

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0047

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JODY JAKE POPE,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable James A. Haynes, Presiding

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STATEMENT OF THE ISSUE

Upon remand for the review of discovery violation sanctions, did the district court act arbitrarily without conscientious judgment in issuing financial sanctions against the State?

STATEMENT OF THE CASE

This Court, in *State v. Pope*, 2017 MT 12, 386 Mont. 194, 387 P.3d 870, determined that the State violated the criminal discovery process when it did not provide Pope with a copy of the State's June 23, 2014 videotaped interview (Prosecution Interview) of the victim in the case, Susan Myers. The sole issue now before this Court is whether the district court abused its discretion in issuing financial sanctions, as opposed to granting a mistrial.

Upon remand, both parties briefed their respective positions regarding sanctions and the district court ordered an evidentiary hearing. (D.C. Doc. 132.) At the evidentiary hearing, the State offered six pieces of evidence and stood on their briefs. (D.C. Doc. 122.) Pope then made his argument to the district court with significant interaction and inquiry from the district court. *Id.* The district court then took the matter under advisement. *Id.*

On July 6, 2017, the district court issued a Sanction Order on Remand which concluded that the State's discovery abuse did not harm Pope's defense, but that

the State was liable for the willful and unreasonable mistake due to the burden it placed on the justice system and the Office of the Public Defender. (D.C. Doc. 137.) The district court determined that financial sanctions were necessary to “cause the State to internalize the *Pope* decision and thereby fulfill its discovery obligations by underlining the predictable costs the State’s discovery abuse inflicted on the justice system.” (D.C. Doc. 137 at 23.)

STATEMENT OF THE FACTS

I. The offense

On the evening of September 12, 2013, Pope and Myers were driving in a large, older-model gray van around Hamilton, Montana, on their way to go camping somewhere, when they got into an argument. (Trial Tr. at 138, 160.)

Around 7:33 p.m., Myers threw Pope’s wallet out of the passenger’s window of the van as they were travelling southbound out of town on Highway 93. Pope pulled the van over to look for his wallet, and Myers exited the van and started walking north by herself. Jeff Carter, one of Pope’s friends, recognized Pope and pulled over to help him. They located the wallet in about 10 minutes. Carter advised Pope not to go back to town because “it seemed like maybe there was a situation escalating, and I didn’t want to see that happen.” (Trial Tr. at 299-302; *see also* State’s Ex. 2; Trial Tr. at 14, 121-30, 124-25.)

Around 7:49 p.m., Myers crossed Highway 93 at the intersection with Hope Avenue/Golf Course Road and walked into the parking lot of the Town Pump gas station and convenience store. Pope pulled the van into the Town Pump parking lot, and stopped near the entrance of the building. Myers and Pope talked through the driver's side window, and then entered the convenience store together. While Myers purchased a Slurpee, the two continued to talk. When they left the building, Myers got into the passenger side of the van, and Pope drove off southbound on Highway 93 around 7:51 p.m. (Tr. at 125-28; State's Ex. 2; *see gen.* State's Ex. 1, admitted into evidence at Tr. at 14.)

Shortly thereafter, eyewitness Jay Duce was driving home with his son southbound on Highway 93 in the left-hand lane of traffic. In front of him, he saw Pope's van come across the two lanes of southbound traffic, the center turning lane, and the two lanes of northbound traffic at a sharp angle. Duce then noticed Myers, who had exited the van, walking northbound along the far side of the road just outside of the lane of right-hand traffic. (Trial Tr. at 192-93, 198-99.) From Duce's perspective, the van did not appear to be curving as if to enter the lane of traffic; rather, it "was going at the pedestrian." (Trial Tr. at 193.) At first, Duce thought Pope was going to pick up Myers, in part, because Myers turned to face the van and appeared to cross over the fog line towards the vehicle; however, "the speed remained constant," that is, between 20 and 30 miles per hour, and "the

angle was such that it was going directly at the individual.” (Trial Tr. at 193-94, 212-13.) Myers lifted her arm with the Slurpee cup in it, and Duce thought she might have been preparing to throw it. (Trial Tr. at 214. The van did not swerve away from her. (Trial Tr. at 195-96.) The cup hit the windshield, and there was a big splash. (Trial Tr. at 214-15.) Duce did not have a clear view of the impact because the van was between his truck and Myers, but he believed the front passenger side of the van hit Myers. After the impact, the van did not stop but rather accelerated toward the lane of traffic. (Trial Tr. at 195-96, 214-16.) Once the van passed out of his line of sight, Duce saw the woman lying on the far side of the road up against the curb. (Trial Tr. at 197, 215.) Duce honked his horn multiple times and pointed out of his window to try to make the driver of the van aware that he had hit someone, but the van did not stop. (Trial Tr. at 197.)

