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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1819**

State of Minnesota,
Respondent,

vs.

Timeshia Reagan Frye,
Appellant.

**Filed September 17, 2018
Affirmed in part and remanded
Hooten, Judge**

Hennepin County District Court
File No. 27-CR-16-10621

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and Smith, John, Judge.*

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

UNPUBLISHED OPINION

HOOTEN, Judge

In this direct appeal from final judgment of conviction and sentence for second- and third-degree assault, appellant argues that she was deprived of her right to a fair trial by the court's evidentiary rulings that excluded relevant evidence favorable to her defense and admitted irrelevant and unfairly prejudicial evidence designed to elicit sympathy for the victim. Alternatively, appellant argues that the district court erroneously entered convictions and sentences for second- and third-degree assault. We affirm in part and remand to vacate appellant's conviction and sentence for third-degree assault.

FACTS

On April 14, 2016, appellant Timeshia Frye met with her sister. Earlier in the day while at a gas station, Frye's sister got into a physical fight with A.R., who accused her of posting derogatory comments on Facebook. A video of the fight was posted on Facebook, and throughout the day, A.R. and Frye's sister messaged each other about having another fight. After discussing where the fight would take place, Frye and her sister rode in a car to Cleveland Park, near the intersection of Lowry and Penn Avenues, in Minneapolis. A.R., who was accompanied by her friend, A.B., went to Cleveland Park to meet Frye's sister for the fight.

At the park, Frye moved into the driver's seat with her sister in the backseat. Videos of the incident show that Frye and her sister were yelling out the windows with A.B. and A.R. shouting back and standing near the car. A.B. testified to shouting "Get the f-ck out the car. I want to fight." She also heard Frye's sister say, "hit that b-tch." A.B. thought

the sister was telling Frye to hit her and A.R. with the car. Meanwhile, Frye's sister had told her that someone had just pulled a gun. Frye testified that she thought someone was going to shoot her or her sister. A.B. began to walk towards the sidewalk. However, before A.B. made it out of the street, Frye made a U-turn in the middle of Lowry, hit A.B., and drove away. Gun shots went off immediately after the impact took place. A.B. was taken to the hospital where she was treated for a fractured right femur. A.B. was discharged from the hospital, but returned for further treatment on April 19. When she returned, a gun was found in her bag that was consistent with casings discovered at the scene.

The state charged Frye with assault in the first degree in violation of Minn. Stat. § 609.221, subd. 1 (2014), assault in the second degree in violation of Minn. Stat. § 609.222, subd. 1 (2014), and criminal vehicular operation in violation of Minn. Stat. § 609.2113, subd. 1(7) (2014). The jury was instructed on two lesser included offenses: assault in the third degree in violation of Minn. Stat. § 609.223, subd. 1 (2014), and criminal vehicular operation in violation of Minn. Stat. § 609.2113, subd. 2(7) (2014).

While testifying at trial, A.B. became extremely upset at counsel and the judge. Over Frye's objection, the district court allowed the state on redirect to elicit testimony that A.B.'s brother had recently been shot and killed. The district court also excluded any evidence regarding the discovery of the gun in A.B.'s possession.

The jury acquitted Frye of first-degree assault and two counts of criminal vehicular operation, and convicted her of second- and third-degree assault. The district court sentenced her to 21 months for second-degree assault and a prison term of one year and one day for third-degree assault. The district court indicated that the sentence for third-

degree assault merged with the 21-month sentence. Frye appeals the evidentiary rulings and her sentence.

D E C I S I O N

I. Evidentiary Rulings

“Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Frye challenges the district court’s evidentiary rulings, arguing that the district court allowed the state to introduce irrelevant and unfairly prejudicial evidence and excluded relevant evidence favorable to her defense.

Improperly Admitted Evidence

Frye states that the district court abused its discretion by allowing the prosecutor to introduce evidence that A.B.’s brother was shot and killed shortly before trial. The district court stated that this evidence “is not designed to try to get sympathy or anything. I think this is designed to try to provide information about the emotional reaction.” The emotional reaction the district court referenced was A.B.’s outbursts after defense counsel asked her whether she was “at the scene with people who had guns?” In response, the following dialogue took place between the district court and A.B.:

THE COURT: [Defense counsel] asked questions and you need to —

A.B.: What he’s asking me and how he’s saying it to me, he’s not making no point. So first off, I did—

THE COURT: All right.

