

STATE OF MINNESOTA

IN SUPREME COURT

A19-0063

Court of Appeals

Chutich, J.

Abraham Tony Dolo,

Respondent,

vs.

Filed: April 29, 2020
Office of Appellate Courts

State of Minnesota,

Appellant.

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant State Public Defender, Saint Paul, Minnesota, for respondent.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Nicole Cornale, Assistant County Attorneys, Minneapolis, Minnesota, for appellant.

S Y L L A B U S

1. When an excerpt of a recorded statement is admitted into evidence, Minnesota Rule of Evidence 106 requires contemporaneous admission of any other part of the recording that relates to the facts offered in the excerpt and, in fairness to the opposing

party, is necessary to correct a misimpression or distortion of the factual content of the admitted excerpt.

2. The district court did not abuse its discretion in denying respondent's petition for postconviction relief because the court correctly concluded that the trial court properly overruled respondent's objection under Minnesota Rule of Evidence 106 and admitted only a short excerpt of respondent's videotaped interview.

Reversed.

OPINION

CHUTICH, Justice.

Appellant State of Minnesota charged respondent Abraham Tony Dolo with second-degree criminal sexual conduct involving his 5-year-old daughter. At trial, the State offered as evidence an 8-minute excerpt of a voluntary, hour-long, videotaped interview of Dolo by a police detective. Dolo objected to introducing only the excerpt, arguing that admission of the entire recorded interview was immediately required under Minnesota Rule of Evidence 106. The trial court overruled his objection and the State played for the jury only the interview excerpt. The jury found Dolo guilty.

Dolo did not file a direct appeal, but timely filed a petition for postconviction relief. He alleged that the trial court abused its discretion by failing to play the entire recorded police interview for the jury. The district court denied Dolo's request for postconviction relief. Dolo appealed, and the court of appeals reversed and remanded for a new trial. The court held that, under Minnesota Rule of Evidence 106, the entire interview should have been played for the jury and that failure to do so was not harmless error beyond a reasonable

doubt. *Dolo v. State*, 933 N.W.2d 423, 433–34 (Minn. App. 2019). Because the trial court did not abuse its discretion under Rule 106 by overruling the defendant’s objection and allowing the jury to hear only an excerpt of the recorded interview, the district court did not abuse its discretion in denying Dolo’s petition for relief. Accordingly, we reverse.

FACTS

Dolo has two children with Y.L.C.K. (Mother), K.D., a son, and a daughter, C.D. On December 21, 2015, a district court granted Dolo sole legal custody of each child and joint physical custody to Dolo and Mother. According to Mother, the children started living with Dolo in January 2016, when K.D. was 7 and C.D. was 5 years old.

On January 23, 2016, Mother took the children to a hospital after C.D. told Mother that Dolo had touched her inappropriately. Doctors examined C.D. and found no physical signs of abuse, such as scratches, bruises, or abrasions. Police were dispatched to the hospital, and Mother reported to the officers that C.D. had told her that Dolo had slept naked with her, put C.D.’s feet on his penis, and put his hand down C.D.’s pants. K.D. also reported that Dolo had slept naked with the children.

Officers took C.D. to CornerHouse, an interagency child abuse and maltreatment center, for an interview. During the interview with CornerHouse staff, C.D. stated that Dolo did “disgusting things,” slept naked with her and K.D., dug in their pants, and “scoot[ed] up and hum[ped]” the children. She also stated that Dolo had put her feet on his “private” part.

Later, a police detective asked to meet with Dolo for a voluntary interview. Over the course of the hour-long interview, Dolo was asked about many things, including his

relationship with the children, his relationship with Mother, the sleeping arrangements for the children, and his custody battle with Mother. He denied touching his children inappropriately. Dolo also repeatedly stated that Mother fabricated the allegations against him as a retaliatory act after he won sole legal custody of the children.

About a month later, the State charged Dolo with second-degree criminal sexual conduct, Minn. Stat. § 609.343, subd. 1(g) (2018),¹ and the case proceeded to a jury trial.

The court found C.D. and K.D. to be competent witnesses, and they each testified at trial. C.D. testified that she and K.D. slept in the same bed as Dolo while his clothes were off. She also testified that Dolo touched his “private” with her feet, and that these actions made C.D. feel “sad” and “nasty.” C.D. also told the jury that Dolo was “scooting up against” her “butt,” and his “private” felt “hard.” She stated that neither Mother nor anyone else told her what to say during her CornerHouse interview or in court.²

The detective who interviewed Dolo also testified. During her testimony, the State sought to introduce an 8-minute excerpt—the piece of evidence at issue here—of Dolo’s hour-long interview. Dolo’s counsel objected and argued that the entire recording should

¹ The relevant portions of section 609.343 provide:

Subdivision 1. **Crime defined.** A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists:

. . . .

(g) the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual contact. Neither mistake as to the complainant’s age nor consent to the act by the complainant is a defense

² K.D.’s testimony corroborated much of the testimony of C.D.

be admitted into evidence and played for the jury under Minnesota Rule of Evidence 106. Counsel also stated that he would later play the entire recorded interview during Dolo's case-in-chief and it would therefore "make no sense" to play the interview at two separate times during the trial.

The State argued that it wanted to introduce and play for the jury a "snippet" of the recorded interview to show that Dolo "lied about the living arrangements at the house because it shows consciousness of guilt."

Before ruling, the trial court recessed, reviewed a written transcript of the entire recorded interview, and considered our decision in *State v. Bauer*, 598 N.W.2d 352 (Minn. 1999). The court concluded that the recorded interview offered into evidence by the State was "limited to a specific part of the tape, and [was] an issue of who lives where in the home." The trial court decided that it was "appropriate" to play only the requested excerpt for the jury.

On cross-examination of the detective, Dolo's counsel questioned the detective about whether Dolo had professed his innocence during the parts of the recorded interview that were not played for the jury, but the court sustained each of the State's hearsay objections. Counsel briefly argued that Dolo's statements were not hearsay because he was a "party," but offered no other arguments in response to the State's successful hearsay objections.

Dolo presented his own witnesses, which included his custody evaluator from the custody dispute with Mother; Dolo's mother, who owned the home; and Dolo's sisters. Each witness testified that Dolo was an honest man who treated his children well, they had

never seen the children sleep with Dolo, and they had never seen him touch the children inappropriately.

Dolo testified in his own defense and completely denied the allegations against him. He testified about the custody dispute with Mother that led up to the child abuse allegations and his interview with the detective. Specifically, Dolo testified that he denied the allegations during his interview and told the detective about the ongoing custody issue between him and Mother.

On cross-examination, the State pressed for information about what Dolo did and did not say to the detective during the recorded interview, referring to parts of the interview that were not played for the jury. He testified that the interview was months ago and he could not be “all accurate” in recounting what he said to the detective during the interview. Dolo testified that he “believe[d]” that he told the detective that Mother had “implanted” the allegations in the heads of their children. Dolo’s counsel did not object during this cross-examination or thereafter attempt to refresh Dolo’s recollection of the interview. Nor did counsel seek to play the entire interview once Dolo had testified.

The jury found Dolo guilty. He moved for a new trial and a judgment of acquittal, but the trial court denied his motion and sentenced him to a stayed term of 36 months and 5 years of probation.

Dolo did not appeal, but timely petitioned for postconviction relief. He asserted that “[t]he trial court’s decision to prohibit the jury from considering [his] entire interview violated the plain language of Rule 106 of the Minnesota Rules of Evidence and prevented [him] from exercising his right to a meaningful defense.” The district court denied the

postconviction petition without a hearing, concluding that the trial court did not abuse its discretion in admitting only the interview excerpt into evidence.

Dolo appealed, and the court of appeals reversed. *Dolo*, 933 N.W.2d at 434. The court of appeals concluded that the trial court abused its discretion in allowing the State to use only a portion of the interview without conducting a proper fairness analysis under Minnesota Rule of Evidence 106. *Id.* at 430–31. The court of appeals held that, because the State’s purpose in playing the interview excerpt was to show Dolo’s “consciousness of guilt,” fairness required that the rest of the interview be played so that the “jury could have better understood the context of the entire interview.”³ *Id.* at 430.

The court of appeals further concluded that, because the case ultimately turned on credibility and Dolo’s denials in the recorded interview could have supported his credibility by showing the “consistency of his defense,” the trial court’s evidentiary error was not harmless beyond a reasonable doubt. *Id.* at 433.

We granted the State’s petition for review and now reverse.

ANALYSIS

We review the denial of a postconviction petition for an abuse of discretion. *Miles v. State*, 840 N.W.2d 195, 200 (Minn. 2013). A postconviction court abuses its discretion when the court’s “decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). We will not

³ The court of appeals also held that Dolo’s statements during the entire interview were admissible as statements of a party-opponent under Minnesota Rule of Evidence 801(d)(2). *Dolo*, 933 N.W.2d at 431.

reverse findings of fact unless they are clearly erroneous, but we review conclusions of law de novo. *Miles*, 840 N.W.2d at 200.

Here, Dolo bases his claim for postconviction relief upon an allegedly erroneous evidentiary decision of the trial court. “A district court’s evidentiary rulings will not be reversed absent a clear abuse of discretion, and we ‘largely defer to the trial court’s exercise of discretion in evidentiary matters and will not lightly overturn a trial court’s evidentiary ruling.’ ” *State v. Robertson*, 884 N.W.2d 864, 872 (Minn. 2016) (quoting *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989)). Dolo bears the burden of showing that an abuse of discretion occurred and that he was prejudiced by it. *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015).

I.

This case requires us to consider the purpose and application of Rule 106. We review the application and interpretation of evidentiary rules de novo. *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 329 (Minn. 2016).

The parties dispute whether, when applying Rule 106, district courts must consider the State’s purpose in seeking admission of an excerpt and whether district courts must explicitly consider fairness when ruling on an excerpt’s admission. We have not previously addressed the analytical approach to be used when applying Rule 106.

The State asserts that a certain sequence of analysis should occur under the rule. First, once a party identifies the evidence the party intends to present, if the other party believes that fairness requires introduction of additional material at the same time, Rule 106 must be raised and the objecting party must make a fairness showing to the district

court. Then, according to the State, the court conducts a “fairness analysis” by considering whether (1) the proposed additional material relates to the admitted portion; and (2) the admitted portion leaves the factfinder with a “misimpression that require[s]” correction. *Robertson*, 884 N.W.2d at 874. Only if each requirement is met must the court require that the additional material be presented at the same time.

The State asserts that, when conducting this two-step analysis, district courts must look to the *substance* of the offered evidence, and not the State’s *purpose* in admitting that evidence. Because a defendant’s out-of-court statements are frequently offered to show a “consciousness of guilt,” the State warns that defendants should not be able to introduce inadmissible “exculpatory hearsay statements” in the State’s case without being subject to cross-examination.

Dolo asserts, by contrast, that the court of appeals was correct in concluding that district courts must consider the underlying *purpose* for which the evidence is being offered when analyzing fairness under Rule 106. Here, he maintains that the purpose was not limited to explaining the layout of the house, as the trial court and postconviction court found, but to show that he lied when doing so, thereby exhibiting a consciousness of guilt.

Dolo also contends that our case law previously addressing Rule 106 is not binding because in each case we determined that the rule did not apply to the challenged evidence at issue. Instead, he cites decisions of some federal courts of appeals interpreting Federal Rule of Evidence 106, which has similar language to Rule 106 of the Minnesota Rules of

Evidence, to urge us to adopt certain fairness factors used by those courts to determine whether introduction of an entire statement is necessary.⁴

After considering the language of Rule 106, its purpose, and our relevant precedent, we agree with the State’s approach. Minnesota Rule of Evidence 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which *ought in fairness* to be considered *contemporaneously* with it.

(Emphasis added.)

The plain language of the rule shows that it operates as follows. First, a party introduces a “writing or recorded statement” or a “part thereof.” *Id.* Then, when the writing or recorded statement is introduced, the adverse party “may require” the introduction of additional material—that is, “any other part or any other writing or recorded statement” not already introduced. *Id.* Then, the district court decides whether “in fairness” the additional material must be introduced “contemporaneously,” or that is, immediately at that time. *Id.*

Rule 106 therefore addresses the *timing* of when certain additional material is admitted. The rule does not govern its admissibility—in fact, the additional material must be independently admissible. 11A Peter N. Thompson & David F. Herr, *Minnesota*

⁴ In particular, some federal courts have considered whether introduction of the entire statement is necessary to “(1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding.” *United States v. Sweiss*, 814 F.2d 1208, 1211–12 (7th Cir. 1987) (quoting *United States v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984)) (internal quotation marks omitted); see, e.g., *United States v. Dotson*, 715 F.3d 576, 582 (6th Cir. 2013).

Practice—Courtroom Handbook of Minnesota Evidence 27 (2019). The rule contains no presumptions and gives the district court broad discretion to determine its application. 11 Peter N. Thompson, *Minnesota Practice—Evidence* § 106.01 (4th ed. 2019).

In making fairness determinations under Rule 106, district courts must consider whether the additional material must be admitted “contemporaneously” because, if not, the opposing party must wait until later in the trial to supply the evidence necessary to avoid misleading the jury. *Id.* In other words, fairness requires that district courts consider whether the content of the admitted excerpt needs to be explained or clarified by admitting the additional material at that time to ensure an accurate understanding of the admitted excerpt and to avoid misleading the factfinder.

The parties dispute what, exactly, is required of district courts when considering the “fairness” aspect of Rule 106. Although not dispositive because no recorded writing or statement was admitted under Rule 106 in the following cases, our precedent is helpful on this point.

For example, in *State v. Robertson*, an investigator testified at a murder trial about statements that Robertson made during a recorded interview. 884 N.W.2d at 873. The investigator testified that Robertson said that he was in a gang, he owned shoes like those worn by the shooter, and he had exchanged messages with the intended victim after the murder. *Id.* at 868–69, 874. Robertson sought to introduce his entire recorded statement to the police under Rule 106, including his claim of innocence. *Id.* at 872. We concluded that Rule 106 did not apply because no portion of an actual recording was admitted into evidence. *Id.* at 873.

But in discussing Rule 106, and the “rule of completeness,”⁵ we noted that Robertson did “not point to any specific portions of his police interview that he contends were needed” to correct anything misleading about the evidence offered by the prosecution. *Id.* When he contended that the fairness standard in Rule 106 had been extended to oral statements in two other decisions, we distinguished those cases factually. *Id.* at 873–74. We concluded that because the State did not offer evidence that Robertson told the police that he was involved in the shooting, the jury “was not left with a misimpression that required clarification.” *Id.* at 874.

Similarly, in *State v. Bauer*, the prosecution introduced several incriminating statements by Bauer through the testimony of police officers who had interviewed him and who, at times, read from transcripts of the interviews. 598 N.W.2d 352, 368 (Minn. 1999), *overruled on other grounds by State v. McCoy*, 682 N.W.2d 153, 160 n.6 (Minn. 2004). Bauer asserted that Rule 106 required the district court to admit the recordings of the interviews into evidence. *Id.*

We held that neither Rule 106 nor the “rule of completeness” compelled admission of the entire recordings of Bauer’s interviews. *Id.* at 368–69. We recognized that “ ‘the “rule of completeness” applies only when it is necessary to give the jury a full understanding of the facts and it may not be used to introduce otherwise irrelevant

⁵ Unlike Minnesota Rule of Evidence 106, the “rule of completeness” applies to conversations. *State v. Mills*, 562 N.W.2d 276, 286 n.8 (Minn. 1997). Rule 106 is therefore more limited than the rule of completeness, but the rule of completeness still does not extend an absolute right to have an entire conversation admitted into evidence. The remainder of a conversation is admissible only if it “bears upon the admission” of the admitted excerpt. *State v. Kiewel*, 217 N.W. 598, 600 (Minn. 1928).

statements.’ ” *Id.* at 368 (quoting *State v. Mills*, 562 N.W.2d 276, 286–87 (Minn. 1997), *overruled on other grounds by McCoy*, 682 N.W.2d at 160 n.6).

Considering the text of Rule 106, its purpose, and the principles enunciated in our case law, we conclude that Rule 106 applies when the proposed additional material (1) relates to the facts offered in an excerpt of a recorded statement or writing and (2) is necessary to correct a misleading or distorted impression of the facts created by the admitted excerpt or writing.⁶ *Cf. Robertson*, 884 N.W.2d at 874. That is, the substance of the admitted excerpt or writing must so inaccurately or unfairly distort the evidentiary facts that it requires immediate correction of its *content* by admitting the additional material.

In addition, the State’s *purpose* for introducing an excerpt of a recorded statement is hardly ever determinative when assessing fairness under Rule 106. Prosecutors nearly always proffer evidence to show criminal guilt—they introduce separate pieces of evidence that they eventually try to tie together in closing arguments to demonstrate proof of guilt beyond a reasonable doubt. If district courts were to consider this underlying purpose as a part of the dispositive fairness determination under Rule 106, then, as the State asserts, the

⁶ We decline Dolo’s invitation to adopt non-binding federal precedent. Nothing in the body of case law concerning the accompanying federal rule is particularly persuasive; nor does it offer a definitive rule for how district courts are to apply Rule 106. And at least one commentator has suggested that federal courts are split on how the rule is applied concerning timing and admissibility. See Blake R. Hills, *Fairness by Omission: Rule 106 and the Doctrine of (In)completeness*, 55 Tulsa L. Rev. 45 (2019).

district courts would be required to admit exculpatory statements unrelated to the content of the small piece of evidence offered by the prosecutor.⁷

Finally, we decline to place any additional burden on the district court to explain its ruling when determining whether Rule 106 applies in a particular instance. Like most other evidentiary decisions within the discretion of the district court, we anticipate that the court will hear arguments on the factors that we have articulated above, and then decide on the propriety of admitting an excerpt with or without requiring the contemporaneous admission of additional material.

In sum, we hold that the appropriate consideration for district courts under Rule 106 is the *content* of the excerpt or writing admitted, rather than the *purpose* for which it is admitted. If the factual content of the admitted portion of the writing or recorded statement leaves the jury with a distorted or misleading understanding of the facts in a way that requires clarification or correction, then, in fairness to the defendant, Rule 106 requires that the additional material that provides such clarification or correction must be admitted contemporaneously with the limited portion.

II.

Applying these principles here, we now consider whether Dolo has shown that the district court abused its broad discretion in denying his petition for postconviction relief. To make this determination, we consider whether the *trial* court abused its discretion by

⁷ The State also correctly asserts that admitting the additional material is not necessary simply to put the admitted portion in “context.” The context of the admitted statements is relevant to making a fairness determination under Rule 106, but, like the purpose for which the evidence is offered, it is hardly a dispositive factor.

playing only the excerpt of Dolo’s recorded interview rather than the entire recording. *Robertson*, 884 N.W.2d at 872 (“A district court’s evidentiary rulings will not be reversed absent a clear abuse of discretion . . .”).

The State asserts that the trial court did not abuse its discretion because “[f]airness did not require that the jury in this case hear Dolo’s entire police interview.” Dolo maintains that the trial court abused its discretion by not considering the purpose for which the State offered the evidence. In addition, Dolo claims that the trial court’s reliance on *Bauer* was misplaced and the court failed to conduct a proper fairness analysis. Based upon the principles articulated above and the specific circumstances of this case, we conclude that the trial court appropriately considered Rule 106 and did not abuse its discretion in admitting only the excerpt of the police interview during the State’s case-in-chief.

When faced with Dolo’s Rule 106 objection, the trial court properly heard arguments from each party, recessed, analyzed the rule, read *Bauer*,⁸ read the transcript of the excerpt and the entire recorded interview between Dolo and the detective, and then made its evidentiary determination. In admitting the requested excerpt, the court reasoned that it is “very limited, it’s limited to . . . an issue of who lives where in the home,” and found that it was “appropriate to put in the shorter version” that the prosecution offered. Notably, before the trial court ruled, Dolo did “not point to any specific portions of his

⁸ When the trial court made its determination on Rule 106, our decision in *State v. Robertson*, 884 N.W.2d 864 (Minn. 2016), had not yet issued. *Bauer* was therefore our latest discussion of Rule 106 and the “rule of completeness.”

police interview that he contends were needed” to cure any misleading impression about who lived where in the home, *see Robertson*, 884 N.W.2d at 873, and instead only sought to introduce the entire hour-long recording.

