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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0023**

State of Minnesota,
Respondent,

vs.

Gonzalo Gallegos-Olivera,
Appellant.

**Filed December 23, 2019
Affirmed
Klaphake, Judge***

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

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

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.

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.

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.