A.B.: Hold on. Hold on. I did not know that nobody I was with had a gun. It does not matter what I said or if I wanted to fight. She had no right to hit me with a f-cking car. All I wanted to do was fight. She had no right to hit me with no car. So everything you said, don't none of that mean sh-t to me. It doesn't matter. It would never justify her hitting me with a car. That's like you getting in an argument with me and you leave and I hit you with a car. Is that right?

THE COURT: All right.

A.B.: Does that make sense?

THE COURT: [A.B.]—

A.B.: Hell nah. Man, f-ck this sh-t. I don't need to hear this sh-t. I don't—

THE COURT: All right. I think we should take a couple minute break and we'll come back in a few minutes. All right.

A.B.: This is bullsh-t. What the f-ck does having a gun got to do with anything. Shut your b-tch ass up. That b-tch done hit me with that car. What the f-ck you talking about.

On redirect, the state asked A.B. “are there other things that have happened very recently in your life that are somewhat traumatic?” After the district court overruled Frye’s objection for relevancy, the state elicited that A.B.’s brother was recently shot and killed.

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, testimony regarding A.B.’s brother was not relevant during direct examination because it did not have any probative effect regarding the charged offense. It was only after A.B. reacted strongly during cross-examination that the state introduced any context about the death of A.B.’s brother. While evidence may be relevant to shed light on a witness’ credibility, that credibility must first be attacked in order for the state to introduce new evidence to rehabilitate A.B. *See* Minn. R. Evid. 801; *see also* Minn. R. Evid. 608; Minn. R. Evid. 404.

Defense counsel's general question as to the presence of guns at the scene that precipitated A.B.'s emotional outburst was not an attack on her credibility regarding her testimony that Frye hit her with her car, but was only an attempt to establish the circumstances surrounding the incident. Because there was no attempt by defense counsel to attack A.B.'s credibility, the state did not have the right to rehabilitate her by attempting to show that her emotional outburst was due to the recent death of her brother.

Additionally, defense counsel did not open the door to testimony regarding the death of A.B.'s brother. "Opening the door occurs when one party by introducing certain material creates in the opponent a right to respond with material that would otherwise have been inadmissible." *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006) (quotation omitted). Here, defense counsel did not attempt to introduce any new material. Instead, the transcript indicates that counsel was simply asking A.B. if she knew there was a gun at the scene the day of the assault. As the evidence about the death of A.B.'s brother was irrelevant and was not properly used to rehabilitate A.B., the district court abused its discretion by admitting it.

To warrant reversal, Frye must show 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). In reviewing if the error was harmless, this court considers: "(1) the manner in which the State presented the testimony; (2) whether the testimony was highly persuasive; (3) whether the State used the testimony in closing argument; and (4) whether the defense effectively countered the testimony." *Id.*

First, the manner in which the state presented the testimony did not create a reasonable possibility it affected the verdict. In *State v. Matthews*, the supreme court found that there was no effect on the verdict when the state presented evidence very briefly and only during the redirect examination. 800 N.W.2d 629, 634 (Minn. 2011). Here, the state elicited the evidence only on redirect and it was only a few sentences of A.B.'s testimony.

Second, the testimony was not highly persuasive on the issue of guilt. When the testimony is "overshadowed by strong evidence of guilt," it does not affect the verdict. *See id.* at 634. Here, two eyewitnesses testified that they saw the car hitting A.B. There is also a video showing the car making a U-turn and hitting A.B. Additionally, there is no dispute over the fact that Frye hit A.B. with her car. Instead, the dispute is over if it was done out of fear of the gun or if it was intentional. The evidence against Frye was strong enough to overshadow this testimony.

Third, the use of the testimony in closing argument did not create a reasonable possibility it affected the verdict because of its brevity. *Id.* at 635. While the prosecutor did thoroughly discuss A.B.'s demeanor on the stand, there was only one mention of A.B.'s brother. While discussing A.B.'s actions, the prosecutor stated,

Please consider what it must have been like for her to come in front of nearly 20 strangers and the person who ran her over in the middle of the street and talk about that. It's a tall order for anyone to bear, let alone a young woman who was a teenager when this happened, who has a young child, who has suffered from a major injury, that a year and two months later she's suffering with, and who just had to bury a good friend over a week ago.

This brief reference did not substantially affect the verdict.

Fourth, the defense countered the testimony by asking on recross, “Let me clarify. When you say a brother, this is not a biological brother, correct?” To which A.B. responded, “Yes.” During closing argument, the defense counsel, in addressing A.B.’s outburst, stated “the testimony of [A.B.] . . . is not reliable. It’s not credible. It’s not believable.” Thus, the defense effectively countered the testimony. *See id.* at 629. While admitting testimony regarding the death of A.B.’s brother was error, the effect of it on the verdict was harmless.

Properly Excluded Evidence

Frye argues that the district court abused its discretion by excluding evidence that a gun linked to the scene was discovered in A.B.’s possession when she returned to the hospital five days after the assault. She states that the exclusion of such evidence denied her the right to present a complete defense. “A criminal defendant must be treated with fundamental fairness and afforded a meaningful opportunity to present a complete defense.” *State v. Henderson*, 620 N.W.2d 688, 698 (Minn. 2001) (quotation omitted). However, “criminal defendants are bound by the rules of evidence, which are designed to assure fairness and reliability in ascertaining guilt or innocence.” *Id.* Therefore, Frye does not have a right to introduce irrelevant evidence. The district court’s ruling on the relevancy of offered evidence is reviewed for an abuse of discretion. *Id.*

Here, we agree with the district court that the evidence regarding A.B.’s possession of a gun five days after the assault is irrelevant. While the gun was linked to the scene where the assault took place, Frye did not assert that A.B. was the person who fired the shots that day. Further, it was uncontested that multiple gun shots were fired; it was Frye’s

intentions that were disputed at trial. The defense argued Frye had fled the scene because she knew a gun was present and inadvertently hit A.B. The state argued that Frye intentionally hit A.B. with her car. Under either theory, A.B.'s possession of the gun five days after the assault does not make any fact more or less probable. The district court did not err in excluding evidence regarding the gun that was in A.B.'s possession five days after she was hit by Frye's car.

II. Sentencing

The parties agree that the district court improperly sentenced Frye for both second- and third-degree assault. A person “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04 (2016). Additionally, “if a person’s conduct constitutes more than one offense . . . the person may be punished for only one of the offenses.” Minn. Stat. § 609.035, subd. 1 (2014). Frye’s conviction of second- and third-degree assault arise out of the same behavioral event and she cannot be convicted and sentenced for both. *See State v. Lohmeier*, 390 N.W.2d 882, 886 (Minn. 1986) (holding that appellant’s sentence for third-degree assault must be vacated under Minn. Stat. § 609.035 when he was also sentenced for second-degree assault); *see also State v. Tenhoff*, 322 N.W.2d 354, 356–57 (Minn. 1982).

Frye was convicted of both second-degree and third-degree assault. “If the lesser offense is a lesser degree of the same crime or a lesser degree of a multi-tier statutory scheme dealing with a particular subject, then it is an ‘included offense’ under section 609.04.” *State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995). Frye cannot be convicted of both second-degree and third-degree assault.

The district court initially sentenced Frye to 21 months for second-degree assault and a prison term of one year and one day for third-degree assault to run concurrently. The prosecutor noted that she thought “the sentence for the assault three would merge with the sentence on the assault two.” The district court agreed and in the warrant of commitment stated that the third-degree assault “[s]entence combines [sic] with count 2.” The term “combines” with regard to sentencing “do[es] not describe dispositions recognized by the law, and [it does] not clearly indicate the disposition intended by the district court.” *State v. Walker*, 913 N.W.2d 463, 467 (Minn. App. 2018). When sentencing “the district court should clearly indicate the disposition for every charge.” *Id.* Remand is appropriate for the district court to vacate the conviction and sentence for third-degree assault.

Affirmed in part and remanded.