Duce pulled around and parked just in front of Myers with his hazards on. (Trial Tr. at 197.) He called 911 to report the accident and told the dispatcher, “I have a woman that was just hit . . . hit by a van, the van intentionally tried to hit her. . . .” He can also be heard explaining to a bystander that “[a] guy in a van, he came across and aimed for her.” Duce told dispatch that Myers had a pulse and was breathing, but appeared to be “fading in and out of consciousness, like she was hit in the head.” (State’s Ex. 25, Trial Tr. at 16, 200.)

Two of Duce's friends, Brian and April Hawkes, also stopped to assist Myers. (Trial Tr. at 165-66.) Myers appeared to be in pain. (Trial Tr. at 167, 174, 201.) She was moaning and complaining of pain in her hips and back. (Trial Tr. at 167, 175, 201.) She did not get up, her speech was slurred, and she appeared to be possibly losing consciousness. (Trial Tr. at 174-75, 201.) Duce smelled alcohol on her, but believed there was "something much more going" on with Myers than simple intoxication. (Trial Tr. at 220.) Myers appeared tearful. (Trial Tr. at 176.) Although she answered generic questions properly, she would not answer questions about what had happened to her or who had done it. (Trial Tr. at 175-76.)

After Myers was transported to the hospital, she told the responding emergency medical technician that her boyfriend "flipped" out when he found out that she got her hair done by a "gay guy." (Trial Tr. at 233; *see also* State's Ex. 26, admitted into evidence at Trial Tr. at 190. She refused to provide her boyfriend's name. (Trial Tr. at 233.) She was "unable to relate whether or not she went under the vehicle or over the vehicle." (State's Ex. 26 at 2.) Myers had a laceration on her knee and complained of severe head pain, back pain, and tingling in her neck. She also exhibited some wincing or guarding on her right upper abdomen. Her speech was slurred, and she was confused. She admitted having consumed "a pint of alcohol" that day. (Trial Tr. at 233-36.) She did not report any prior injuries to her ribs. (*See* State's Ex. 26 at 2, "Medical History.")

At the emergency room, medical personnel noted Myers had swelling on her face, redness on the back of her hand, bilateral knee lacerations, a contusion on the left side of her head, and an injury to her left anterior chest which a CT scan revealed was a minimally displaced left lateral tenth rib fracture. (Trial Tr. at 263-64, 278-79, 282; *see also* State's Ex. 27 at 3, admitted into evidence at Trial Tr. at 190; State's Ex. 28 at 3, admitted into evidence at Trial Tr. at 190; *but see* State's Ex. 28 at 5-6, describing the pain and fracture on the right side.) Although it was "possible" that the broken rib had occurred at an earlier time, there was no evidence of healing, *i.e.*, a callous formation over the rib and Myers did not report that she had any preexisting injury to her ribs. (Trial Tr. at 266, 280, 282.) Drug testing revealed a blood alcohol concentration of 0.043 and the presence of benzodiazepines and marijuana in Myers. (Trial Tr. at 291-92; State's Ex. 28 at 5.) Upon discharge, Myers was prescribed Lortab—hydrocodone and acetaminophen—for pain. (Trial Tr. at 297-98.)

While in the emergency room, Myers initially told the medical personnel that she had been hit by a van, but did not say who was driving the van. (Trial Tr. at 261; State's Ex. 27 at 2.) Later, when she was asked if the staff could call her boyfriend to give her a ride home, Myers stated "her boyfriend was the one driving the van that hit her, so she did not want to call him." (Trial Tr. at 267, 272; State's Ex. 27 at 3.)

Myers' shoes were found one to two feet inside of the lane of traffic. (Trial Tr. at 167-68, 201-02.) Law enforcement officers were unable to find anything on the pavement at the accident scene indicating that Pope had engaged in some type of evasive maneuver to avoid hitting Myers. (Trial Tr. at 133-34.)

The following day, Pope was interviewed by Ravalli County Detective Jase Basnaw. Pope asserted his "crackhead" girlfriend, Myers, had "gotten out of control" the prior day. He told the officer he was trying to turn the van around to bring her back into town when she slammed the van into park while it was moving and jumped out and began walking back to town herself. Pope claimed he "got moving again, was headed into town" when Myers "jumped out in front of him, threw the drink at the front of his van and he swerved to miss her." He adamantly denied that he was trying to hit Myers and adamantly denied that he had hit her. (Trial Tr. at 138, 162-63.)

On September 16, 2013, Ravalli County Justice of the Peace Jim Bailey issued an order precluding Pope from having contact with Myers. (Trial Tr. at 339-40.) However, on September 26, 2013, Pope called Myers from the Ravalli County Detention Facility. (*See* State's Ex. 29, Trial Tr. at 338-39.) During that call, Myers told Pope that things had been "a little rough" for her and that she "got a couple broken ribs" from the incident. (State's Ex. 29 at 2:05-2:10, 3:20-3:30.) When Pope stated, "the van didn't hit you, right?," Myers indicated she was "not

sure,” that it had happened so fast, and that she woke up in an ambulance with two broken ribs. Pope then indicated Myers had hurt her ribs before, but she explained they had healed before the accident. (State’s Ex. 29 at 3:25-4:25.) Pope stated he “swerved and missed” her, State’s Ex. 29 at 3:40-3:46, and that it looked like Myers “hit the curb, or something, I don’t know.” (State’s Ex. 29 at 4:25-4:30.)

The following discussion then occurred:

Myers: That was crazy, though. That was absolutely crazy.

Pope: Yeah.

Myers: That was crazy. What the hell were you thinking?

Pope: Hello?

Myers: What the hell were you thinking?

Pope: I didn’t know you was going to jump out in the road.

Myers: I was standing on the side. I wasn’t in the road.

Pope: Okay. It looked to me like you jumped out. I seen the milkshake on the thing and I couldn’t see shit.

Myers: I didn’t jump out. I’m not that crazy. And what were you thinking? Hello? What kind of behavior is that?

Pope: (inaudible) I was pulling over to the side. I was going to pull over to the parking lot.

Myers: Well, we were not near the store. We were up from it. We weren’t that close to the store.

Pope: The gas station.

Myers: Right. We wasn't that close.

Pope: I was gonna' cross the road and go to the gas station (inaudible) and over there.

Myers: Well, what were you thinking when you didn't cross the road to go to the gas station and you went at me?

Pope: You threw a milkshake at my frickin' window and it was very hard so I got the hell out of there.

Myers: No, you almost hit me, you almost hit me with your van and you were going straight at me and you were trying to fuckin' run me over.

Pope: Oh no, I wouldn't do that. Come on. You know better than that

Myers: Yeah, that's what you were doing. That's what you did.

Pope: I love you baby. I wouldn't do that. Okay?

Myers: You did that.

Pope: Huh?

Myers: But you did that. I was there.

(State's Ex. 29, Audio at 4:32-6:08.)

In December 2013, after Pope was out of jail, he continued to have contact with Myers and eventually moved back in with her. On January 30, 2014, Myers filed a letter with the court in which she stated, in part:

I am asking for the no contact order between Jody Pope and myself Susan Myers be lifted. He did not hit me with his van. He is my friend and I do not fear him.

(D.C. Doc. 32.)

She also told Streano and the prosecution's investigator that Pope did not hit her with the van and that she was not afraid of him. (Trial Tr. at 324-25.)

However, on February 14, 2014, Myers called 911 to report that Pope had choked her. When officers responded, Myers was passed out and Pope was hiding in the bushes nearby. (D.C. Docs. 44, 52; Trial Tr. at 398.) Pope's bail was revoked and increased as a result of this conduct. (D.C. Doc. 52.)

On June 19, 2014, the State disclosed the audio recording the seven-minute long telephone call between Pope and Myers that occurred on September 26, 2013. (D.C. Doc. 86 at 2.)

A three-day jury trial was held before the Honorable James A. Haynes, district court judge, on June 23-25, 2014.

II. Myers' video interview

On the first day of trial, during jury selection, an investigator for the prosecution, James Hulme, recorded a video interview with Myers. In that interview Myers made a lot of statements that were consistent with her previous

statements at the emergency room to medical staff after the incident, as well as her statements made to Pope when he called her from jail. *Pope*, ¶¶ 6-7.

In the interview, Myers recounted the events of the evening, stating after their argument she no longer wanted to ride with Pope. After getting out of the van she explained that she was standing on the side of the road when Pope drove the van across the street. She stated Pope “wasn’t driving slow.” Myers stated even though she was already standing on the side of the road, she moved out of the way when he came towards her and threw the punch at the window. Myers explained the next thing she remembered was waking up in an ambulance. (Video at 10:34:40-10:40:00.) When Hulme asked her what she thought Pope was trying to do when he drove the van toward her, she responded, “I don’t know. I don’t know what his intentions were. I don’t know,” and started crying. (Video at 10:39:35-10:38:50.)

