

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0248

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CODY RAY TUNNELL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Christopher Abbott, Presiding

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STATEMENT OF THE ISSUE

Did the district court abuse its discretion by precluding extrinsic evidence of a criminal conviction for purposes of attacking the credibility of a witness?

STATEMENT OF THE CASE

On February 12, 2021, Cody Tunnell (Tunnell) was charged by Information with felony DUI, felony criminal endangerment, and misdemeanor partner or family member assault (PFMA). (D.C. Doc. 4.) At trial, Tunnell was convicted on the felony DUI and criminal endangerment but acquitted on the PFMA. (D.C. Doc. 32.)

Tunnell now appeals an evidentiary ruling of the district court that allowed him to cross-examine the victim, Sandra Hyer (Hyer), regarding her underlying conduct on a 2012 conviction for misdemeanor “false reports,” but precluded him from introducing extrinsic evidence of the conviction.

STATEMENT OF THE FACTS

Around 8:50 p.m., on January 31, 2021, Helena police officers were called on a report of a woman screaming for help in the Les Schwab parking lot on Prospect Avenue. (1/3/22 Tr. at 144, 153.) Upon arrival, Officer Justin Mohr (Officer Mohr) observed Tunnell and another male standing in front of Tunnell’s

van or truck. (*Id.* at 145.) A female, later identified as Hyer, was on the other side of the truck, but Officer Mohr could not see her when he arrived. (*Id.* at 145.)

Officer Mohr dealt with Tunnell, while other officers dealt with Hyer and the other male. (*Id.* at 146.) Officer Mohr detected a strong odor of alcohol coming from Tunnell, and noticed his eyes were watery and glossy and that he was unstable on his feet. (*Id.* at 147.) Officer Mohr’s body-worn camera (BWC) captured the conversations he attempted to have with Tunnell. (*Id.* at 149.) The BWC video was introduced as Exhibit 11 and published to the jury. (*Id.* at 149-50.)

On the BWC video, shortly after Tunnell acknowledged his *Miranda*¹ rights, Officer Mohr asked Tunnell to tell him what happened. (Ex. 11 at 4:05-4:07.) The first words of Tunnell’s response were, “I was riding around with her.” (*Id.* at 4:09-4:11.) While his speech was somewhat incoherent, Tunnell described driving to a different location or parking lot, where he met up with Hyer. He then repeated, “all of a sudden, we’re riding around and . . . I parked it here [the scene of the incident].” (*Id.* at 4:24-4:35; *see also*, 1/4/22 Tr. at 60.) He also stated, “so I went and bought her a bottle of vodka.” (*Id.* at 4:57-5:00.) Tunnell repeated that comment a few times, and later clarified that he paid for the bottle of vodka “with her money.” (*Id.* at 8:53-8:56.) After speaking with the officers who had been in contact with Hyer, Officer Mohr decided to arrest Tunnell. (1/3/22 Tr. at 151.)

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Officer Mohr later drove to the hospital and spoke with Hyer there. (*Id.*) He photographed her injuries, and the photographs were admitted into evidence as Exhibits 12 through 20. (*Id.* at 151-52.) A photograph of the injuries to Hyer's hand as it had appeared at the scene was introduced through Officer Bryan Haven as Exhibit 1. (*Id.* at 104.)

Officer Alex Nimmick (Officer Nimmick) also responded to the scene. (1/4/22 Tr. at 14.) Officer Nimmick observed the same "truck type RV camper thing" that Officer Mohr described. (*Id.* at 16.) He touched the hood of the vehicle, and it was warm to the touch. (*Id.*)

Officer Nimmick was tasked with the DUI portion of the investigation, and transported Tunnell to the detention center. (*Id.* at 17.) Officer Nimmick smelled alcohol coming from Tunnell, who fell asleep in the back seat of the squad car during the transport. (*Id.*) Tunnell subsequently refused to take any field sobriety tests. (*Id.* at 18.) A sample of Tunnell's blood was eventually drawn pursuant to a warrant. (*Id.* at 20-21.) Tunnell's blood sample was analyzed, and the results showed .157, plus or minus .011 grams, of ethanol per 100 milliliters of whole blood. (*Id.* at 41.) The toxicology report was entered into evidence as Exhibit 25. (*Id.*)

Tunnell was charged by information with three counts: felony DUI, felony criminal endangerment, and misdemeanor PFMA. (D.C. Doc. 4.) The matter

eventually proceeded to trial on January 3, 2022. Prior to jury selection, the court asked if there were any pretrial issues that needed to be addressed. The prosecutor indicated he would object to the introduction of a 2012 conviction that Hyer had out of Butte, Silver Bow County, for misdemeanor false reports. (1/3/22 Tr. at 7.) The conviction had been for misdemeanor false reports. (*Id.*) The State’s objection was to the remoteness in time and to relevance. (*Id.*)

