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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1300**

State of Minnesota,
Respondent,

vs.

Abdulaziz Mohamed Yussuf,
Appellant.

**Filed May 20, 2019
Affirmed
Larkin, Judge**

Stearns County District Court
File No. 73-CR-16-10308

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney,
St. Cloud, Minnesota (for respondent)

Adam R. Klinnert, The Wolfgram Law Firm, Ltd., Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of second-degree assault, arguing that the district court erred by excluding evidence suggesting that a prosecution witness was racially biased. Because the erroneous exclusion was harmless, we affirm.

FACTS

The state charged appellant Abdulaziz Mohamed Yussuf with one count of terroristic threats and one count of second-degree assault. The case was tried to a jury over the course of two days. On the first day of trial, the state called three civilian witnesses, J.P., C.S., and J.M., as well as St. Cloud Police Officer Brian Heim. Their testimony showed that on the evening of November 9, 2016, J.P., C.S., and J.M. were in a Lexus heading south on Ninth Avenue in St. Cloud. J.P. was driving, C.S. was in the front passenger seat, and J.M. was in the back seat. A gray sedan, driven by a man later identified as Yussuf,¹ passed the Lexus, moved in front of it, and slowed down. J.P. drove past Yussuf's sedan and moved in front of it. J.P. started tapping his breaks because Yussuf was tailgating him. Both cars stopped at a stoplight. J.P. turned onto a side road, and Yussuf made a sudden U-turn and followed J.P.

Both cars stopped at a stop sign, with Yussuf's sedan on the left side of J.P.'s Lexus. J.P. and Yussuf "started exchanging words." Next, C.S. started swearing and calling Yussuf names. C.S. got out of the Lexus and walked between the Lexus and Yussuf's sedan. C.S. testified that Yussuf pulled out a gun, pointed it at C.S.'s chest, and smirked. C.S. described

¹ Because the parties do not dispute that Yussuf was the driver of the sedan, we refer to the driver as Yussuf throughout this opinion.

the handgun as a “black handgun with a silver slide,” which he thought was a “Smith and Wesson . . . 9mm or a .45.” J.P. also testified that he saw Yussuf point a gun at C.S. And J.M. testified that he saw Yussuf point what looked like a gun at C.S.

C.S. testified that Yussuf said he would “blaze” him. C.S. told Yussuf he would “beat the s--t out of him” and reached for the sedan’s door, but Yussuf drove away. C.S. got back into the Lexus and dialed 911. He reported the incident and described the handgun as a “Smith and Wesson.” Officer Heim responded to the call, took statements from C.S. and J.M., and obtained a description of the suspect vehicle.

On the second day of trial, Yussuf’s attorney asked to recall C.S. and J.M. for additional cross-examination. As support, Yussuf’s attorney reported that the night before, Yussuf reviewed J.M.’s Facebook page and saw that J.M. had posted a news article regarding the incident. In the conversation chain below the article, C.S. had commented, “False.” Yussuf’s attorney stated that the post was public and that the “date of the article and the posting” was December 16. Yussuf’s attorney wanted to question C.S. about the “False” comment.

Yussuf’s attorney also reported that Yussuf had observed Facebook posts by J.M. that were racist in nature. Yussuf did not present a copy of those posts, but his attorney claimed that J.M.’s Facebook page was “rife with a lot of public posts” showing his “strong opinions on Muslims” and “his distaste for Muslims in America, specifically Somali Muslims,” and included a post “where he appeared to be defending Hitler.” Yussuf’s attorney wanted “to use those posts to impeach [J.M.] if he [were to] testify that he had no racial bias or motive in

his testimony or in his initial reporting to law enforcement about what happened.” The state objected, arguing that the disclosure was untimely and unfairly prejudicial to the state.