Myers explained she broke her rib as a result of the accident on September 12, 2013. She stated she had hurt her ribs four to six weeks before the incident, but they had been healing. They were not hurting immediately before the accident. Myers admitted her ribs hurt after the incident. (Video at 10:31:10-10:34:25.)

During their conversation, Myers told Hulme that Pope had been calling her and writing letters to her, but that it stopped after he “got caught” and his attorney told him to knock it off. (Video at 10:42:40-10:44:15.) At first, she stated, “I

don't remember exactly" if Pope had told her what to say at trial. Video at 10:42:50-10:43:06.) She later stated he did not tell her what to say "in so many words." (Video at 10:55:05-10:55:30.) However, she eventually stated Pope asked her to write the letter to the judge. As a result of that incident, Myers stated she did not trust defense counsel, Jennifer Streano. She also felt that Streano had misled her into making a recorded statement saying nothing happened. Myers explained that she was misled into believing that if she wrote the letter to the judge, she would not have to do a recorded interview. Streano read the letter Myers wrote to the judge and indicated it was okay, yet Myers still was asked to provide a recorded interview. (Video at 10:51:00-10:52:25; 11:07:25-11:09:47.)

III. Myers' testimony

During trial, on direct examination, Meyers testified that Pope was her boyfriend at the time of the incident, and that they had discussed marriage. However, they were no longer engaged because she "moved on with [her] life." (Trial Tr. at 317-18.) With respect to the incident with the van, Myers stated:

We were arguing. We were drinking and arguing, and I got out of the van, and I went to the Town Pump, and I got back in the van, and then I got back out of the van, and I walked across the street from the van on the other side, and then he drove the van at me on the other side.

(Trial Tr. at 326.)

Myers stated Pope “tried to hit me with the van,” and that she was afraid when the van was coming towards her. (Trial Tr. at 318-19.) She stated she could not remember whether the van hit her, that she was unconscious, and that the next thing she remembered was waking up in the ambulance. (*Id.* at 324.) She testified that she went to the hospital that night and they told her she had a fractured rib. Although she admitted she had previously hurt her ribs, she testified that the prior injury had healed. (*Id.* at 318.)

Myers admitted she had told the State’s investigator and Streano that Pope did not hit her with the van and she was not afraid that evening. (Trial Tr. at 324-25.) She also admitted that she sent a letter to the court in which she tried to get the charges against Pope dismissed, claiming that Pope did not hit her with the van and she was not afraid. (Trial Tr. at 325.) Myers explained these prior statements were not accurate. (*Id.* at 325.) She explained she made the statements because Pope asked her to do it, and she thought that if she did, the charges would be dismissed. (*Id.* at 326.)

On cross-examination, Myers admitted she threw her drink at the van’s windshield. However, she stated that she was on the side of the road when Pope came towards her with the van, and she denied that she ever stepped into the road. Defense counsel did not confront Myers with any prior statements to the contrary. (*Id.* at 331.)

IV. District court briefs and evidentiary hearing on Pope's motion for sanctions.

Upon remand, Pope filed a motion for sanctions for discovery violation. (D.C. Doc. 127.) After the motion was fully briefed by all parties, the district court set an evidentiary hearing for June 7, 2017. (D.C. Doc. 132.)

A. Pope's motion

Pope argued in his motion that the State's actions were willful and then detailed the times Pope attempted to gain access to the video recording. Pope then addressed the issue of prejudice, arguing that the nondisclosure prevented the defense from being able to adequately cross-examine the State's main witness, and defend Pope at trial.

Pope argued in his brief that he had "no idea what topics Myers would testify inconsistently on, nor had any preparation time to adequately examine her." (D.C. Doc. 127, at 10.) Pope asserts that there were mischaracterizations of the plea offers and about whether Pope expected Myers to testify. (*Id.* at 11.) Pope's brief also argued that Myers' testimony about previous rib fractures improperly left the inference with the jury that those injuries were caused by Pope as well. (*Id.* at 12.) Finally, Pope's motion argued that they were unprepared to provide any witnesses for Myers' character for untruthfulness and that "[o]nly after the interview, did her credibility for untruthfulness become relevant." (D.C. Doc.

127 at 13.) Pope concluded by requesting sanctions, preferably a mistrial.

