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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 15-0379

DA 15-0379

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 195N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MAKUEEYAPEE DELENE WHITFORD,

Defendant and Appellant.

APPEAL FROM: District Court of the Twentieth Judicial District,
In and For the County of Lake, Cause No. DC 13-45
Honorable James A. Manley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Chief Appellate Defender, Eileen A. Larkin, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Jonathan M. Krauss, Assistant Attorney General, Helena, Montana

Daniel Guzynski, Special Deputy Lake County Attorney, Helena, Montana

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Submitted on Briefs: July 11, 2018

Decided: August 7. 2018

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Makueeyapee Whitford was tried by a Lake County jury in 2014 and convicted of deliberate homicide in violation of § 45-5-102, MCA. Whitford now appeals the Montana Twentieth Judicial District Court's denial of his motion for a new trial. We affirm.

¶3 In March 2013, Whitford attended a large party in Polson. As he was leaving the party, Whitford stabbed and killed John Pierre. After his arrest and appropriate *Miranda* warnings, Whitford agreed to two interviews with police; both occurred in a sheriff's office interview room, and both were video-recorded. Whitford asserted a justifiable use of force defense. He testified at trial about the events leading up to the party, why he stabbed Pierre, and how he was arrested and jailed.

¶4 The State sought to admit both video interviews into evidence at trial. Both depicted Whitford in orange jail clothes and wearing restraints. The District Court admitted Video 1 without objection. Two off-the-record conversations ensued between counsel and the court before the jury watched Video 1. The next day, out of the jury's presence, the defense made a record that reflected an objection it had made during one of the previous day's off-the-record discussions, stating that allowing the jury to see

Whitford in jail clothing and in restraints in Video 1—rather than playing only the audio portion—was prejudicial to him.

¶5 When the State sought to admit Video 2, the defense objected, stating outside the presence of the jury that Video 2 was irrelevant and prejudicial ("again, it's another image of him in orange, another image of him in handcuffs for a mere conversation about procedural stuff"). The District Court overruled the objection and admitted Video 2, and the jury watched it.

¶6 Whitford argues that he was denied a fair and impartial trial and was prejudiced when the District Court admitted and allowed the jury to watch the interview videos.

¶7 We generally review a trial court's evidentiary rulings for an abuse of discretion. *State v. Ankeny,* 2018 MT 91, ¶ 16, 391 Mont. 176, 417 P.3d 275. A trial court has broad discretion in determining the relevance and admissibility of evidence. *State v. Santillan,* 2017 MT 314, ¶ 24, 390 Mont. 25, 408 P.3d 130. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." M. R. Evid. 403. Unfair prejudice occurs when the evidence causes the jury to make its determination on an "improper" basis. *Ankeny,* ¶ 33 (quoting *State v. Stewart,* 2012 MT 317, ¶ 68, 367 Mont. 503, 291 P.3d 1187). Because of the risk of unfair prejudice, a defendant's Fourteenth Amendment rights to due process are violated if he is compelled to appear at a jury trial in identifiable jail clothing. *Estelle v. Williams,* 425 U.S. 501, 512, 96 S. Ct. 1691, 1697 (1976). This Court has urged district courts to order jail officials to bring defendants into court dressed in their own clothes. *State v. Rodriguez,* 192 Mont. 411, 420, 628 P.2d 280, 285 (1981). Defendants generally are

entitled by the Fifth Amendment of the United States Constitution and Article II, Section 17, of the Montana Constitution to appear before juries without shackles and other restraints. *State v. Rickett,* 2016 MT 168, ¶ 8, 384 Mont. 114, 375 P.3d 368 (citing *State v. Herrick,* 2004 MT 323, ¶¶ 12-13, 324 Mont. 76, 101 P.3d 755). We have not held that a defendant has the same right to exclude video evidence showing him in identifiable jail clothes and restraints.

¶8 Whitford argues that he would not have been prejudiced had only the audio portions of Videos 1 and 2 been played, which he suggested at trial. On this record, we conclude that the District Court did not abuse its discretion in allowing the jury to watch the videos. The jury knew about Whitford's arrest and detention from evidence other than the videos, including unchallenged testimony from other witnesses and later from Whitford himself. Further, although Whitford was interviewed in jail clothes and restraints, the jury viewed Whitford personally in his own clothes and without restraints during the six days of trial. Whitford has not carried his burden on appeal to demonstrate prejudice to his substantial rights. *See* § 46-20-701(1), MCA.