The district court ruled that C.S. and J.M. could be recalled for cross-examination and that Yussuf’s attorney could question C.S. about the news-article post and “False” comment. The district court also ruled that Yussuf’s attorney could question J.M. about whether his testimony was “influenced by any racial prejudice.” But the district court ruled that Yussuf could not use J.M.’s other Facebook posts for impeachment and that they would not be admitted as extrinsic evidence. The prosecutor asked the district court to clarify its ruling, and the following exchange occurred:

PROSECUTOR: And with respect to [J.M.], the sole question, from my understanding, is that he’s allowed to be asked whether his reporting what happened was motivated by racial bias?

DISTRICT COURT: Correct.

PROSECUTOR: Regardless of his answer, no extrinsic evidence will be referenced either as evidence or as impeachment?

DISTRICT COURT: Correct.

The state resumed the presentation of its case and called St. Cloud Police Officer Jacob Lanz. He testified that the day after the incident, he stopped the suspect vehicle. Yussuf was the driver. Officer Lanz discovered a handgun in the vehicle between the driver’s seat and the center console. Officer Lanz testified that, after removing the gun from the vehicle, he identified it as “a Smith and Wesson M&P .40 caliber, black semiautomatic handgun.”

Officer Lanz interviewed Yussuf regarding the incident. Yussuf’s statement was received as evidence at trial. In that statement, Yussuf admitted that he was involved in the altercation with C.S., J.P., and J.M. He denied that he pointed a gun at C.S., but he admitted

that he told C.S. he had a gun. Yussuf speculated that C.S. must have seen the gun in his sedan. Although Yussuf claimed that he was trying to get away from the Lexus, he admitted following it after it turned onto another street.

Next, the state recalled C.S. for questioning about the comment he made regarding J.M.'s news-article post on Facebook. C.S. explained that his comment was made in response to a comment by J.M. suggesting that Yussuf had pointed the gun at C.S., J.M., and J.P. C.S. testified that he commented "False" because Yussuf had pointed the gun only at him, and not at J.M. or J.P. The state rested without recalling J.M.

Despite the district court's ruling, Yussuf did not call J.M. to the stand for further cross-examination regarding whether his testimony was influenced by racial bias. Yussuf did not present any witnesses, and he waived his right to testify.

The jury found Yussuf guilty as charged. Yussuf requested a downward dispositional departure, which the district court granted. The district court entered judgment of conviction on the second-degree assault charge and sentenced Yussuf to a stayed 36-month prison term. Yussuf appeals.

D E C I S I O N

Yussuf contends that the district court erred by excluding evidence of J.M.'s Facebook posts, arguing that the posts were admissible as evidence of J.M.'s bias. "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." Minn. R. Evid. 616. "In criminal cases, the defendant's right to cross-examine witnesses for bias is secured by the Sixth Amendment." *State v. Brown*, 739 N.W.2d 716, 720 (Minn. 2007).

Bias is a catchall term describing attitudes, feelings, or emotions of a witness that might affect [his] testimony, leading [him] to be more or less favorable to the position of a party for reasons other than the merits. Evidence of bias may properly show hatred or enmity between a witness and a party. The partiality or bias of a witness is always relevant as discrediting the witness and affecting the weight of his testimony. Moreover, extrinsic evidence of nonconviction misconduct may be admitted to show that a witness is motivated by bias, interest, or influence.

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.

State v. Lanz-Terry, 535 N.W.2d 635, 640 (Minn. 1995) (quotations and citations omitted).

As to extrinsic evidence of bias, the general rule is that “[i]f the witness on cross-examination denies or does not fully admit the facts claimed to show bias, the attacker has the right to prove those facts by extrinsic evidence.” *State v. Garceau*, 370 N.W.2d 34, 40 (Minn. App. 1985) (quotation omitted), *review denied* (Minn. Sept. 13, 1985). Rule 616 “should make it clear that bias, prejudice, or interest is not a collateral matter, and can be established by extrinsic evidence.” Minn. R. Evid. 616 1989 comm. cmt. But “the district court may exclude any evidence, although relevant, for which the danger of unfair prejudice or misleading the jury substantially outweighs its probative value.” *State v. Larson*, 787 N.W.2d 592, 598-99 (Minn. 2010) (citing Minn. R. Evid. 403).

We review the district court’s evidentiary ruling in this case for an abuse of discretion. See *Brown*, 739 N.W.2d at 719-20 (reviewing district court’s limitation on cross-examination of prosecution witness to show bias for an abuse of discretion); *State v.*

Carillo, 623 N.W.2d 922, 928 (Minn. App. 2001) (reviewing exclusion of bias evidence for an abuse of discretion), *review denied* (Minn. June 19, 2001). “Under an abuse-of-discretion standard, [an appellate court] may reverse the district court when the district court’s ruling is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015) (quotation omitted).

The district court ruled that it would not allow evidence of racial motivation for impeachment purposes. Specifically, the district court ruled that it would allow “a rather narrow inquiry as to whether [J.M.’s] testimony was at all influenced by any racial animosity or ethnic prejudice,” but that it was “not inclined to allow any extrinsic evidence of that to come in if there is a denial of any racial motivation.” The reason for the district court’s ruling was twofold: the limited probative value of the evidence and the late disclosure of the evidence

We begin our review of the district court’s ruling by noting that a defendant must make an adequate offer of proof to enable appellate review of a claim that the district court erroneously excluded evidence. *See State v. Lee*, 494 N.W.2d 475, 479 (Minn. 1992) (“[D]efendant did not properly preserve the claimed errors for review by making an offer of proof showing the nature of the evidence excluded so that courts on appeal could determine if it was error to exclude the evidence and whether the error, if any, was prejudicial.”). The state notes that Yussuf “neither offered photocopies of J.M.’s ‘bias’ posts nor articulated when they were made or what *specific* remarks they contained.” Instead, Yussuf’s attorney generally described their content. However, the state does not dispute the accuracy of the description that was provided and that description was the basis

for the district court’s ruling. Under the circumstances, the record is adequate to assess the merits of Yussuf’s claim, even without a copy of the posts.

Probative Value

We first address the district court’s conclusion that evidence of J.M.’s Facebook posts had limited probative value. “Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” *United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469 (1984); *see State v. Clifton*, 701 N.W.2d 793, 797 (Minn. 2005) (“Evidence of bias is almost always relevant” (quotation omitted)).

Yussuf argues, “In a case like this . . . any evidence of bias or prejudice of one of these witnesses is incredibly important for the [j]ury to know in order to assess the credibility of the testimony as the finder of fact.” The state counters that the district court’s ruling was not an abuse of discretion because Yussuf failed to demonstrate how J.M.’s Facebook posts showed racial bias against Yussuf. The state notes that in district court, Yussuf claimed that J.M.’s posts “showed hostility towards ‘*Muslims*,’ ‘*Muslims in America*,’ and ‘specifically Somali *Muslims*.’” The state therefore argues that any evidence of bias in the Facebook posts did not specifically pertain to Yussuf because “[the posts] were not describing a *racial* bias as much as a *religious* one.” The state concludes, “[That] distinction limits the bias posts’ probative value because the defense never established that Yussuf was a practicing Muslim—much less to J.M.’s knowledge.” *See*

Lanz-Terry, 535 N.W.2d at 640 (“[N]ot everything tends to show bias, and courts may exclude evidence that is only marginally useful for this purpose.”).

We disagree. Yussuf notes, and it is not disputed, that he is “visibly not white” and is “of Somali-American descent.” The defense described J.M.’s posts as showing hostility towards Somali Muslims, which could reasonably be interpreted to include Yussuf, who is a Somali American. Because the posts showed that J.M. disliked Somali Muslims and Yussuf is a Somali American, the Facebook posts are not “only marginally useful” or “so attenuated as to be unconvincing.” *See id.*

The state also argues that to the extent “a person’s distaste for Muslims . . . may affect their views of Somali individuals, . . . that *alone* does not establish admissibility,” noting that relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,” Minn. R. Evid. 403. The state argues that the danger of unfair prejudice was a particular concern in this case because “the alleged Facebook posts [could] offend and anger the jury.”