(D.C. Doc. 127.)

B. State's response

The State's response admitted that it "refused to provide the video recording under a mistake of law and that in that context the non-compliance was willful."

(D.C. Doc. 130 at 5.)

The State emphasized that Pope's attorney was more than able to cross-examine Myers effectively and that during trial the court addressed the issue.

(D.C. Doc. 130 at 7.) The State highlighted that the trial court had previously addressed this issue at trial, stating that "there's no surprise to you . . ." and "all I heard her testifying about was consistent with what she initially said. So there's no surprise. There's no new news." (Trial Tr. at 397-99.) The State emphasized Myers' recanted recantation as support that Pope was aware of the inconsistencies at issue and, therefore, was not surprised. (D.C. Doc. 130 at 6.)

The State attached several exhibits to their response, mostly pertaining to settlement discussions. (D.C. Doc. 130.)

C. Pope's reply

Pope asserted that the State's "intentional and unnecessary action" undermined the discovery process and that "a new trial, and or other sanctions are warranted." (D.C. Doc. 131.)

D. Evidentiary hearing

The State rested on their briefing as they had addressed the prejudice issue therein. The State also introduced exhibits, which included several emails, request for discovery, as well as the trial transcript, and the video recorded interview at issue. (6/7/17 Evid. Hearing, Tr. at 14.)

Pope argued, based off briefing, that the State had an unfair advantage in knowing “exactly what she was going to say and . . . they were able to benefit from that.” (*Id.* at 15.) Pope reiterated the purpose of discovery being for “fairness and to prevent delay and surprise.” (*Id.*) Pope then stated the cross-examination of Myers was ineffective because she was “limited to what questions [she] wanted to ask her” because she “had no idea at that point what she was changing her story on and what she was not changing her story on[.]” (*Id.* at 16) Pope then advocated for a new trial as no other remedies were available to him. (*Id.*)

E. Sanction order on remand

Pursuant to Mont. Code Ann. § 46-15-329, this Court directed the district court to consider “appropriate sanctions for the State’s discovery abuse.” *Pope*, ¶ 27; (D.C. Doc. 137). The district court considered all evidence including all briefs, attached materials, and held an evidentiary hearing in order to determine what sanction would be appropriate. (*Id.* at 3.)

After consideration of all evidence, the district court determined that due to Pope's continued interference and disregard for the no contact order, there could be no surprise as he "engineered the inconsistencies in Myers' testimony through his contact with her." (*Id.* at 4.) The district court also relied on the testimony of the eyewitness and the medical expert. They determined that they both "testified strongly and credibly with respect to the material facts in this cause [sic]" and that the State's failure to disclose was ultimately harmless. (D.C. Doc. 137.)

The district court then detailed Myers' testimony and how it shifted due to Pope's contact despite the no contact order. The district court specifically reviewed the phone call on September 26, 2013, where Pope called Myers from jail. After Pope told Myers that "he loved her and said he would never hurt her," Myers resisted and stated:

"What the hell were you thinking?"

"You were going straight at me and tried to f-ing run me over."

"You did that."

(D.C. Doc. 137 at 6; Trial Tr. at 323; Ex. 29.)

In reviewing the timing of Myers' recantations, the district court continued to look at Pope's involvement with Myers, noting that in early December 2013, upon posting bond, Pope began living with Myers despite the district court's no contact order. (D.C. Doc. 137 at 6.) The district court noted that at this point Myers

began to recant her earlier statements she made on the phone when Pope called her and the statements to medical staff after the incident. (D.C. Doc. 137 at 4-7.) On January 29, 2014, Myers sent a letter to the district court which claimed that Pope had not hit her with his van. (*Id.* at 6.)

The district court noted that on March 13, 2014, Pope appeared before the court and did not contest the contact violations. Pope remained in jail up until the trial and the court noted that at that point Attorney Streano “knew Myers had moved on to a new relationship.” (D.C. Doc. 137 at 8; Trial Tr. 317-18, 327.)

At trial, Myers testified that Pope had tried to hit her with the van and when confronted with her conflicting positions (by the State), she stated she had told a different story because “[Pope] asked [her] to do it.” (D.C. Doc. 137; Trial Tr. at 326.)

The district court then reviewed the State’s reasoning for not disclosing and determined that a sanction was necessary “so that the State will take the necessary steps to internalize *Pope* and comply with its criminal discovery obligations.” (D.C. Doc. 137 at 15-16.)

