the jury's decision to convict. *Caron*, 300 Minn. at 128, 218

N.W.2d at 200; *see also* *State v. Buggs*, 581 N.W.2d 329, 341-42 (Minn.1998) (where verdict "surely" not attributable to prosecutorial misconduct, defendant not entitled to new trial).

VIII.

Yeazizw argues that the district court's denial of a *Schwartz* hearing based on alleged juror misconduct was an abuse of discretion. "The granting of a *Schwartz* hearing is generally a matter of discretion for the trial court." *State v. Rainer*, 411 N.W.2d 490, 498 (Minn.1987) (citation omitted). The trial court should be liberal in granting a hearing, but the defendant must first present evidence that, if unchallenged, would warrant the conclusion that jury misconduct occurred. *Id.* We will not reverse the denial of a *Schwartz* hearing unless the denial constitutes an abuse of discretion. *State v. Church*, 577 N.W.2d 715, 721 (Minn.1998).

During an inquiry into the validity of a verdict, a juror is permitted to testify regarding whether "extraneous prejudicial information was improperly brought to [the] jury's attention." Minn. R. Evid. 606(b); *see also State v. Pederson*, 614 N.W.2d 724, 731 (Minn.2000) (citing Minn. R. Evid. 606(b) and stating that "[w]e are concerned with discovering whether extraneous prejudicial information was considered by the jury"). But a juror is not permitted to testify regarding the jury's thought processes or deliberations. *See* Minn. R. Evid. 606(b); *Pederson*, 614 N.W.2d at 731.

In support of her motion, Yeazizw submitted the affidavit of Stephanie Howard-Clark, an attorney who works for the law firm representing Yeazizw. The affidavit states that Howard-Clark contacted a juror "to learn [her] general views of the trial, and how the lawyers performed at trial." The juror told Howard-Clark

> that there was an interpreter, so [the juror] assumed that meant the Defendant couldn't speak English. But then [the juror] heard the Defendant speaking some English during a break, to someone in the hall. [The juror] also saw [Yeazizw] have brief conversations with her attorney. [The juror] said that in the jury room she mentioned to the other jurors that she had observed the Defendant speaking English in the hall, and then some of the jurors disclosed they had heard it too. [The juror] said it was that observation of the Defendant speaking English that largely persuaded her to decide that the Defendant was guilty. She thought that if the Defendant lied about needing an interpreter, she must've lied about what happened in her case.

***12** The district court denied a *Schwartz* hearing, stating that Yeazizw provided insufficient evidence to warrant a hearing. Howard-Clark's affidavit raises allegations that jurors committed misconduct by considering extraneous information that was prejudicial. These allegations, if unchallenged, lead to no conclusion other than juror misconduct.

We conclude that Yeazizw has met her evidentiary burden. Evidence that jurors obtained from outside the courtroom would be "extraneous prejudicial information" and not information regarding the jury's deliberations. If the allegations prove to be true, consideration of such "extraneous prejudicial information" constitutes juror misconduct. Accordingly, it was an abuse of discretion to deny Yeazizw a *Schwartz* hearing. We reverse the denial of a *Schwartz* hearing and remand for further proceedings not inconsistent with this ruling.

IX.

The state argues that, because the format of Yeazizw's brief fails to conform to the Minnesota Rules of Civil Appellate Procedure, the brief should be disregarded. The state does not expressly move to strike any portion of Yeazizw's brief, which is appropriate where a party's brief does not conform to the rules of appellate procedure. *State v. Duncan*, 608 N.W.2d 551, 559 (Minn.App.2000), *review denied* (Minn. May 16, 2000). We, therefore, decline to consider the state's argument.

Affirmed in part, reversed in part, and remanded.

All Citations

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Footnotes

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

1 Yeazizw was born in Ethiopia, and her native language is Amharic.

2 The record contains a *Minneapolis Star Tribune* article reporting on an accident in which Mornson's vehicle struck and killed a pedestrian while fleeing the police. The article stated that Mornson was having a "psychotic episode" prior to the police pursuit.

