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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0417**

State of Minnesota,
Respondent,

vs.

Jonathan Edward Buhl,
Appellant.

**Filed May 8, 2017
Affirmed
Johnson, Judge**

Dakota County District Court
File No. 19HA-CR-15-1491

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

James C. Backstrom, Dakota County Attorney, Jeffrey R. Nelson, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A Dakota County jury found Jonathan Edward Buhl guilty of domestic assault based on evidence that he slapped his wife across her face. Buhl argues that the district court

erred by not permitting him to impeach his wife's testimony and by not permitting his attorney to challenge his wife's credibility in closing argument. We conclude that the district court did not err in its evidentiary rulings or in its limitation on closing argument. Therefore, we affirm.

FACTS

In May 2015, Buhl and his wife, J.M., lived in a single-family home with J.M.'s mother, who owned the home. In the early morning hours of May 9, Buhl and J.M. had an argument after Buhl returned home from a bar. J.M. called 911. At approximately 3:30 a.m., a police officer visited the home. J.M. told the officer that Buhl slapped her across her face. The officer noticed a red mark on J.M.'s face and took photographs. Buhl denied slapping J.M. and told the officer that J.M. had hit him. The officer took photographs of Buhl.

Three days later, the state charged Buhl with one count of domestic assault by inflicting fear, in violation of Minn. Stat. § 609.2242, subd. 1(1) (2014), and one count of domestic assault by inflicting harm, in violation of Minn. Stat. § 609.2242, subd. 1(2) (2014).

On the eve of trial in December 2015, Buhl orally moved *in limine* for a ruling that would allow him to impeach J.M. with a prior felony conviction and with the fact that she was on probation at the time of the May 9 incident. The district court denied the motion, ruling that the proffered evidence could not be used to impeach J.M.

During the evidentiary phase of trial, the state called three witnesses: J.M. and two law-enforcement officers. J.M. had difficulty remembering the events of May 9 but, after

having her recollection refreshed, testified that Buhl slapped her. On cross-examination, Buhl's attorney asked J.M. about an incident in 2013 in which she called the police to report that Buhl broke down a door in order to enter the home where J.M. then was living. The prosecutor objected on relevance grounds. During a lengthy discussion outside the presence of the jury, Buhl's attorney stated that she wished to introduce evidence that J.M. made a false report against Buhl in 2013 as a way of challenging the credibility of her accusation in this case. The district court ruled that Buhl could ask J.M. about the 2013 report but could not introduce extrinsic evidence to contradict J.M.'s answers to the questions on that topic. Buhl's attorney continued the cross-examination by asking J.M. about her 2013 report against Buhl, using a contemporaneous police report to refresh her recollection. J.M. persisted in testifying that she could not remember the 2013 report. Buhl's attorney then used an excerpt from the transcript of a subsequent criminal trial concerning the 2013 incident in an attempt to refresh J.M.'s recollection that she testified that Buhl did *not* break into the home because she let him in by unlocking the door. Buhl's attorney read aloud from the transcript, but J.M. testified that she could not recall her prior testimony.

During the defense case, Buhl testified that he did not hit J.M. on May 9 and that J.M. hit him. Buhl then called a retired police officer, who had responded to J.M.'s 2013 report that Buhl had broken down the door to her home. Before the retired officer took the witness stand, the district court and counsel had another lengthy discussion outside the presence of the jury, which followed an off-the-record conversation. The district court noted the prosecutor's objection to the retired officer's proffered testimony on the ground

that the testimony would be improper impeachment evidence. The district court noted Buhl's attorney's response that the proffered testimony is admissible as relationship evidence. See Minn. Stat. § 634.20 (2014); *State v. Fraga*, 864 N.W.2d 615, 627 (Minn. 2015); *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). The district court overruled the state's objection on the ground that the evidence is admissible as relationship evidence, and the district court instructed counsel that the evidence must be limited in scope to the report that J.M. made to the officer in 2013. The state did not request a limiting instruction to the jury. See Minn. R. Evid. 105.

In the course of its ruling on admissibility, the district court also cautioned Buhl's attorney that, "because the defense is relying on this as relationship evidence and not extrinsic evidence as to the character for truthfulness, you must frame your argument in that way, characteristic of the relationship and not she lied under oath." The district court elaborated by saying to Buhl's attorney, "you can argue that this is a pattern in the relationship, but you must be very careful to not run afoul of rule 608" because the retired officer's testimony was being admitted "as relationship evidence but not as extrinsic evidence to prove character or dishonesty." In her closing argument, Buhl's attorney referred to the 2013 incident by stating,

On September 8, 2013, [J.M.] called police and told Officer Abrahamson, who you just heard from this morning, that her husband Jonathan Buhl gained entry to her home by breaking down the door. Later, on [December 17, 2013], she came into court, testified under oath that that didn't happen; she let him in.

The jury found Buhl guilty of domestic assault by inflicting harm but not guilty of domestic assault by inflicting fear. The district court sentenced Buhl to 21 months of imprisonment. Buhl appeals.

D E C I S I O N

I. Impeachment of J.M. with Criminal Record

Buhl argues that the district court erred in its *in limine* ruling by not allowing him to impeach J.M. with her prior felony drug conviction or the fact that she was on probation at the time of the May 9, 2015 incident.

A. Prior Drug Conviction

Buhl's argument concerning J.M.'s prior drug conviction is based on the Minnesota Rules of Evidence, though he also cites caselaw concerning the Sixth Amendment right of confrontation. In general, "Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). But evidence of a prior conviction is admissible for impeachment purposes if the crime is punishable by more than one year in prison and the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a). "[W]hen evaluating whether to admit a prior conviction of a prosecution witness, the major concerns are to protect the witness from being harassed and unduly embarrassed, the jury from being confused and misled, and everyone involved (court, jury, parties) from having to endure an unnecessarily prolonged trial." *State v. Lanz-Terry*, 535 N.W.2d 635, 639 (Minn. 1995). This court applies an abuse-of-discretion standard of review to a district court's ruling on this issue. *Id.* at 641.

In the district court, Buhl's trial attorney did not identify a clear rationale for impeaching J.M. with her prior conviction. Buhl's attorney initially argued that the prior conviction might suggest "an issue of bias or a reason why someone might fabricate a story." When the district court asked for an explanation, Buhl's attorney responded by referring only to the fact that J.M. was on probation, which is a separate issue that is discussed below. *See infra* part I.B. The district court excluded evidence of J.M.'s prior drug conviction for the following reasons:

I find that the conviction for the felony controlled-substance crime—first of all, this is not a crime involving dishonesty or moral turpitude. I find that the conviction for controlled-substance crime has minimal impeachment value, that it does not assist the jury in determining the issues in this case, and that the prejudicial effect of allowing in that conviction exceeds the probative value. Essentially, I find that a conviction for a fifth-degree controlled substance crime has virtually no probative value in terms of assessing the issues in this case.

Buhl contends that evidence of J.M.'s prior drug conviction would not have been prejudicial and would not have confused the jury. But the supreme court stated in *Lanz-Terry* that prior convictions could cause a jury to conclude that a victim who testifies as a prosecution witness "was a bad person who deserved to be the victim of a crime, which would amount to a decision being made on an improper basis." 535 N.W.2d at 639. In light of the caselaw, and given the lack of any other justification for the evidence, the district court reasonably determined that the evidence lacked probative value.

Buhl also contends that evidence of J.M.'s prior drug conviction would have allowed the jury to see J.M.'s "whole person" and thereby shed light on her credibility. In

support of this contention, Buhl cites *State v. Hill*, 801 N.W.2d 646 (Minn. 2011), which states that “any felony conviction is probative of a witness’s credibility, and the mere fact that a witness is a convicted felon holds impeachment value.” *Id.* at 652. But the *Hill* opinion concerns impeachment of a *defendant* with prior convictions, not impeachment of a *prosecution witness*. See *id.* at 650-51. The supreme court recognized in *Lanz-Terry* that different considerations apply to the impeachment of a defendant with a prior conviction. 535 N.W.2d at 639. We are unaware of any Minnesota caselaw applying the “whole person” rationale to a prosecution witness who is the victim of an alleged crime. The district court considered the relevant factors under rule 609(a) and did not fail to consider any justifications offered by Buhl. The district court’s reasons are consistent with the relevant caselaw.

