

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0826**

State of Minnesota,
Respondent,

vs.

Lisa Beth Ellenberg,
Appellant.

**Filed May 24, 2021
Affirmed
Slieter, Judge**

Dakota County District Court
File No. 19HA-CR-18-1049

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

Kathryn M. Keena, Acting Dakota County Attorney, Anna Light, Heather D. Pipenhagen,
Assistant County Attorneys, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this direct appeal from final judgment of conviction of one count of second-degree burglary, appellant claims the conviction must be reversed and the matter remanded for a new trial because three trial errors deprived her of a fair trial and because the district

court erred in its resolution of appellant's motions for *in camera* review. In her *pro se* brief, appellant also claims that the district court erred by failing to provide an accomplice-testimony instruction to the jury. Because no reversible errors occurred by the district court during appellant's trial and the district court properly considered appellant's *in camera* review motion, we affirm.

FACTS

Respondent State of Minnesota charged appellant Lisa Beth Ellenberg with one count of second-degree burglary, in violation of Minn. Stat. § 609.582, subd. 2(a)(1) (2018), after it was reported to police that a safe containing approximately \$10,000 in cash had been stolen from the victim's home. The victim's bother reported that the safe had disappeared during the time the victim was being held in jail in Dakota County as a result of allegations of sexual assault made by appellant. No charges were brought against the victim related to these allegations.

At appellant's trial for second-degree burglary, the jury heard testimony from the victim, several members of the victim's family, a member of the Lakeville Police Department, and several other related individuals.

Several witnesses testified that, because appellant had borrowed the victim's vehicle, which contained an opener for the victim's attached garage, while the victim was in jail, appellant had access to the victim's home during the time of the robbery. Witnesses testified that they had noticed new scuff marks inside the vehicle matching the paint color of the safe which was reported stolen. These witnesses also testified that a number of seats in the second and third rows of the vehicle had been folded flat (the victim testified that he

typically only kept one seat folded flat) and that a number of boxes in the victim's garage had been moved during the time he was in jail. Two witnesses, A.M. and K.F., testified that appellant had confessed to them that she had removed items from the home and had asked for their discretion in concealing the crime and aid with hiding a portion of the money. The jury found appellant guilty of second-degree burglary. The district court convicted appellant of the offense, stayed imposition of sentence, and placed appellant on probation for three years. This appeal follows.

DECISION

I. Appellant received a fair trial.

Appellant argues that she was deprived of a fair trial due to three errors. These errors include the district court allowing witness A.M. to testify despite her purported incompetence and allowing testimony that the victim would not be criminally charged with sexual assault despite the allegations by appellant. Finally, appellant argues that the prosecutor committed reversible error by insufficiently preparing a police officer which resulted in the officer making a prohibited statement regarding prior drug use by appellant. Appellant argues that these errors require reversal and a remand for a new trial. Alternatively, appellant argues that these errors, even if not justifying reversal individually, do so when viewed collectively. We review each purported error in turn.

A. Testimony of A.M.

Prior to trial, and pursuant to Minn. Stat. § 595.02, subd. 1(f) (2018), appellant sought an order to prevent A.M.'s testimony due to her incompetence. In support of this motion, appellant submitted 43 pages of text message and Facebook Messenger statements

from A.M. which detailed a series of ongoing delusions, including one in which A.M. stated that she believed that she had been implanted with a “voice-to-skull” chip in her brain through which she was receiving communications. The district court conducted a competency examination with A.M. prior to her testimony and concluded that A.M.’s mental health was “not enough to find her incompetent.”

“Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal,” except “[p]ersons of unsound mind and persons intoxicated at the time of their production for examination are not competent witnesses if they lack capacity to remember or to relate truthfully facts respecting which they are examined.” Minn. Stat. § 595.02, subd. 1(f). A district court must determine whether a potential witness is able to both (1) understand the obligation of an oath made to testify truthfully, and (2) correctly relate the facts to which their testimony would pertain. *State v. Hunt*, 615 N.W.2d 294, 300 (Minn. 2000). “The determination of a mentally ill person’s competency to testify is usually made only after the [district] court’s preliminary examination of the witness.” *Id.* Reviewing courts may look to the preliminary examination as well as the testimony of the challenged witness to determine whether the district court correctly found them to be competent. *See State v. Struss*, 404 N.W.2d 811, 814 (Minn. App. 1987), *review denied* (Minn. Jun. 9, 1987).

During the competency examination, the district court asked A.M. whether she understood she would be “required to tell the truth about all of the issues involved in this case,” whether she “underst[ood] the difference between telling the truth and not telling the truth,” and whether she would be able to “tell the truth about all of the issues involved

in this case.” A.M. answered all these questions affirmatively. The district court judge asked no follow-up questions, but then inquired into A.M.’s mental health and how it would impact her ability to relate the facts of this case. A.M. confirmed that she believed “[appellant] and maybe another individual had been involved in putting a chip in [her] brain” and indicated her belief that she was “working with a bioengineer . . . in Australia,” “ha[d] a detective working for [her],” and “ha[d] a referral to the Mayo Clinic.” A.M. indicated that she felt she was “able to give the [c]ourt and the jury information about other aspects of this case.” The district court found A.M. to be competent to testify and ruled that appellant’s counsel could “inquir[e] into [A.M.] on her mental illness for credibility or bias purposes.” We discern no error by the district court in so ruling.

The district court properly assessed A.M.’s competency and concluded the issue raised by appellant to be one of *credibility* and not *competency*. “A competency determination is not the same as a credibility determination.” *State v. Sime*, 669 N.W.2d 922, 926 (Minn. App. 2003). Though a witness’s competency to testify is determined by the district court, credibility—which speaks to “the weight to assign the testimony”—is solely the province of the finder of fact. *Id.* (quoting *State v. Lanam*, 459 N.W.2d 656, 660 (Minn. 1990)). Once the district court had made its findings that A.M. understood her oath and could correctly relate the facts to which she would testify, the issue of competency was resolved. *Hunt*, 615 N.W.2d at 300. Any further questions regarding the veracity of A.M.’s testimony were questions of credibility—an issue solely within the province of the jury. *Sime*, 669 N.W.2d at 926. The jury was made aware of A.M.’s delusions and they were free to take them into account when weighing the credibility and value of A.M.’s

testimony. The district court did not abuse its discretion in finding A.M. competent to testify.

B. Lack of Criminal Charges Against Victim

Though appellant agreed the jury may hear evidence that she had made allegations that the victim sexually assaulted her, which resulted in his subsequent arrest and detention, appellant argues that the district court erred when it allowed the jury to also learn that no criminal charges against the victim resulted from her allegations. Appellant's primary argument is that this evidence, which "suggested [appellant] fabricated very serious charges against [the victim] and caused him to spend several days in jail" in order to "facilitate the burglary," was highly prejudicial and therefore inadmissible pursuant to Minn. R. Evid. 403 because "its probative value [was] substantially outweighed by the danger of unfair prejudice." She argues that this evidence invited speculation by the jury that she had fabricated the sexual assault claims to facilitate the burglary.¹ The district court allowed the evidence, concluding that the "[t]here is some probative value to this information," as it would help contextualize the facts of this case, and "[t]he potential for unfair prejudice [was] low."

"Rulings on evidentiary matters rest within the sound discretion of the district court and will not be reversed on appeal absent a clear abuse of discretion." *In re Source Code*

¹ Appellant argues additionally that admission of this evidence constituted impermissible vouching for the victim's credibility. We are not convinced. The state may not vouch for or against the credibility of any witness. *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). Instead of vouching, the jury was accurately told that the victim was not charged with the crime alleged by appellant.

Evidentiary Hearings, 816 N.W.2d 525, 537 (Minn. 2012). The district court did not abuse its discretion in concluding this evidence should be allowed. As the district court noted, the parties had already “agreed to allow testimony of criminal sexual conduct allegations made by [appellant] against the victim.” Once the jury heard this evidence, it follows that there is probative value in the jury learning that he was not charged with sexual assault.