Tunnell countered, “I guess we would like to enter it in. I mean, we will keep it extremely limited just to the conviction. We’re not going to get into the details of what happened.” (*Id.* at 8.) The court responded, “I mean, I will say that I think you guys have it backwards, because you can’t say Rule 610 [sic], Rule 609 prohibits using a conviction to impeach a witness. You can’t use the fact that she’s been convicted of a crime.” (1/3/22 Tr. at 8.) Tunnell clarified, “Your Honor, I would only use it for impeachment when I ask if she’s ever lied to law enforcement previously and she says no. That’s the only way I would bring it in.” (*Id.*)

The court ruled as follows:

What I will allow is this, which I think is consistent with 608 and 609. You can’t reference a conviction, that’s inadmissible. You can ask her if she’s ever—I mean, I think you can ask about the underlying conduct on cross-examination of her, if she’s ever made false reports to law enforcement. You can ask as much detail as you have to know about that prior conviction and you’re stuck with her answer. You can’t call a witness to then rebut that with extrinsic evidence of the prior conviction.

(*Id.*)

The trial commenced, and Hyer testified that she was homeless and living in Helena on January 31, 2020.² (1/3/22 Tr. at 111.) She testified that she had to go to St. Peter's Hospital on that date because Tunnell had run over her arm with his vehicle. (*Id.*) Hyer testified that she first saw Tunnell on the night of the incident at the Shopko parking lot, when his vehicle pulled up next to hers. (*Id.* at 113.) She got into Tunnell's vehicle. (*Id.* at 113-14.) Hyer elaborated that she wanted to get into Tunnell's vehicle to get warmed up, and she described the weather as "freezing." (*Id.* at 114.)

Tunnell allowed Hyer into his vehicle and took her to a casino, and she gave him money to purchase a bottle of vodka. (*Id.* at 115.) They left the casino and began drinking out of the bottle of vodka. (*Id.*) After a while, the two of them got into a physical altercation, and, Hyer testified, Tunnell stopped at a different parking lot. (*Id.* at 121.) She clarified it was at the Les Schwab parking lot, which was too far from the Shopko parking lot for her to walk. (*Id.*)

Hyer testified that Tunnell kicked her out of his vehicle. (*Id.* at 124.) While she was on the ground attempting to get up, Tunnell ran over her arm and hand. (*Id.*) As a result, two of her fingers had the skin pulled off, and she would later have the fingernails on those digits removed. (*Id.* at 126.) Her arm and/or elbow

² This was in response to a leading question that was inaccurate as to the year. The correct date was January 31, 2021. (D.C. Doc. 4.)

was also injured, and Hyer showed the scar on her arm from that injury to the jurors. (*Id.* at 127-28.) Hyer elaborated that the wound went “right down to the bone.” (*Id.* at 129.)

On cross-examination, Tunnell asked Hyer about her dishonesty with law enforcement. They had the following exchange:

Q. So, Sandy, have you ever been dishonest with the police before?

A. I can't remember. I was asked that question. I don't know if I knew what I was saying. I cannot remember at all what that was about because I consider myself—I try not to lie.

Q. Okay. So in Butte in 2012 there wasn't an incident where you were dishonest with the police?

A. I can't remember. I know I used to rent out . . . a room in my house, and the only thing I could think of is maybe I lied to the police and said he wasn't in the house. I don't know, that's the only thing I can think of. Because I don't think I even—I don't even remember signing anything that said that. I don't even know if I got charged for it, if I had to pay a fine or anything. But that was my handwriting, I was showed it. It was my handwriting, I did sign it.

Q. So you don't recall this incident from 2012 but you remember—

A. Not at all. I'm thinking that -- because I know that the police came to my door a couple of times and I had to get rid of those roommates because drugs and things like that, even though they lied to me and I didn't know that they were doing drugs. So there was a few times that I did lie to the police and said, no, that person isn't here and then I would kick them out. And . . . then I learned to just rent to women.

Q. So you don't recall that but you recall this night perfectly, is that correct?

A. Well, this, you said, happened, what, 10, 12 years ago, and a lot's happened in my life since then. A lot. And I don't—I consider myself to be a pretty honest person. In fact, all the street people will tell you she didn't lie. All the street people will say that about me.

[Defense counsel]: I have nothing further.