¶9 The State called Adrian Afterbuffalo at trial to testify about the events related to Whitford's assault of Pierre. Afterbuffalo testified that he was concerned about Whitford's behavior that night because Whitford seemed as if he was preparing for a fight and was "hyping up and getting all violent." He testified that Whitford had given him a knife and he had taken another knife away from Whitford and told him there was "no reason to be trying to fight around." Afterbuffalo testified that he told Whitford, "If you're going to keep acting this way, we're going to turn around and go back to the motel

room," and Whitford then said he would be "good" and calm down. The defense did not object during Afterbuffalo's testimony.

¶10 When the State concluded its direct examination of Afterbuffalo, the defense asked the District Court for a sidebar. The District Court excused the jury and heard the defense's argument that Afterbuffalo's testimony had presented new information they had not heard in previous interviews with him, that the State knew about the change in Afterbuffalo's story and had not informed them, and that failing to provide notice to the defense about the new information violated the prosecutor's statutory and ethical duties and required a mistrial and dismissal with prejudice. The State argued that it had learned about Afterbuffalo's new information only that morning and had no duty to disclose it to the defense, and the defense could have learned the new information had it interviewed Afterbuffalo immediately before trial. The District Court denied the defense's motion for a mistrial, made Afterbuffalo available to the defense for a short interview, allowed the defense to cross-examine Afterbuffalo, and allowed the defense to examine the prosecutor outside the presence of the jury about the new information.

¶11 Whitford argues that the District Court should have granted a mistrial or a new trial because the State's failure to notify him of Afterbuffalo's new version of events prejudiced his substantial right to a fair trial. We review a district court's ruling on a motion for a mistrial for an abuse of discretion. *Ankeny,* ¶ 16. We review a district court's denial of a motion for new trial for an abuse of discretion. *State v. Reinert,* 2018 MT 111, ¶ 12, 391 Mont. 263, 419 P.3d 662.

¶12 Under § 46-15-322, MCA, the State must disclose to the defense the witnesses it may call and the evidence it may introduce. *State v. Lamar,* 2014 MT 222, ¶ 22, 376 Mont. 232, 332 P.3d 258. The State "may not be required to prepare or disclose summaries of witnesses' testimony." Section 46-15-322(5), MCA. But Whitford argues that the State is under a continuing statutory duty to provide information, whether exculpatory or inculpatory, to prevent surprise at trial. Section 46-15-327, MCA; *State v. Stewart,* 2000 MT 379, ¶¶ 22-23, 303 Mont. 507, 16 P.3d 391. A district court may impose sanctions commensurate with the failure to comply with discovery statutes. *State v. Pope,* 2017 MT 12, ¶ 25, 386 Mont. 194, 387 P.3d 870. One such sanction is "declaring a mistrial when necessary to prevent a miscarriage of justice." Section 46-15-329(5), MCA. A district court also may grant a defendant a new trial if required in the interest of justice. Section 46-16-702(1), MCA. The grant or denial of a motion for a new trial is generally within the sound discretion of the district court. *State v. Jackson,* 2009 MT 427, ¶ 50, 354 Mont. 63, 221 P.3d 1213. Likewise, discovery sanctions are "best left to the sound discretion of the district court. Such discretion allows the court to consider the reason why disclosure was not made, whether noncompliance was willful, the amount of prejudice to the opposing party, and any other relevant circumstances." *Pope,* ¶ 25 (quoting *State v. Waters,* 228 Mont. 490, 495, 743 P.2d 617, 621 (1987)).

¶13 The State knew about Afterbuffalo's new inculpatory testimony the morning of trial. The District Court stated that "obviously" it "wish[ed]" the State had told Whitford of Afterbuffalo's statements, but noted that the defense did not object to Afterbuffalo's new testimony until after it was completely presented, nor did Whitford seek a cautionary

instruction to the jury. The District Court determined that any prejudice Whitford suffered as a result of the nondisclosure did not "seem significant." Having reviewed the record, we find no reversible error in this ruling. Following Afterbuffalo's direct examination, the defense had the opportunity to interview Afterbuffalo and then to cross-examine him, which the District Court found it had done "quite effectively." Whitford responded to Afterbuffalo's testimony, as well as that of other witnesses, during his own testimony. The District Court determined that no other witness supported Whitford's version of events. The court found that a jury reasonably could have concluded from the testimony of the other witnesses, particularly one other witness who "was probably the only sober witness from the party," that Whitford was not justified when he assaulted Pierre. The District Court acted within its discretion when it determined that Whitford was not unfairly prejudiced by the State's failure to notify him of Afterbuffalo's new statements.

¶14 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. We conclude that the case presents a question controlled by settled law or by the clear application of applicable standards of review. The three-year delay between judgment and the submission of the appellate briefs in this case is unacceptable. Having found no error in the District Court's rulings, we need not address Whitford's cumulative error claim. His conviction is affirmed.

/S/ BETH BAKER

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA