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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0892**

State of Minnesota,
Respondent,

vs.

Sarar Chan Chhoy,
Appellant.

**Filed March 6, 2017
Affirmed
Schellhas, Judge**

Ramsey County District Court
File No. 62-CR-15-7237

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Schellhas, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his convictions for possession of a firearm by an ineligible person and reckless discharge of a firearm. We affirm.

FACTS

On a September 2015 evening, A.Y. was watching television when he heard gunshots coming from the street in front of his house. A.Y. stepped outside to investigate and saw three men walking down the street. One man was firing a gun into the air. A.Y. believed the man firing the gun was a light-skinned Hispanic or Asian man wearing red shorts and a red shirt. A.Y. watched as at least one of the men ran into an apartment across the street.

Police arrived within minutes, and A.Y. told an officer what he had witnessed. Police then obtained a warrant to search the apartment. Five adults, including Sarar Chhoy, were found inside. Chhoy was wearing red shorts and a red shirt. Police summoned A.Y., and he identified Chhoy as the man he had seen shooting a gun into the air. A.Y. also identified a second man, P.D., as one of the other men he had seen with Chhoy. A.Y. could not identify the third man he saw from among the people found in the apartment.

Police searched the apartment and discovered a 9 mm handgun hidden in the toilet tank in the bathroom. A handgun magazine was recovered from the garbage can in the kitchen, and an unspent 9 mm cartridge was located nearby on the kitchen floor. Police also recovered three spent 9 mm shell casings from the street outside the apartment. The handgun, unspent cartridge, and magazine were swabbed for DNA, but no measurable sample was obtained from any of the items.

The state charged Chhoy with possession of a firearm by an ineligible person and reckless discharge of a firearm. A jury found him guilty of both counts. Chhoy now appeals.

DECISION

I

Before trial, Chhoy moved the district court “[f]or an order requiring a hearing outside the presence of the jury to determine the admissibility of the testimony of Nathaniel Pearlson who performed ballistics testing in this case.” At a pretrial hearing, defense counsel explained:

[W]e would ask that the court consider doing a voir dire of the witness outside of the presence of the jury to determine whether the testimony he’s about to give is foundationally reliable and to determine whether it is too confusing for the jury.

Essentially, what this witness, I believe, will say is that he cannot say that the recovered cartridges were fired from the recovered firearm. That he can say that he believes they had been cycled through that firearm; but, he cannot say that they have been fired by that firearm. And I think that that’s not typically what we see. We typically see an analyst, the state introducing evidence that the ballistics match; that the analyst can say that the bullet recovered or the cartridge recovered was fired from that firearm. But, there was too much variability in the testing and the test firing for that analyst to be able to make that finding.

So, that’s why it’s a little more complicated and that’s why I would like to have a hearing outside of the presence of the jury about whether what he has to say is foundationally reliable; and whether what he has to say is more prejudicial than probative in that it would be confusing to the jury.

Defense counsel added, “[W]e’re not asking for this to happen before the trial.” When the district court asked counsel if she was “actually requesting an opportunity, [her]self, to voir dire the witness,” counsel replied, “Yes, Your Honor, I apologize. That’s what I meant to say that we would ask for an opportunity to voir dire the witness in front of the court and have the court make that determination.”

On the first day of trial, the district court ruled that the ballistics-comparison evidence was admissible and that “questions about [Pearlson’s] training and information regarding details about which he might testify . . . could all be addressed in cross-examination.” Chhoy did not object. Pearlson subsequently testified that he compared markings on shell casings obtained from test firing the handgun with the casings found in the street. He concluded that the shell casings found in the street had been fired from or cycled through the handgun found in the apartment.

Chhoy argues on appeal that the district court erred by admitting the ballistics testimony “without first holding a hearing to determine whether his opinion had foundational reliability.” The rules of evidence permit the admission of expert testimony when it will assist the jury in understanding the evidence or in determining factual issues. Minn. R. Evid. 702. The witness must be “qualified as an expert” and the expert opinion must have “foundational reliability.” *Id.* This court reviews the admission of expert testimony for an abuse of discretion. *State v. Burrell*, 772 N.W.2d 459, 467 (Minn. 2009).

Chhoy appears to argue that the district court should have held a pretrial *Frye-Mack* hearing to determine whether Pearlson’s opinion was admissible. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000) (stating that, under the *Frye-Mack* standard, “when novel scientific evidence is offered, the district court must determine whether it is generally accepted in the relevant scientific community,” and whether “the particular scientific evidence . . . ha[s] foundational reliability”); Minn. R. Evid. 702 (“[I]f the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying

scientific evidence is generally accepted in the relevant scientific community.”). Chhoy’s argument is problematic for various reasons.

First, the *Frye-Mack* standard only applies to “evidence based on emerging scientific techniques.” *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 528 (Minn. 2007) (quotation omitted). And the evidence here was not novel; Minnesota courts have admitted ballistics-comparison evidence for years. *See, e.g., State v. DeRosier*, 695 N.W.2d 97, 103 (Minn. 2005); *State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998). Second, Chhoy did not move for a pretrial hearing, and he points to no authority suggesting that the court was required to hold a hearing sua sponte. *Cf. State v. Tanksley*, 809 N.W.2d 706, 710 n.4 (Minn. 2012) (noting that the district court “is not required to hold a *Frye-Mack* hearing sua sponte when the party opposing the admission of scientific evidence has failed to file a motion or state a proper objection”). Finally, defense counsel specifically informed the district court that she was *not* seeking a pretrial hearing. Chhoy therefore cannot convincingly argue on appeal that the district court abused its discretion by not holding a pretrial hearing.