Furthermore, rule 403 does not prevent admission of all prejudicial evidence—the probative value must be “substantially outweighed by the danger of *unfair* prejudice.” Minn. R. Evid. 403 (emphasis added). “[T]he term prejudice in Rule 403 does not mean the damage to the opponent’s case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade [the jury] by illegitimate means.” *State v. Mosley*, 853 N.W.2d 789, 797 (Minn. 2014) (quotations omitted). Appellant has failed to demonstrate how the evidence in question is “unfair.” Instead, it is evidence from which a jury could have legitimately “drawn a logical inference assisting, even though remotely, the determination of the issue in question.” *See State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). As such, the district court correctly considered rule 403 and did not abuse its discretion in concluding that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice.

C. Prosecutorial Misconduct

In a pretrial order, the district court prohibited any witness from testifying about appellant’s prior drug use. However, during the testimony of a police officer who had investigated the burglary, the following exchange occurred:

Q: And did [K.F.] tell you how the [appellant] appeared upon coming to her residence?

A: She looked like she was dirty like she was on drugs, based on [K.F.'s] past experience of seeing the [appellant].

This testimony was a clear violation of the district court's pretrial order.

Appellant claims that the prosecutor's failure to adequately prepare the witness was misconduct. Because appellant alleges prosecutorial misconduct and did not object to it during trial, we apply the modified plain-error standard to the alleged error.² See *State v. Ramey*, 721 N.W.2d 294, 302 (Minn.2006). By this standard, the defendant must "demonstrate both that error occurred and that the error was plain." *Id.* If such a showing is made, the burden shifts to the prosecution to demonstrate a lack of prejudice; in other words, that the misconduct did not affect substantial rights. *Id.* A prosecutor's failure to prepare their witnesses prior to trial and subsequent eliciting of inadmissible testimony may constitute misconduct. *State v. Richmond*, 214 N.W.2d 694, 695 (Minn. 1974).

We will assume without so finding that the prosecutor committed misconduct by failing to adequately prepare the officer and we conclude this is plain error. However, we conclude that the misconduct did not affect appellant's substantial rights.

The eliciting of inadmissible evidence by a prosecutor due to inadequate preparation of witnesses, even if unintentional, may in certain circumstances justify reversal. *Id.* at 695. However, the unintentional admission of inadmissible evidence is *not* reversible error

² We note that appellant's trial counsel stated that he "[did]n't think that the county attorney failed to prepare their witnesses."

if the statement was merely a “passing” reference, and the evidence against the defendant was “overwhelming.” *State v. Haglund*, 267 N.W.2d 503, 505-06 (Minn. 1978).

The evidence was overwhelming. The state presented a plethora of evidence supporting the jury’s determination including witness testimony which, placed appellant at the victim’s home while he was away, established that she had the victim’s car (and therefore access to the victim’s garage and home), established that the victim’s car was later found to have paint scratches in it matching the safe, and established that appellant confessed to the theft of the safe and had hid money from the safe. Against this “overwhelming” evidence must be weighed the one inadmissible “passing” reference to prior drug use. *Id.* This one reference in no way related to or negated any other evidence considered by the jury. Therefore, this error did not affect appellant’s substantial rights and does not justify reversal.

D. Lack of Accumulated Errors

Appellant alternatively argues that the above alleged errors, even if not justifying reversal on their own, do so when viewed cumulatively. “Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant’s prejudice by producing a biased jury.” *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) (quotations omitted). However, as detailed in our above analysis, we have concluded only a single error is presumed—prosecutorial misconduct. Because only a single error occurred, there exists a lack of errors to accumulate upon which to base a reversal.

II. The district court did not abuse its discretion in deciding appellant's motions for *in camera* review.

Prior to trial, appellant requested that the district court conduct an *in camera* review of the following documents: (1) A.M.'s mental-health records, and (2) the recordings of calls made by the victim while he was in jail. Appellant sought disclosure of all of those records which the district court determined were relevant to this matter pursuant to *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987). The district court declined to review the mental-health records and, after *in camera* review of the jail call recordings, disclosed two of fifteen recordings to appellant. Appellant challenges these decisions.

A. Mental-Health Records

The district court declined to review A.M.'s mental-health records, concluding that appellant "ha[d] not made a plausible showing that [A.M.]'s psychological records [we]re material and favorable to her defense" because "[A.M.] did not start showing any signs of a mental condition until after [appellant] allegedly confessed to her." A district court's denial of a motion for *in camera* review is reviewed for an abuse of discretion. *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012).

"Criminal defendants have a broad right to discovery in order to prepare and present a defense." *Id.* However, *in camera* review is not an absolute right. *Hokanson*, 821 N.W.2d at 349. Against this right must be balanced an individuals' rights to privacy in their privileged and confidential information, *id.*, including A.M.'s right to privacy in her personal mental-health records, made confidential by the Minnesota Government Data Practices Act, Minn. Stat. § 13.384 (2020), and the Minnesota Health Records Act, Minn.

Stat. § 144.294 (2020). *In camera* review strikes the proper balance between these competing interests. *Id.* To justify review, “the defendant must first establish a plausible showing that the information sought would be both material and favorable to his defense.” *Id.*

The district court did not abuse its discretion in declining to review A.M.’s mental-health records. As we describe above, the district court properly concluded that, despite A.M.’s delusions, she was competent to testify. Appellant did not make “a plausible showing that the information sought would be both material and favorable to his defense.” *See id.* The district court did not abuse its discretion in declining to conduct an *in camera* review of A.M.’s mental-health records.

B. Review of Victim’s Jail Calls

The district court judge, pursuant to *Paradee*, 403 N.W.2d 640, conducted an *in camera* review of calls made by the victim while in jail. Once a party has established a “plausible showing that the information sought would be both material and favorable to his defense,” the district court should conduct an *in camera* review of such information. *Hokanson*, 821 N.W.2d at 349-50. In conducting an *in camera* review, a district court must “determin[e] what if any of the information in the records might help in the defense,” and only disclose such information or documents to the requesting party. *Id.* at 350 (quotation omitted). Information that is “irrelevant” or “duplicative” need not be disclosed. *Id.* On appeal, “the relevant question is whether the district court abused its discretion in either failing to disclose some records requested by appellant or in not allowing such records to be used at trial.” *Id.*

In this matter, the district court reviewed recordings of these telephone calls, determined that only two of the calls contained information that was relevant and useful to appellant's defense, and ordered them released to appellant. We have obtained and reviewed the recordings of all the telephone calls reviewed *in camera* by the district court. Based on our independent review of these recordings, we conclude the withheld recordings would have been neither relevant nor helpful to appellant's defense. As such, the district court did not abuse its discretion in restricting defense counsel's access to all but two of them. *See id.*

III. Appellant's *Pro Se* Arguments

Finally, appellant raises a number of issues in a *pro se* brief. However, all but one of the claims contained therein are mere restatements of the arguments already made by her counsel in her primary brief and we do not readdress those claims. As to the new issue raised by appellant, she claims that witnesses K.F. and A.M. were accomplices and, therefore, the district court erred by failing to instruct the jury on the law regarding accomplice testimony. *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002) ("As a rule, [district] courts have a duty to instruct juries on accomplice testimony in any criminal case in which it is reasonable to consider any witness against the defendant to be an accomplice.").

The threshold question which must be answered is whether K.F. and A.M. may legally be considered "accomplices" of appellant. "The general test for determining whether a witness is an accomplice for purposes of section 634.04 is whether he could have

been indicted and convicted for the crime with which the accused is charged.” *State v. Lee*, 683 N.W.2d 309, 314 (Minn. 2004) (quotations and citations omitted).

Appellant argues that K.F. and A.M. became accomplices as a result of their complicity in concealing the crime and aiding appellant in hiding a portion of the stolen money. Because the record reflects that neither K.F. nor A.M. became involved in the handling of the stolen money until after the crime had been committed, they are not accomplices to the crime committed by appellant. Neither of them played any part in the burglary (i.e. the taking of the safe from the victim’s home) itself. Furthermore, while the record reflects that K.F. may have been present in the victim’s home with appellant at some point, “mere presence at the scene” does not result in an individual automatically becoming an accomplice. *State v. Palubicki*, 700 N.W.2d 476, 487 (Minn. 2005) (quotation omitted). Because K.F. and A.M. were not accomplices, the district court did not err in not giving an accomplice-testimony instruction to the jury.

Affirmed.