Thus, the district court did not err by denying Buhl’s motion *in limine* with respect to J.M.’s prior drug conviction.

B. Probationary Status

Buhl’s argument concerning J.M.’s probationary status also is based on the Minnesota Rules of Evidence, though he again cites caselaw concerning the Sixth Amendment right of confrontation. The Confrontation Clause gives a defendant a “right of cross-examination.” *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 1110 (1974). “Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Id.* at 316, 94 S. Ct. at 1110. A defendant may challenge a witness’s credibility in various ways, including the introduction of evidence that raises “an inference of undue pressure because of [the witness’s] vulnerable status as a

probationer.” *Id.* at 318, 94 S. Ct. at 1111. But the right to cross-examine a prosecution witness on the basis of his probationary status is “[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation.” *Id.* at 316, 94 S. Ct. at 1110. This court applies an abuse-of-discretion standard of review to a district court’s ruling on this issue. *State v. Whittle*, 685 N.W.2d 461, 464 (Minn. App. 2004), review denied (Minn. Oct. 19, 2004).

When Buhl sought to impeach J.M. based on her probationary status, the district court questioned the purpose of the evidence. Buhl’s attorney argued that, if Buhl had been inclined to call J.M.’s probation officer to report a probation violation on May 9, J.M. might have had “a motive to fabricate a story about him to put him in jail so that he can’t do that or that he will appear less credible.” The district court denied Buhl’s motion without elaborating on its reasons. On appeal, Buhl notes that he told the responding police officer that J.M. had hit him, and he contends that he should have been permitted to impeach J.M. by showing that she had an “incentive to deflect blame or hide the full story.”

Buhl’s argument is flawed because J.M. brought the attention of law enforcement on herself and Buhl by calling 911. As this court explained in *Whittle*, if a victim’s report would reveal a probation violation that otherwise would not have been known, there is less of a reason why the victim would fabricate the report. 685 N.W.2d at 465. The caselaw permitting impeachment by probationary status is concerned with the situation in which a person *first* is under suspicion of a crime and *then* fabricates an accusation against the defendant for the purpose of “minimizing or diverting attention from” the suspected offense. *See id.* In *Davis*, the defendant in a burglary case sought to impeach the testimony

of a witness who was on probation because of a prior burglary and lived near the place where stolen items were found at the time that he identified the defendant as a suspect. 415 U.S. at 310-11, 94 S. Ct. at 1107-08. The defendant's theory was that the witness "acted out of fear or concern of possible jeopardy to his probation" and "might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation." *Id.* at 311, 94 S. Ct. at 1108. The circumstances of the present case do not resemble *Davis*. There is no evidence that J.M. was suspected of any crime before she called 911, and law-enforcement officers would not have known of any suspected crime if she had not called 911. Buhl did not introduce or proffer any evidence that he had reported probation violations by J.M. in the past or that he intended to do so in this instance or that J.M. was concerned about his doing so. In fact, when the district court inquired, Buhl's attorney admitted that she did not have any evidence that Buhl had threatened to report a probation violation by J.M. Furthermore, we are mindful that a district court has broad discretion to admit or exclude impeachment evidence of this type. *See id.* at 316, 94 S. Ct. at 1110; *Whittle*, 685 N.W.2d at 464.

Thus, the district court did not err by not allowing Buhl to impeach J.M. with the fact that she was on probation on May 9.

II. Prior Police Report

Buhl argues that the district court erred during trial by preventing him from impeaching J.M. with evidence that she made a false accusation against Buhl in 2013. Buhl's argument has two parts. He begins by arguing that the district court erred by ruling that the evidence he introduced is not admissible as impeachment evidence. He argues

further that the district court's erroneous ruling on admissibility led the district court to err by limiting his closing argument. He argues in the alternative that, even if the district court properly admitted the evidence as relationship evidence but not as impeachment evidence, the district court nonetheless erred by limiting his closing argument.

A. Basis of Admissibility

Buhl contends that the testimony of the retired officer concerning J.M.'s 2013 report was admissible not only as relationship evidence but also as impeachment evidence. He relies alternatively on two different rules of evidence: rule 608(b) and rule 613.

At trial, the state objected on the ground that Buhl's proffered evidence is inadmissible impeachment evidence under rule 608(b) of the rules of evidence, which forbids a party from introducing extrinsic evidence to prove a witness's character for untruthfulness. Buhl did not challenge the state's position that the evidence is inadmissible under rule 608(b). Rather, Buhl's attorney responded by suggesting another basis for its admissibility: the relationship-evidence statute. *See* Minn. Stat. § 634.20. The district court admitted the evidence as relationship evidence. On appeal, Buhl again does not challenge the state's position that the evidence is inadmissible under rule 608(b). He appears to assume that rule 608(b), by itself, makes the evidence inadmissible, but he contends that this court "created an exception to 608(b)" in *State v. Goldenstein*, 505 N.W.2d 332 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). In that case, we concluded that the district court violated the defendants' right to present a complete defense, in violation of their right to due process, by excluding evidence that the alleged victim had made false accusations against another person on a prior occasion. *Id.* at 340.

We note that Buhl did not cite *Goldenstein* to the district court and does not argue on appeal that the district court violated his constitutional right to present a complete defense. As a consequence, it appears that Buhl did not preserve the argument that he makes on appeal, which means that this court should review for plain error. See Minn. R. Crim. P. 31.02. In any event, *Goldenstein* may not be applied in the manner urged by Buhl because of a subsequent opinion of the supreme court concerning the constitutional right to present a complete defense. In *State v. Pass*, 832 N.W.2d 836 (Minn. 2013), the supreme court stated that “a defendant’s due process right to present a complete defense yields to the application of an evidentiary rule unless the rule ‘infringe[s] upon a weighty interest of the accused and [is] arbitrary or disproportionate to the purposes [the rule is] designed to serve,’” or unless the rules of evidence “‘serve no legitimate purpose or . . . are disproportionate to the ends that they are asserted to promote.’” *Id.* at 841-42 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324-25, 126 S. Ct. 1727, 1731-32 (2006)) (alterations in original). The *Pass* opinion is consistent with a prior opinion of the United States Supreme Court, which stated that the constitutional right to present a complete defense does not alter a state trial court’s “ordinary evidentiary rulings,” including rulings concerning “evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues,” so long as “the application of evidentiary rules . . . serve[s] the interests of fairness and reliability.” *Crane v. Kentucky*, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 2146 (1986) (quotation omitted; first alteration in original). Buhl does not contend that rule 608(b) of the Minnesota Rules of Evidence is “arbitrary or disproportionate to the purposes [the rule is] designed to serve” or that it

“serve[s] no legitimate purpose” or that its effect is “disproportionate to the ends that [it is] asserted to promote.” *Pass*, 832 N.W.2d at 841-42 (quotations omitted). Thus, *Goldenstein* does not allow the conclusion that Buhl’s proffered evidence should have been deemed admissible despite being inadmissible under rule 608(b).