2015 WL 5722805
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United States District Court, S.D.
Alabama, Southern Division.

UNITED STATES of America

v.

DSD SHIPPING, A.S., et al., Defendants.

CRIMINAL NO. 15-00102-CG-B

|

Signed September 29, 2015

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ORDER

Callie V. S. Granade, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on DSD Shipping, A.S.'s motion in limine to exclude evidence of a subsequent remedial measure (Doc. 153), the United States' response (Doc. 176), and DSD Shipping, A.S's reply (Doc. 180). For reasons that will be explained below, the court finds that the motion should be granted.

DSD Shipping, A.S. ("DSD") moves to exclude evidence of the replacement of the Stavanger Blossom's oily water separator ("OWS") after the United States' investigation commenced. DSD contends that under Rule 407, such evidence constitutes a subsequent remedial measure and is unfairly prejudicial and therefore, inadmissible. The United States disagrees, arguing that Rule 407 is a civil rule of evidence that has no application in criminal cases and that even if Rule 407 applies to this case, the evidence can still be offered as proof of a prior condition. The Court finds the United States' arguments fall short.

Federal Rule of Evidence 1101 provides that the Federal Rules of Evidence apply in not only "civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;" but also "criminal cases and proceedings." Fed. R. Evid. 1101(b). Thus, "the plain language of Rule 1101(b) renders each of the Federal Rules of Evidence—including [Rule 407]—generally applicable to criminal cases and proceedings." See United States v. Arias, 431 F.3d 1327, 1336 (11th Cir. 2005) (citing 1101(b) and discussing the application of Rule 408 to criminal cases).

Federal Rule of Evidence 407 states the following:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> • negligence;
>
> • culpable conduct;
>
> • a defect in a product or its design; or
>
> • a need for a warning or instruction.
>
> But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

Fed. R. Evid. 407. The United States contends that the language of Rule 407 indicates that the Rule applies only to civil contexts. The Rule only precludes evidence that would have made an earlier injury or harm less likely to occur. However, neither harm nor injury are exclusively civil matters. The harm in this case was to the environment. The Defendants are charged with violating the International Convention for the Prevention of Pollution from Ships (MARPOL) and the Act to Prevent Pollution from Ships (APPS), which were enacted "to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances." United States v. Pena, 684 F.3d 1137, 1142 (11th Cir. 2012) (quoting MARPOL). The alleged harm to the environment caused by the Defendants in this case, is exactly what MARPOL and APPS were enacted to prevent.

The United States also contends that the type of things Rule 407 precludes the use of subsequent measures to prove (negligence, culpable conduct, a defect in a product or its design or a need for a warning or instruction) are also

indicative of civil cases. However, culpability is clearly an element in both civil and criminal cases.

*2 The Court would agree that the possibility that subsequent remedial measures will be taken does not arise under most criminal contexts. There simply is no way for a party to do something to alleviate the danger or eliminate the possibility of future harm in most criminal cases. However, where, as here, subsequent remedial measures are possible in a criminal case, Rule 407 does not state that the case is excluded from its application. "[W]here the drafters of the Rules intended to prevent the application of a particular Rule to criminal cases, they provided so expressly. Arias, 431 F.3d at 1336-37 (citations omitted). For instance, Federal Rule of Evidence 803 provides that public records are not to be excluded as hearsay when setting forth "a matter observed while under a legal duty to report, but not including, in a criminal case." Fed. R. Evid. 803(A)(ii); see also United States v. Bailey, 327 F.3d 1131, 1146 n. 6 (10th Cir. 2003) (citations omitted). DSD points out that there are other examples of rules that are expressly applied only to civil cases. See e.g. Fed. R. Evid. 301 ("In a civil case ..."); Fed. R. Evid. 302 ("In a civil case ..."); Fed. R. Evid. 404(a)(2) ("The following exceptions apply in a criminal case: ..."). "Where the drafters of [the Rule] did not expressly preclude application of [the Rule] to criminal cases, we are reluctant to construe that decision as inadvertent." Arias, 431 F.3d at 1337. While at least two district courts have concluded that the Rule was meant to apply only to civil cases, see, e.g., United States v. Gallagher, 1990 WL 52722 (E.D. Pa., April 24, 1990) and United States v. Wittig, 425 F.Supp.2d 1196 (D. Kan. 2006), this Court finds the structure of the Rules and the express command of Rule 1101(b) more compelling. See Arias, 431 F.3d at 1337.[1]