THE WITNESS: You could remind me and see what it was about, I really don't remember.

[Defense counsel]: I have no further questions.

(1/3/22 Tr. at 139-40.)

On January 4, 2022, Tunnell was convicted on the DUI and criminal endangerment and acquitted on the PFMA. (D.C. Doc. 32.)

SUMMARY OF THE ARGUMENT

The district court properly allowed Tunnell to inquire into the conduct underlying Hyer's prior false report to law enforcement, but also properly excluded extrinsic evidence about that prior conduct as required by Mont. R. Evid. 608(b). The court correctly excluded evidence of the conviction under Mont. R. Evid. 609.

ARGUMENT

I. Standard of review

A court's ruling on evidentiary issues is reviewed for abuse of discretion. *State v. Ankeny*, 2018 MT 91, ¶ 16, 391 Mont. 176, 417 P.3d 275; *State v. Cesnik*, 2005 MT 257, ¶ 12, 329 Mont. 63, 122 P.3d 456 (“The determination of whether evidence is relevant and admissible is left to the sound discretion of the trial judge and will not be overturned absent a showing of abuse of discretion.”). A court abuses its discretion if it acts arbitrarily, without the employment of conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *State v. Hardman*, 2012 MT 70, ¶ 8, 364 Mont. 361, 276 P.3d 839. To the extent that the court's ruling is based on an interpretation of an evidentiary rule, this Court's review is *de novo*. *State v. Madplume*, 2017 MT 40, ¶ 19, 386 Mont. 368, 390 P.3d 142.

II. The district court properly applied Mont. R. Evid. 608(b) and 609 when it allowed a detailed cross-examination into a specific instance of conduct probative of truthfulness and precluded extrinsic evidence of the conviction.

The district court correctly excluded evidence that Hyer had been convicted of a prior offense under Mont. R. Evid. 609. Rule 609 states, “For the purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.” The Commission Comments demonstrate that the

commission “reject[ed] the rule allowing impeachment by evidence of conviction of a crime . . . most importantly because of its low probative value in relation to credibility.” Commission Comments, Mont. R. Evid. 609; *see also Sloan v. State*, 236 Mont. 100, 103-04, 768 P.2d 1365 (1989). The comments further explain:

The Commission does believe that conviction of certain crimes is probative of credibility; however, it is the specific act of misconduct underlying the conviction which is really relevant, not whether it has led to a conviction. Allowing conviction of crime to be proved for the purpose of impeachment merely because it is a convenient method of proving the act of misconduct . . . is not acceptable to the Commission, particularly in light of Rule 608(b) allowing acts of misconduct to be admissible if they relate to credibility.

Commission Comments, Mont. R. Evid. 609.

As the Commission Comments demonstrate, acts of misconduct that relate to credibility may be admitted under Mont. R. Evid. 608(b), but the fact that a witness has been convicted of an offense is excluded under Rule 609.

Further, Rule 608(b) explicitly bars the admission of extrinsic evidence to prove the acts of misconduct. Rule 608(b) provides, in pertinent part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness

Interpreting Rule 608(b), this Court has explained that “after counsel is permitted to ask a witness about a specific instance of lying on cross-examination,

counsel is ‘*stuck with whatever response the witness gives.*’ *State v. Quinlan*, 2021 MT 15, ¶ 23, 403 Mont. 91, 479 P.3d 982 (emphasis added). The defendant in *Quinlan* made a similar argument to the one being made by Tunnell on appeal. Quinlan argued that, “after [the victim] ‘denied lying’ or stated she ‘did not remember’ a specific instance of lying, ‘the ruling of the Court prevented the defense [from] controverting her responses of cross-examination with extrinsic evidence of those specific lies.’” *Quinlan*, ¶ 22; *Cf.*, Appellant’s Br. at 11-12. This Court rejected Quinlan’s argument, stating, “Quinlan’s position contradicts the text of Rule 608(b). A witness’s denial of having lied in an instance inquired about on cross-examination does not open the door for a party to otherwise prove the lie by extrinsic evidence.” *Quinlan*, ¶ 23.