The transcript shows that the trial court correctly determined that introduction of this excerpt, without immediate introduction of the full recorded statement, was appropriate. The content of the 8-minute excerpt was discrete, covering Dolo’s work schedule, who lived in his mother’s house, where his and the children’s bedrooms were located, and what was in their rooms. During the excerpt, no discussion of the allegations of abuse occurred, and nothing in the excerpt created an impression that Dolo admitted guilt. Nor did the detective testify that Dolo incorrectly described the living arrangements. And, as we concluded above, the purpose for which the State sought to present evidence about the sleeping arrangements—to later argue in closing that Dolo’s inaccurate description showed a consciousness of guilt—was not determinative.

By contrast, the rest of the interview covered many other topics unrelated to the issue of the living arrangements in the home. These topics included Dolo’s denial of the allegations, his dysfunctional relationship with Mother, the custody battle over the children, and why Dolo believed the allegations against him were fabricated. At no time in the full interview did Dolo further discuss or clarify his statements concerning the sleeping arrangements in the home. The rest of the interview was simply unrelated to that topic.

Accordingly, Dolo cannot show that admitting the *entire* recorded interview was necessary to give the jury a “full understanding” of what Dolo said in the 8-minute excerpt

or to clarify a “misimpression” that was created when the jury watched only the excerpt and not the entire recording. The factual content of the excerpt admitted was not distorted by leaving out the additional material. Under these circumstances, the trial court did not abuse its discretion because fairness did not require the court to admit the rest of the recording contemporaneously with the 8-minute excerpt.⁹

In sum, because the trial court did not abuse its discretion when it properly overruled Dolo’s objection under Rule 106, the district court correctly denied Dolo’s petition for postconviction relief.¹⁰

⁹ In addition, an independent basis exists to affirm the trial court’s evidentiary ruling: Dolo’s statements to the detective denying the sexual abuse were inadmissible self-serving hearsay when sought to be admitted during the State’s case-in-chief. The court of appeals incorrectly determined that Dolo’s statements to the detective were admissible under Minnesota Rule of Evidence 801(d)(2) as statements of a party-opponent. *Dolo*, 933 N.W.2d at 431. A “statement by a party-opponent” is not hearsay and is defined as a “party’s own statement” being “offered against a party.” Minn. R. Evid. 801(d)(2).

The State offered Dolo’s statements about the sleeping arrangements “against” him to show that he lied and therefore possessed a consciousness of guilt. But it did not offer Dolo’s other statements *against* him because doing so would not be at all against Dolo’s interest. Instead, Dolo’s exculpatory statements that he sought to admit during the State’s case-in-chief were inadmissible self-serving hearsay. *See State v. Briggs*, 142 N.W. 823, 827 (Minn. 1913) (stating “the general rule that self-serving declarations of an accused person are not admissible in his favor, unless part of the *res gestae*, or part of a general confession”) (citations omitted); *see also State v. Taylor*, 258 N.W.2d 615, 622 (Minn. 1977) (recognizing that, without the rule against self-serving hearsay, a defendant has “the opportunity to present his version of the facts without ever being subject to cross-examination by the state”). Accordingly, the district court did not abuse its discretion in denying postconviction relief when it found that the recording, when Dolo sought to admit it, “contained self-serving hearsay.”

¹⁰ Because no abuse of discretion occurred, we need not reach the issue of whether the exclusion of evidence prejudiced Dolo. We note, however, that an erroneous evidentiary decision under Rule 106 does not necessarily mean that a defendant was prejudiced or received an unfair trial. Such a decision may be harmful only if the *timing* of the

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals.

Reversed.

non-admission of the additional material was so damaging that it would have affected the jury's verdict.