Again, we disagree. The law makes liberal allowance for bias evidence. *See* Minn. R. Evid. 616; *State v. Pride*, 528 N.W.2d 862, 867 (Minn. 1995) (“Cross-examination to show the bias, prejudice, interest or disposition of the witness to tell the truth is a matter of right, the exercise of which is indispensable to show the truth.” (quotation omitted)); *Garceau*, 370 N.W.2d at 40 (“If the witness on cross-examination denies or does not fully admit the facts claimed to show bias, the attacker has the right to prove those facts by extrinsic evidence.” (quotation omitted)).

Although evidence regarding racial or religious bias could inflame a jury, disallowing such evidence on that ground would be inconsistent with the law favoring the jury's consideration of bias evidence when assessing the credibility of a witness. *See Lanz-Terry*, 535 N.W.2d at 640 (“The partiality or bias of a witness is always relevant as discrediting the witness and affecting the weight of his testimony.” (quotation omitted)). Moreover, evidence is not unfairly prejudicial unless it “persuades by illegitimate means, giving one party an unfair advantage.” *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). J.M.’s Facebook posts could have persuaded by the legitimate means for which bias evidence is allowed. *See Lanz-Terry*, 535 N.W.2d at 640 (“Evidence of bias may properly show hatred or enmity between a witness and a party.”).

Accepting Yussuf’s description of the Facebook posts—as the state and district court seem to have done—we conclude that they showed bias and that they were relevant. The district court therefore erred by disallowing any reference to the Facebook posts based on its conclusion that they had limited probative value.

Late Disclosure

We turn to the district court’s conclusion that Yussuf’s “late disclosure” of the Facebook posts justified their exclusion. The state argues that the district court properly excluded the Facebook posts as a sanction for a discovery violation. Specifically, the state contends that, “[e]ven if J.M.’s Facebook posts were admissible, the court still had discretion to exclude them because the defense unjustifiably failed to disclose [the] posts until after the State’s eyewitnesses had testified.”

The state relies on *State v. Lindsey*, in which the supreme court held, “The imposition of sanctions for violations of discovery rules is a matter for the sound judgment and discretion of the [district] court.” 284 N.W.2d 368, 369 (Minn. 1979). The supreme court stated that in exercising such discretion, the district court should consider the following factors: “(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; [and] (4) any other relevant factors.” *Id.* The state argues that the *Lindsey* factors support the district court’s ruling in this case and that “[e]xclusion was appropriate because the court had discretion to protect the State from being unfairly surprised with this new evidence.”² Because the state’s sanction argument depends on the existence of a discovery violation under the Minnesota Rules of Criminal Procedure, we consider whether there was such a violation.

A defendant’s disclosure obligations, without court order, are set forth in Minn. R. Crim. P. 9.02, subd. 1. Generally, the defense is required to disclose documents and tangible objects, reports of examinations and tests, notice of defense witnesses, statements of defense and prosecution witnesses, notice of defenses other than not guilty, entrapment disclosures, alibi disclosures, and prior convictions of the defendant. Minn. R. Crim. P. 9.02, subd. 1. At oral argument to this court, the state argued that the Facebook posts

² The state’s assertion of unfair surprise is repeated throughout its brief. The state complains that “neither Yussuf nor his attorney satisfactorily explained what *prevented* them from searching J.M.’s Facebook page for this evidence in the weeks before trial.” Given the damaging potential of that evidence, perhaps the better question is what prevented the *state* from investigating and discovering the damaging public posts of its own witness before calling the witness.

should be treated as documents subject to disclosure under Minn. R. Crim. P. 9.02, subd. 1(1), because if they were to be used “as evidence, it would presumably be in the form of a document. . . . [I]t would have to be printed out.”