The district court then addressed the extent of prejudice to Pope. The district court concluded that the interview was insignificant, that the inconsistencies in Myers’ statements therein were not new, and that “the state had a strong case based on Duce’s compelling eyewitness and Dr. Morey’s expert medical testimony.” (D.C.

Doc. 137 at 8.) The district court reviewed both parties' assertions, but ultimately agreed with the State that Pope had "knowledge of sufficient facts to effectively cross-examine Myers." (D.C. Doc. 137 at 18.) The district court highlighted several facts demonstrating sufficient pre-existing knowledge to effectively cross Myers. The district court noted that Attorney Streano had knowledge of the September 26, 2013 phone call, that the prosecution interview was characterized as non-exculpatory, that Pope had been in prolonged contact with Myers, and that Myers was in a new relationship with someone other than Pope. (*Id.* at 18-19.)

The district court's sanction order made the State financially responsible for the appeal that occurred as a result of the discovery abuse, but determined that there was no harm resulting from the abuse and that as a result mistrial was not an appropriate sanction.

SUMMARY OF THE ARGUMENT

Pope has not, and cannot, show how the State's failure to disclose the recording of Myers' interview prejudiced his defense or requires a new trial. The district court properly reviewed Pope's briefs and arguments at the evidentiary hearing. The court correctly determined that Pope was not entitled to a new trial because Myers' interview did not constitute exculpatory evidence, *i.e.*, evidence favorable to the defense. Nor is this a case of unfair surprise. Myers' interview

closely tracked her original statements to medical personnel and to Pope himself regarding what had happened to her. Pope knew from at least September 26, 2013, that Myers believed Pope had “tried to [sic] run her over,” that she denied stepping into the street toward the van, that she believed Pope broke her ribs that night, and that she denied that her prior injury was the cause of those broken ribs. And Myers’ trial testimony was consistent with the statements she made during the interview and during that telephone call with Pope shortly after the accident occurred. The recording does not support the contention that Myers changed her story from an exculpatory one to an inculpatory one in the middle of the interview due to something Hulme said to her or under duress. In short, Pope has not shown how his trial counsel could have used the video recording to his advantage at trial or what she would have done differently had she known its contents, let alone how that might have changed the outcome of the trial.

After considering all of the evidence, as well as the parties’ positions in briefing and in an evidentiary hearing, the district court correctly determined that granting a new trial was not an appropriate sanction. The district court reasonably determined that a financial sanction was appropriate to ensure “the State complies with discovery in all cases, even those—such as the one here—in which such compliance is harmless or likely to be harmless.” (D.C. Doc. 137 at 5.)

ARGUMENT

I. Standard of review

This court reviews a district court’s decision regarding matters of discovery for abuse of discretion. *Pope*, ¶ 13. “When a district court acts arbitrarily, without conscientious judgment or exceeds the bounds of reason it has abused its discretion.” *State v. Pierce*, 2016 MT 308, ¶ 16, 385 Mont. 439, 384 P.3d 1042. A “district court cannot be overturned on appeal in absence of a showing of prejudice to the movant.” *Pierce*, ¶ 16. “Imposition of sanctions is a matter 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 (citing *State v. Waters*, 228 Mont. 490, 495, 743 P.2d 617, 621 (1987)).

II. Abuse of discretion

The sole issue on appeal is whether the district court correctly issued sanctions against the State or whether, as suggested by *Pope*, the district court acted arbitrarily without conscientious judgment and should have granted a mistrial.

Montana Code Annotated § 46-15-329(2) states that the court “may impose any sanction it finds just under the circumstances[.]” This Court has continuously held that “the statutory language ‘may’ in § 46-15-329 MCA, grant the court

discretion regarding imposition of sanctions where there has been a failure to comply with a discovery order.” *Pierce*, ¶ 19. In order to determine whether, and to what extent, sanctions may be necessary the district court will 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, (citing *Waters*, 228 Mont. at 495, 743 P.2d at 621; *see also Pierce*, ¶ 20.)

A. Reasons for nondisclosure

The district court properly reviewed the State’s actions and reasons for not disclosing and factored those into its order for financial sanctions.

Pope’s motion for sanctions asserted the reason for nondisclosure as due “to a complete misstatement of the law,” and that the State “wrongly asserted a recorded witness interview was not discoverable because it was not exculpatory, and or, it was work product.” (D.C. Doc. 127 at 5-6.)

The State stated they failed to disclose based on the mistaken belief that the video was protected by the work product doctrine and that Mont. Code Ann. § 46-15-322 only required sharing “the names and contact information for testifying witnesses and only exculpatory material.” (D.C. Doc. 130 at 5; *Pope*, ¶ 9.)