Applying Rules 608(b) and 609 to a prior conviction, this Court held in *State v. Martin*, 279 Mont. 185, 199, 926 P.2d 1380, 1389 (1996), that a district court correctly allowed the State to cross-examine a witness about false alibi information she had previously given to authorities and correctly prohibited the State from admitting evidence that she was convicted of a crime as a result of that conduct. Citing Mont. R. Evid. 608(b), the State in *Martin* motioned to impeach the defendant’s wife with the underlying conduct of her perjury conviction, and specifically acknowledged it was not allowed to offer the conviction. *Id.* The district court agreed, allowing the State to inquire about specific instances of

conduct but excluding evidence of the witness's prior conviction. *Martin*, 279 Mont. at 199, 926 P.2d at 1389. This Court affirmed that ruling. *Id.*

Under Rules 608(b) and 609, as applied in *Martin*, the district court in this case correctly excluded evidence of Hyer's conviction, but allowed Tunnell to inquire into the facts surrounding her filing of a false report. The district court allowed Tunnell to

ask [Hyer] about the underlying conduct on cross-examination of her, if she's ever made false reports to law enforcement. You can ask as much detail as you have to know about that prior conviction and you're stuck with her answer. You can't call a witness to then rebut that with extrinsic evidence of the prior conviction.

(1/3/22 Tr. at 8.)

Contrary to Tunnell's assertion, the court's ruling was not "a restricted reading" of Rules 608 and 609. (*See* Appellant's Br. at 8.) Instead, as *Martin* demonstrates, the court's ruling was required by those rules. Further, Tunnell's argument that "the district court only allowed vague cross-examination of this prior conviction" (*id.*), is inaccurate. The court told Tunnell that he could "ask as much detail as you have to know about that prior conviction." (1/3/22 Tr. at 8.)

In response to Tunnell's questions about whether Hyer had ever been dishonest with the police, Hyer initially stated that she did not remember, but then she said, "maybe I lied to the police and said he wasn't in the house." (*Id.* at 139.) She then went further and acknowledged, "there was a few times that I did lie to

the police and said, no, that person isn't here[.]” (*Id.* at 139-40.) If Tunnell wanted to elicit additional information, Tunnell could have asked further questions about the details surrounding the 2012 false report and also could have used the 2012 conviction to attempt to refresh Hyer’s recollection. Instead, Tunnell used Hyer’s lack of memory to question whether she remembered the incident at issue in this case. (*Id.*) That was a tactical decision that was not required by the court’s ruling.

Further, there would have been no grounds to admit the conviction under the argument advanced by Tunnell at trial. Tunnell’s counsel stated, “I would only use it for impeachment when I ask if she’s ever lied to law enforcement previously and she says no. That’s the only way I would bring it in.” (*Id.* at 8.) Hyer acknowledged that she did lie to police, which eliminated the ability to impeach her. (*Id.* at 140.)

Finally, Tunnell’s reliance on *State v. Frey*, 2018 MT 238, 393 Mont. 59, 427 P.3d 86, is misplaced because the admissibility of a prior conviction under Rule 609 was not raised in *Frey*. In *Frey*, the defendant was charged with three counts of sexual assault against children. *Frey*, ¶ 3. Prior to trial, Frey moved to prohibit the State from presenting evidence of seven prior criminal convictions. *Frey*, ¶ 4. The State argued it should be allowed to introduce Frey’s convictions for false reporting to law enforcement on cross-examination should Frey testify. *Id.*

The district court ruled that the State could inquire into the false reporting convictions on cross-examination. *Id.* When Frey testified, his attorney fronted the issue and had Frey admit to and explain the convictions. *Frey*, ¶¶ 9-10. Frey was convicted on all three counts. *Frey*, ¶ 11.

On appeal, Frey argued that his prior convictions should have been excluded because they were “too remote” and that they should have been excluded under Mont. R. Evid. 403 because they were too prejudicial. *Frey*, ¶ 19. This Court affirmed the ruling of the district court, relying on the language of Mont. R. Evid. 608(b) in its analysis. *Frey*, ¶ 17. *Frey* is not controlling in this case because it did not address Rule 609. Instead, it addressed whether the prior convictions were admissible under Rules 403 and 608(b).

In this case, the district court correctly relied on Rule 609 to exclude evidence of Hyer’s prior conviction. As this Court has stated, “Montana’s Rule 609, M.R.Evid. is unique; it specifically prohibits evidence of a witness’s prior convictions [for the purpose of attacking the credibility of a witness]. This Court has been adamant in prior rulings that Rule 609 be strictly enforced[.]” *State v. Gollehon*, 262 Mont. 1, 25, 864 P.2d 249, 259 (1993). The district court correctly enforced the rule in this case.

CONCLUSION

The district court did not abuse its discretion when it excluded extrinsic evidence of a conviction for purposes of attacking Hyer's credibility and allowed her to be cross-examined regarding the underlying conduct of the conviction. Therefore, Tunnell's convictions should be affirmed.

Respectfully submitted this 22nd day of September, 2023.

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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 3,324 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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