The state’s reasoning is not persuasive for two reasons. First, as the state notes, Yussuf did not proffer a document depicting the Facebook posts; he described the posts without providing any documentary support. Second, the district court’s ruling indicates that Yussuf was not even allowed to refer to the Facebook posts for impeachment purposes. A reference to the posts would not have been in the form of a document. The state does not argue that any other disclosure obligation under rule 9.02, subdivision 1, applied to J.M.’s Facebook posts, and none is obviously applicable to us.³ Indeed, the state seems to concede that the Facebook posts do not readily align with the disclosure requirements of rule 9.02, stating that “a *Lindsey* analysis helps illustrate why the untimeliness justified exclusion even if one did not treat the late disclosure as a discovery violation *per se*.”

But for the procedural posture of this case, in which the defense disclosed the Facebook posts as justification for its request to recall C.S. and J.M. for additional cross-examination, we question whether the defense was required to disclose its intent to use the Facebook posts for impeachment purposes. Essentially, the state contends that it is entitled to pretrial disclosure of evidence that the defense intends to use solely for impeachment. The state does not cite any authority to support that contention, and we are aware of none.

³ The state does not argue that the Facebook posts are discoverable under rule 9.02, subdivision 1(4), which requires disclosure of “[s]tatements of prosecution witnesses obtained by the defendant, defense counsel, or persons participating in the defense within the defendant’s possession or control.”

But we note that the United States Court of Appeals for the Eighth Circuit takes a contrary view and has held that the reciprocal requirements of the federal discovery rules do not require the defense to disclose evidence that is offered solely for impeachment purposes. *See United States v. Eason*, 829 F.3d 633, 638 (8th Cir. 2016) (concluding that “the fact that defense counsel did not turn over [a] video to the government prior to trial [was] not grounds to prohibit the defense from using the video for impeachment purposes”); *United States v. Medearis*, 380 F.3d 1049, 1057-58 (8th Cir. 2004) (holding that the district court abused its discretion by refusing to allow defense counsel to use an undisclosed letter to impeach a prosecution witness).

We also note that Minn. R. Evid. 613(a) provides: “In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness *at that time*, but on request the same shall be shown or disclosed to opposing counsel.” (Emphasis added.) The plain language of rule 613(a) indicates that impeachment disclosures to opposing counsel are made on request at the time of impeachment, and not before trial. *See In re Welfare of D.D.R.*, 713 N.W.2d 891, 904 (Minn. App. 2006) (noting that, under Minn. R. Evid. 613(a), defense counsel may examine a witness “without disclosing the contents of her prior statement”); *see also* 11 Peter N. Thompson, *Minnesota Practice* § 613.01 (4th ed. 2018) (“There is no requirement that the witness be forewarned by disclosure of the prior statement or by other foundational questions before being asked about the prior statement. To guard against possible abuse, counsel for the adverse party is entitled to see the statement upon request.”).

The committee comment to rule 613(a) explains, “The rule is based on the belief that the truth finding function of cross-examination will be better served by permitting such examination without providing the witness with a warning as to where the examiner is going.” Minn. R. Evid. 613(a) 1977 comm. cmt. That comment undercuts the state’s argument that Yussuf should have disclosed the Facebook posts “before trial” so the state would have had a “chance to contextualize this evidence during opening statements and J.M.’s testimony.” Requiring a party to disclose impeachment evidence before trial so opposing counsel can neutralize the impact of that evidence is inconsistent with the truth-finding function of rule 613(a), as explained in the comment.

In sum, J.M.’s Facebook posts, which were offered solely for impeachment purposes, did not fall within Yussuf’s disclosure obligations under Minn. R. Crim. P. 9.02, subd. 1. Because Yussuf did not violate a discovery rule, the timing of Yussuf’s disclosure does not provide a basis for a discovery sanction under *Lindsey*. The district court therefore erred by excluding evidence of the Facebook posts based on the timing of Yussuf’s disclosure.

Harmless Error

Having determined that the district court abused its discretion by prohibiting use of J.M.’s Facebook posts for impeachment purposes, we turn to the remedy. The erroneous exclusion of bias evidence is subject to harmless-error analysis. *Carillo*, 623 N.W.2d at 928-29; *see Pride*, 528 N.W.2d at 867 (stating that prohibiting a criminal defendant’s cross-examination designed to expose a prosecution witness’s bias is a violation of the Confrontation Clause subject to harmless-error analysis). An error will be deemed

harmless if an appellate court is “satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (*i.e.*, a reasonable jury) would have reached the same verdict.” *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (footnote omitted).

For example, in *Carillo*, this court held that the district court erred by excluding extrinsic defense evidence that a state witness had offered to change her testimony against the defendant in exchange for money, reasoning that the evidence of “a solicitation of a payoff in exchange for revised testimony . . . was offered for the impeachment purpose to show veracity or bias of a witness.” 633 N.W.2d at 928-29. But we also held that the district court’s failure to admit the extrinsic bias evidence was harmless beyond a reasonable doubt given the corroborating testimony of another state witness, “as well as the abundance of evidence presented against [the defendant].” *Id.* at 929.

In this case, J.M. testified that he saw Yussuf point what looked like a gun at C.S. Similarly, C.S. testified that when he approached the sedan, he was face-to-face with Yussuf, and Yussuf pointed a gun at his chest. J.P. also testified that he saw Yussuf point a gun at C.S. C.S. described the gun as a “Smith and Wesson” during his 911 call following the incident. Officer Lanz testified that he found a Smith and Wesson handgun in Yussuf’s vehicle the day after the incident. The jury heard that Yussuf admitted that he was the driver of the sedan, that he had exchanged words with C.S., and that he told C.S. that he had a gun in his vehicle. But Yussuf denied pointing the gun at C.S. and suggested that C.S. must have seen the gun in his vehicle. Yussuf’s inconsistent statements regarding the incident, which the jury heard, suggested that his denial was not credible. On the one hand, Yussuf told

Officer Lanz he was trying to “get away” from the Lexus. On the other hand, Yussuf admitted he went out of his way to follow the Lexus. And when asked why he did not drive away after stopping at the stop sign, Yussuf claimed he was “tryin’ to see [the other driver’s] face because—‘cause you never know.” In sum, J.M.’s incriminating testimony was corroborated by the testimony of C.S. and J.P. and there was significant evidence of Yussuf’s guilt independent of J.M.’s testimony.

Yussuf claims that the damaging impeachment value of J.M.’s Facebook posts could have negatively impacted the jury’s assessment of the credibility of C.S. and J.P., arguing,

In a case like this where the only evidence is the testimony of the three witnesses, who were high school friends and now roommates in college, any evidence of bias or prejudice of one of these witnesses is incredibly important for the Jury to know in order to assess the credibility of the testimony as the finder of fact. It is also important that the only witnesses in this case have such a close friendship, as extreme beliefs such as these are likely to be shared by such close friends.

Yussuf concludes,

[T]his evidence of bias was specifically important in this case because the only witnesses with a firsthand account had such a close personal relationship that the bias of one witness could reasonably be taken into account by the Jury in assessing the testimony of the other firsthand witnesses.

But there is no direct evidence of racial bias by C.S. or J.P. and no reasonable basis to assume that they endorse the views expressed in J.M.’s Facebook posts. Thus, Yussuf’s suggestion that he could have convinced the jury to reject the testimony of C.S. and J.P. based on J.M.’s Facebook posts is unpersuasive.

Given the corroborating testimony of C.S. and J.P. and the substantial evidence of guilt independent of J.M.'s testimony, we are satisfied, beyond a reasonable doubt, that the jury would have found Yussuf guilty even if the damaging potential of J.M.'s Facebook posts had been fully realized. Because the district court's erroneous exclusion of those posts was harmless, we affirm.

Affirmed.