1 There are at least two district courts that have applied Rule 407 to criminal cases. See e.g. United States v. Parnell, 32 F. Supp.3d 1300, 1304 (M.D. Ga. 2014) (agreeing with government in a case where defendants had been indicted for crimes arising from the sale of salmonella-contaminated peanuts, that Rule 407 did not preclude admissibility because the evidence was being offered to show the absence of industry standards.); United States v. Shanrie Co., 2008 WL 161467, at *1 (S.D. Ill. Jan. 17, 2008) (agreeing with government in Fair Housing Act violations case that Rule 407 did not preclude admissibility because the evidence was being offered to prove feasibility and not to prove "negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction").

The United States contends that even if Rule 407 applies, the evidence may still be offered as proof of a prior condition. The United States relies primarily on Bailey v. Kawasaki-Kisen, K.K., 455 F.2d 392 (5th Cir. 1972), as support for this argument. In Bailey, the plaintiffs attempted to introduce evidence that excessive grease had been removed from a winch. The Court held that the evidence should have been admitted because it "was offered to negate the Shipowner's defense of operational negligence by showing that the winch was in fact defective because it was too greasy to operate properly" and to show that "the danger could easily be eliminated by the most perfunctory of operations."[2] Id. at 396. However, as the Fifth Circuit later pointed out Bailey preceded both the Federal Rules of Evidence and the 1997 Amendments to the Rules, which added that "subsequent remedial measures may not be used to prove 'a defect in a product or its design.' " Rutledge v. Harley-Davidson Motor Co., 364 Fed.Appx. 103, 106 n. 4 (5th Cir. 2010) (citing Fed. R. Evid. 407 advisory committee notes). The Rutledge Court found that the evidence in that case was inadmissible under Rule 407 to show "a preexisting condition that caused her motorcycle to be potentially dangerous." Rutledge, at 106. The Court found that the stated purpose fell "squarely within Rule 407's bar on evidence of subsequent remedial measures offered 'to prove ... a defect in a product[or] a defect in a product's design.' "

2 The Court notes that whether the danger could be eliminated is a question of feasibility which is a purpose for which Rule 407 expressly allows the admission of subsequent remedial measures.

In this case, the United States has not suggested that there is a dispute as to any issue that would render the evidence admissible, such as ownership, control or feasibility of precautionary measures. The advisory committee notes to Rule 407 state that the rule is broad enough to encompass the exclusion of, among others, "subsequent repairs" and the "installation of safety devices." In the instant case, the evidence the United States seeks to admit is of subsequent repairs or the installation of remedial equipment to show that the equipment was faulty prior to the repairs. The admission of such evidence would discourage future parties from taking remedial steps to prevent further violations and harm. The Court finds that the stated purpose for the evidence falls squarely within Rule 407's bar of evidence of subsequent measures to prove culpable conduct.[3]

3 The Court notes that evidence of DSD's replacement of the equipment does not necessarily amount to an admission because DSD contends that they were replaced based on concerns about future serviceability, not because it knew that they were faulty. Additionally, the United States has other means of showing the condition of the equipment prior to replacement. According to the United States, it will provide testimony from Chief Engineer Dancu, Engine Department crewmembers, and the vessel surveyor to establish that the OWS was inoperable. The subsequent replacement is merely further evidence of the condition of the equipment at the time of the offense. As such, the Court finds that the evidence could also be excluded under Rule 403, because its probative value is substantially outweighed by a danger of unfair prejudice.

CONCLUSION

***3** For the reasons explained above, the motion of DSD Shipping, A.S. to exclude evidence of a subsequent remedial measure (Doc. 153), is **GRANTED**.

DONE and **ORDERED.**

All Citations

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