The district court reviewed why disclosure was not made and agreed with Pope that sanctions were necessary, stating that “[a]lthough the State’s actions

were willful and unreasonable, they were based upon an unreasonable error rooted in extreme carelessness, not an intent to subvert the discovery process.” (D.C. Doc. 137 at 4.)

B. Whether the noncompliance was willful

The State conceded that the conduct was willful, albeit based upon a mistake of the law. (D.C. Doc. 137 at 4.) The district court properly factored this into its determination that sanctions were necessary and correctly determined that financial sanctions were appropriate.

The district court looked at both parties’ positions regarding the willful determination and agreed that the State’s conduct was willful. Despite the State’s assurance that no sanctions were necessary, the district court agreed with Pope that a sanction was necessary. The district court determined that the State’s error warranted “a financial sanction as being just under the circumstances,” because the error was “rooted in extreme carelessness, not an intent to subvert the discovery process.” (D.C. Doc. 137 at 4.) There was no abuse of discretion in arriving at that decision.

C. The amount of prejudice to the opposing party

The district court correctly determined based on the record, including the video, that Pope was not prejudiced by the discovery violation. As the district court noted, nothing that Myers stated in the interview—or at trial—should have come as

any surprise to Pope or his defense team. Myers' recorded interview, and her trial testimony, closely track what she told the emergency room staff on the night of the incident. That information was disclosed in the affidavit in support of the Information and the medical records disclosed to Pope, which he sought to admit at trial. (*See* State's Ex. 27; D.C. Doc. 1 at 4; Trial Tr. at 16-17, 20, 190.) Myers' recorded interview also closely tracked what she told Pope himself when he called her two weeks after the incident from jail. (*See* State's Ex. 29.)

Although Pope contends the State's disclosure of the jail recording was untimely, it was disclosed the week before trial and was only seven minutes long. Defense counsel acknowledged the appropriate sanction for this allegedly untimely disclosure, if any, was a continuance to allow her time to prepare, and she conceded she did not need additional time. (Trial Tr. at 8-9.) Thus, counsel was not unaware of Myers' belief that Pope had tried to run her over. Nor was she unaware that Myers claimed she was standing on the side of the road; that she did not jump into the road; that she was not sure whether she had been hit with the van; and that although her ribs had previously been hurt, they had healed before Pope drove at her. (*See* State's Ex. 29.) Myers was not a recanting witness—she was a domestic violence victim who had previously recanted and then returned to her original statements.

Pope had an opportunity to cross-examine and impeach at the trial, but he elected not to do so despite knowledge of Myers' inconsistencies. Defense counsel had marked one of Myers' prior recorded interviews as a defense exhibit for purposes of impeachment—*see* Trial Tr. at 20-21, discussing Defendant's Proposed Exhibit E—yet, she never used it on cross-examination. In fact, she failed to refer to any of Myers' prior *exculpatory* recorded statements. But that failure was certainly not the result of the suppression of Myers' prior *inculpatory* statement.

Pope contends that he was not able to prepare or bring in witnesses to show Myers' character for untruthfulness. The State, however, actually brought up Myers' inconsistent positions and addressed them on the stand when they asked Myers "why did you tell my investigator, Ms. Streano, and the Court something different?" (Trial Tr. at 326.) To which Myers replied "[b]ecause I thought maybe they would drop the charges." (*Id.*) On follow up, Myers responded, "Jody [Pope] asked me to do it." (*Id.*) The issue of character for truthfulness was brought up at trial by the State. Witnesses would not have been needed and there was ample opportunity to address the inconsistencies at trial.

D. Other relevant circumstances

The district court also considered Pope's continued violation of the September 16, 2013 no contact order and, ultimately, how instrumental he himself

was in eliciting the original recantation from Myers.¹ This analysis was important as it highlighted the pre-existing knowledge Pope had of the original statements from Myers. At the evidentiary hearing the district court directly addressed Pope and his attorney, inquiring “ultimately you were aware of the recantation letter; correct?” (6/7/17 Evid. Hr’g Tr. at 21.) To which counsel for Pope responded “I was aware of the letter that she wrote to the Court asking for the no contact order lifted. I don’t know if I would recall it—I don’t know if I would characterize it as a recantation letter.” (*Id.*)

The district court detailed an extensive list of events and police reports demonstrating continued contact between Pope and Myers over a period of approximately six months. (D.C. Doc. 137 at 5-8.)

The district court reviewed the prosecution interview within the context of trial and deemed it “insignificant” as it contained “inconsistencies in Myers’ statements” which were “not new[.]” (*Id.* at 8.) The district court also relied on the State’s “strong case[.]” which was “based on Duce’s compelling eyewitness and Dr. Morey’s expert medical testimony.” (*Id.* at 8.) The district court addressed the issue of prejudice directly with Pope’s counsel in relation to the “two other live eyewitnesses” and how prejudice related to Myers in the overall trial. (6/7/17 Evid.

¹The district court later adopted the Justice Court’s no contact order on October 3, 2013.

Hr'g Tr. at 27.) Pope's counsel responded "I guess I can't really speak to how the court sees how that is weighed."

Defense counsel had notice that Myers had previously said *the exact same thing* as her statements in the investigator interview to Pope just weeks after the incident, and she had the ability to prepare her case based on those prior inculpatory statements.

Pope relies on *State v. Stewart*, 2000 MT 379, 303 Mont. 507, 16 P.3d 391, where the prosecution had introduced evidence on cross-examination without disclosing it to defense counsel. *Stewart* is distinguishable from this matter, as that case dealt with physical evidence that defense counsel was likely unaware of and the defendant had no reason to believe the State possessed. That is different than a witness statement because there is always uncertainty about what a witness will say and in this case the witness had already made inconsistent statements.

This case is more similar to *Waters*. In *Waters*, the defendant was arrested after trying to trade a VCR that he had rented, for a VCR at a store. The defendant claimed that when the State failed to include "a VCR in the list of tangible objects, as required by Mont. Code. Ann. § 46-15-322(1)(d), it should have been excluded from evidence admitted at the trial[.]" *Waters*, 228 Mont. at 491, 743 P.2d at 618. Deferring to the district court's discretion to "impose any sanction that it finds just under the circumstances" this Court held there was no clear abuse of discretion

where “Waters knew about the VCR since it was the item in controversy.” *Waters*, 228 Mont. at 495, 743 P.2d at 620. Pope knew of the inconsistencies in Myers’ statements.

The district court reviewed both the State’s and Pope’s positions and correctly determined that Pope had “knowledge of sufficient facts to effectively cross examine Myers.” (D.C. Doc. 137 at 18.) There was ample opportunity to address the inconsistencies, especially after the witness admitted to them on the stand. These inconsistencies did not hinge on the interview; they were prevalent throughout the entire process leading up to trial. Myers’ original statements were even corroborated by the eyewitness, which was a significant factor in the district court’s decision. (D.C. Doc. 137 at 11-12.)

The district court correctly determined that the State’s failure to disclose did not prejudice Pope’s case presentation or trial. (D.C. Doc. 137 at 20.)

E. Sanctions

The district court then turned to the issue of sanctions and their appropriateness in light of the State’s actions and position. Asking whether sanctions were still appropriate even without a finding of prejudice, the district court inquired of Pope’s counsel that if “there was no prejudice that occurred, do you still feel a sanction would be appropriate?” (6/7/17 Evid. Hr’g Tr. at 28.) Pope’s counsel responded “I don’t think we should look at result only . . . it’s [not]

okay for people to not follow the rules.” (*Id.* at 28-29.) The district court responded “Well, I agree with you[,]” and then expressed concern about “an attitude of excuse versus a recognition that there were mistakes made.” (*Id.* at 29.)

After an in depth review of options available for sanctions, and after seeking input from the parties, the district court concluded that “an appropriate financial sanction should alert the Ravalli County Attorney’s Office of the imminent need to alter its current practice course, while underlining the costs that the Ravalli County Attorney’s Office has imposed on others.” (D.C. Doc. 137 at 21.) While considering the district court’s own error, the district court ultimately determined that the appropriate sanction would be the “amount necessary to financially reimburse OPD for the time and effort expended between the filing of Pope’s *Notice of Appeal* (see Doc. #112) on November 18, 2014 and the issuance of this *Sanction Order on Remand*.” (D.C. Doc. 137 at 22.) Given the time and resources the State and OPD has spent on this error, as well as ever present budgetary concerns and limitations, a financial sanction is a more than adequate deterrent to prevent future discovery abuse violations.

CONCLUSION

There was nothing arbitrary about the district court's decision and, as such, the State respectfully requests this Court to uphold the district court's order for financial sanctions.

Respectfully submitted this 28th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,944 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, W. R. Damon Martin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-28-2019:

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