Buhl also contends that the retired officer’s testimony is admissible impeachment evidence pursuant to rule 613(b). That rule allows, in certain situations and on certain conditions, “[e]xtrinsic evidence of a prior inconsistent statement by a witness.” Minn. R. Evid. 613(b). As stated above, the district court and counsel had extensive discussions concerning Buhl’s proffered impeachment evidence, both during Buhl’s cross-examination of J.M. and before Buhl’s direct examination of the retired officer. During neither discussion did Buhl identify rule 613(b) as a basis for admitting his proffered impeachment evidence. In any event, rule 613(b) cannot justify the admission of the retired officer’s testimony. J.M.’s statement to the officer in 2013 cannot be deemed a “prior inconsistent statement” because it concerns a different subject than the subject to which she testified at trial. *See Black’s Law Dictionary* 1539 (9th ed. 2009) (defining “prior inconsistent statement” to mean “[a] witness’s earlier statement that conflicts with the witness’s testimony at trial”). Because J.M.’s prior statement concerned the 2013 incident and her testimony at trial concerned the 2015 incident, the two statements are not irreconcilable, which means that rule 613(b) simply does not apply. *See United States v. Bolzer*, 367 F.3d 1032, 1038-39 (8th Cir. 2004).

Thus, the district court did not err by ruling that the retired officer’s testimony concerning J.M.’s 2013 police report is inadmissible as impeachment evidence.

B. Limitation on Closing Argument

Buhl also argues that, even if the district court properly admitted the evidence as relationship evidence but not as impeachment evidence, the district court nonetheless erred by limiting his closing argument. Buhl did not make a formal objection to the district court's limitation on his closing argument. Accordingly, we review for plain error. See *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

In closing argument, a criminal defendant has a right “to make all legitimate arguments on the evidence, to explain the evidence, and to present all proper inferences to be drawn therefrom.” *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009) (quotation omitted). Whether an argument on certain evidence is “legitimate,” and whether an inference from certain evidence is “proper” or “misleading,” depends in part on the purpose for which the evidence was admitted. The supreme court recognized long ago that an attorney's argument concerning evidence must be limited to the purpose for which the evidence was admitted:

While it is true that counsel, in arguing a case to the jury, is to be given much latitude, and that ordinarily comments of counsel in the closing arguments on properly received evidence [are] never error, *it does not follow that where evidence is received for a specific purpose that it can then be used in argument for some other purpose wholly foreign to the limited purpose for which it was received to the prejudice of a litigant.*

Fieve v. Emmeck, 248 Minn. 122, 132, 78 N.W.2d 343, 350 (1956) (alteration in original; emphasis added; quotation omitted). Although this principle has not been reiterated in Minnesota in recent years, it appears that courts in other jurisdictions and commentators

continue to recognize the principle. *See, e.g., People v. Smalley*, 369 P.3d 737, 745 (Colo. App. 2015) (stating that if “the court admits evidence for a limited purpose, the prosecutor must restrict the use of that evidence to the purpose for which it was admitted”); *see also* Jacob A. Stein, *Closing Arguments* § 1.18, at 1-55–1-58 (2d ed. 2005); William E. Wegner et al., *California Practice Guide—Civil Trials and Evidence* § 13.63 (2016).

In general, a district court “may limit the scope of a defendant’s arguments to ensure that the defendant does not confuse the jury with misleading inferences.” *State v. Caldwell*, 815 N.W.2d 512, 516 (Minn. App. 2012), *review denied* (Minn. June 27, 2012) (quotation omitted). In this case, the district court appropriately limited the scope of Buhl’s closing argument to ensure that it was consistent with the purpose for which the retired officer’s testimony was admitted. The district court appropriately defined the scope of permissible argument in advance, in conjunction with its ruling on admissibility and to complete the extensive discussion with counsel about Buhl’s effort to impeach J.M. Thus, the district court did not err by limiting Buhl’s closing argument.

In any event, Buhl’s attorney’s closing argument was not dramatically different from what it would have been if the district court had not expressly imposed a limitation. Buhl’s attorney juxtaposed the evidence she elicited on cross-examination of J.M. and the evidence she elicited from the retired officer. As a practical matter, the jury had an opportunity to compare and contrast J.M.’s 2013 statement to the officer with her subsequent trial testimony concerning the 2013 incident, which would have allowed a juror to believe that J.M. had made a misrepresentation on one occasion or the other. Thus, even if we were to conclude that the district court erred by limiting Buhl’s closing argument, we

would conclude that the limitation did not affect Buhl's substantial rights. *See Griller*, 583 N.W.2d at 740.

Affirmed.