II

Chhoy argues that the district court erred by prohibiting him from questioning A.Y. about his probationary status. At the time of the shooting and trial, A.Y. was on probation for a drug offense. Prior to trial, Chhoy’s counsel requested the district court allow him to question A.Y. about his probation, arguing:

I think it goes to [A.Y.]’s credibility in why he was awake at 2 o’clock in the morning;¹ why he may have witnessed this particular incident; and whether he was actually observing it correctly or not. It could go to a reason why he would not admit that he had been drinking or he would not admit that he had been consuming any kind of controlled substance, because doing those things would have been a violation of his probation.

The district court ruled that the fact that A.Y. was on probation for a drug offense was irrelevant. Chhoy argues that the district court’s ruling violated his confrontation rights because he was not permitted to cross-examine A.Y. for potential bias.

“[Appellate courts] review a district court’s evidentiary rulings for abuse of discretion.” *State v. Graham*, 764 N.W.2d 340, 351 (Minn. 2009). When a district court erroneously excludes evidence in violation of the defendant’s constitutional rights, the conviction must be reversed if “there is a reasonable possibility that the verdict might have been different if the evidence had been admitted.” *Id.* (quotation omitted).

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to confront and cross-examine witnesses. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 1110 (1974). But that guarantee is limited to “an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985). “In criminal cases, the Confrontation Clause contemplates a cross-examination of the witness in which the defendant has the opportunity to reveal a

¹ Defense counsel appears to have misspoken about the relevant time of night. The undisputed evidence shows that the shots were fired at approximately 11:40 p.m.

prototypical form of bias on the part of the witness.” *State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn. 1995); *see also* Minn. R. Evid. 616 (“For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.”). “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.” *Lanz-Terry*, 535 N.W.2d at 640 (quotation omitted). “But not everything tends to show bias, and courts may exclude evidence that is only marginally useful for this purpose.” *Id.*

Chhoy argues that *Davis* supports his contention that the district court abused its discretion when it prohibited him from questioning A.Y. about his probationary status. In *Davis*, the Supreme Court held a trial court violated a defendant’s Sixth Amendment rights when it ruled that he could not question the prosecution’s principal witness about his probationary status as a juvenile delinquent. 415 U.S. at 318, 94 S. Ct. at 1111. The Court determined that the defendant should have been allowed to cross-examine the witness about his potential bias based on his vulnerable status as a probationer and the witness’s possible concern that he was a suspect in the investigation. *Id.* at 317–18, 94 S. Ct. at 1111.

Davis is distinguishable from this case. Unlike the witness in *Davis*, nothing in the record in this case suggests that A.Y. had a clear motive to fabricate his testimony. No evidence suggests that the police suspected that A.Y. might have been involved in the shooting or that police knew of A.Y.’s probationary status and that he testified in exchange for favorable treatment. Defense counsel’s arguments to the district court that A.Y.’s probationary status would have explained why he was awake and “why he would not admit

that he had been drinking or . . . consuming any kind of controlled substance” also do not survive scrutiny. A.Y. testified that he was awake at the time the shots were fired because he was watching television. And Chhoy does not explain how A.Y.’s probationary status would be relevant for cross-examination of that testimony. Additionally, the argument that A.Y. had an incentive to avoid admitting he was violating his probation by consuming alcohol or drugs is entirely speculative. No evidence suggests that A.Y. was violating that term of his probation. Although an officer testified at trial that Chhoy and P.D. appeared to have been drinking alcohol, the officer stated that he did not make a similar observation about A.Y.

Because A.Y.’s probationary status would have been, at best, only marginally useful for impeaching his potential bias, the district court did not abuse its discretion by limiting cross-examination.

III

At the outset of trial, Chhoy stipulated to his ineligibility to possess a firearm. While questioning a police officer at trial, the prosecutor asked, “Why were both Mr. Chhoy and [P.D.] arrested?” The officer replied: “Based on criminal histories. And they were—it was stated by [A.Y.] that it was Chhoy that shot and [P.D.] was right next to him at the time of the shooting.” Chhoy did not object to the testimony.

On appeal, Chhoy argues that the prosecutor elicited the criminal-history testimony from the police officer and it was misconduct that warrants a new trial. This court reviews claims of unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Chhoy must show that the prosecutor

erred and that the error was plain. *Id.* An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *Id.* When plain error is shown, the burden shifts to the state to demonstrate that the error did not affect the defendant’s substantial rights. *Id.* If the state fails to carry its burden, “the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.*

Even assuming that the police officer’s reference to criminal histories was plain error, the state met its burden of showing that the officer’s testimony did not affect Chhoy’s substantial rights because there is no “reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *Id.* (quotations omitted). The testimony was vague, brief, and isolated; the prosecutor did not ask the officer to elaborate on the testimony, and no reference was made to it at any other point during trial. *See State v. Prtine*, 784 N.W.2d 303, 315 (Minn. 2010) (concluding alleged prosecutorial misconduct was not prejudicial in part because testimony elicited “was brief, isolated, and not repeated”). Additionally, the verdict is supported by A.Y.’s eyewitness testimony, identifying Chhoy as the possessor of the handgun. The alleged misconduct therefore likely did not affect the verdict. *See State v. McNeil*, 658 N.W.2d 228, 236 (Minn. App. 2003) (holding that prosecutorial misconduct was outweighed by victim’s testimony).

Affirmed.