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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1134**

State of Minnesota,
Appellant,

vs.

Taylor James Pass,
Respondent.

**Filed April 5, 2011
Affirmed as modified
Lansing, Judge**

Dakota County District Court
File No. 19HA-CR-09-1823

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

James Backstrom, Dakota County Attorney, Phillip D. Prokopowicz, Assistant County Attorney, Hastings, Minnesota (for appellant)

Mark D. Nyvold, Special Assistant State Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Connolly, Judge.

LANSING, Judge

In a four-count felony prosecution, the jury acquitted Taylor Pass of two charges of second-degree murder of one person but deadlocked on charges of attempted second-degree murder and second-degree assault of another person. Before retrial on the two unresolved charges, the district court denied the state's motion to establish motive by introducing evidence of the fatal stabbing of which Pass had been acquitted. We conclude that the district court did not clearly err by excluding the fatal stabbing from evidence, but because our analysis on the scope of the exclusion varies from the district court's analysis, we affirm as modified.

F A C T S

This pretrial appeal raises issues on the admissibility of evidence in a retrial following a jury deadlock on two charges and the jury's acquittal on two other charges, when the evidence for all four charges involves the same defendant and the same series of events. The jury found Taylor Pass not guilty of two counts alleging second-degree murder for the stabbing death of TSR but was unable to reach a unanimous verdict on counts of attempted second-degree murder and second-degree assault for stabbing OAR.

At trial, OAR testified that he rented a sleeping space in TSR's house. On the evening that TSR was stabbed, OAR went into the attached garage looking for her. When he entered the garage, he found Pass on his knees, straddling TSR, who was lying on the garage floor. Pass told OAR that TSR was choking and needed help. When OAR kneeled down to assist, Pass grabbed him by his head and slit his throat with a knife.

During the ensuing struggle between OAR and Pass, Pass stabbed OAR in the back. Pass eventually left the house and OAR called the police.

Following the jury's acquittal of Pass on the two second-degree murder charges involving TSR, the state began its process for the retrial of the two charges involving OAR. In a pretrial motion the state argued that it should be permitted to present evidence that Pass "had stabbed [TSR]." The state maintained that the evidence was admissible under Minn. R. Evid. 404(b) as evidence of motive because it demonstrated that Pass stabbed OAR in an attempt to eliminate him as a witness to Pass's stabbing TSR. The state also argued that the evidence of Pass's assault of OAR could not be presented "in any sensible fashion without also including evidence that [Pass] had stabbed [TSR]."

The district court denied the state's motion to admit the evidence of TSR's stabbing as other-crimes evidence. The order relied on language in *State v. Wakefield*, providing that "under no circumstances is evidence of a crime other than that for which a defendant is on trial admissible when the defendant has been acquitted of that other offense." 278 N.W.2d 307, 309 (Minn. 1979).

A month later, Pass moved for dismissal of the charges pending for retrial. He argued that the district court's exclusion of the evidence of the stabbing of TSR required dismissal of the remaining charges because the state was no longer able to present its case. In response, the state submitted a memo that shifted from its original position of seeking admissibility of the stabbing under Minn. R. Evid. 404(b) to instead argue that the stabbing arose out of a single course of conduct that would make it admissible as immediate-episode evidence.

The district court denied Pass's motion to dismiss and reaffirmed its earlier denial of the state's attempt to admit evidence that Pass had stabbed TSR. In denying Pass's motion to dismiss, the district court recognized that excluding evidence of the stabbing of TSR would present difficulties for the state in retrying the case, but concluded that it would not result in the state's inability to prosecute. In denying the state's motion to admit evidence of TSR's stabbing under a revised immediate-episode argument, the district court restated its reliance on *Wakefield*. Although the district court concluded that the language of *Wakefield* imposed an absolute exclusion for admission of evidence of the crimes for which Pass was acquitted, it alternatively concluded that even if *Wakefield* did not establish an across-the-board prohibition, the acquitted-crime evidence must be excluded under both Minn. R. Evid. 403 and 404(b) because its probative value is substantially outweighed by the danger of unfair prejudice.

The state appeals the district court's pretrial order, arguing that exclusion of the evidence of TSR's stabbing will have a critical impact on the prosecution and that the exclusion constituted clear error.

D E C I S I O N

When the state exercises its right to appeal a pretrial order under Minn. R. Crim. P. 28.04, subd 1(1), the rules governing the procedure are strictly construed. *State v. Underdahl*, 767 N.W.2d 677, 683 (Minn. 2009). "To prevail, the state must 'clearly and unequivocally' show both that the [district] court's order will have a 'critical impact' on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quoting *State v. Joon Kyu*

Kim, 398 N.W.2d 544, 547 (Minn. 1987)). We first examine critical impact and then consider whether the district court's order constitutes error. *Underdahl*, 767 N.W.2d at 681.

A pretrial order has a critical impact on the prosecution when it significantly reduces the likelihood of its success. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998). To assess the impact of a ruling, we consider the state's evidence as a whole. *Id.*

The state argues that the pretrial order has a critical impact on its prosecution of the two remaining charges against Pass because all four offenses that were initially presented to the jury are inextricably bound and the offenses involving OAR cannot be described without including the stabbing of TSR. The state points out that the two stabbings occurred within minutes of each other and inside the confines of a cluttered single-car garage. Specifically, the state argues that if it cannot introduce evidence of TSR's stabbing, it will be unable to demonstrate that Pass's motive for stabbing OAR was to eliminate him as a witness for TSR's stabbing. In this appeal Pass argues that the ruling excluding the evidence of TSR's stabbing does not have a critical impact on the state's prosecution. This position stands in contrast to Pass's earlier motion for dismissal on the grounds that the district court's exclusion of the stabbing evidence compelled dismissal of the two remaining charges.

We recognize that the state has consistently maintained that the motive for Pass's stabbing OAR was to eliminate him as a witness to the stabbing of TSR. *See State v. Fort*, 768 N.W.2d 335, 343 (Minn. 2009) (relying on evidence of attempt to eliminate witness to first crime as motive for second crime). We also recognize that OAR and Pass

are now the only eyewitnesses to the crime. Consequently, motive is a significant part of the state's case and is likely to have critical persuasive value in a prosecution of charges on which the jury was initially deadlocked. The state has some evidence that Pass stabbed OAR that is independent of TSR's stabbing, which includes the weapon that was used and OAR's ability to identify the person who stabbed him. But based on the record, Pass's theory of defense, and the state's evidence as a whole, we conclude that the district court's pretrial order will significantly reduce the likelihood of a successful prosecution, and, therefore, conclude that the state has met its critical-impact burden.

We now turn to the question of whether the district court clearly and unequivocally erred in ruling that evidence of TSR's stabbing is inadmissible. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "A district court abuses its discretion when its ruling is based on an erroneous view of the law." *State v. Storkamp*, 656 N.W.2d 539, 541 (Minn. 2003).

In excluding evidence of the stabbing of TSR, the district court relied squarely on the holding and language of *Wakefield*, which prohibits admission of evidence at trial consisting of crimes for which the defendant has been acquitted. The *Wakefield* court, after evaluating policy alternatives, broadly held that "*under no circumstances* is evidence of a crime other than that for which a defendant is on trial admissible when the defendant has been acquitted of that other offense." 278 N.W.2d at 308-09 (emphasis added). In its first pretrial ruling, the district court applied the *Wakefield* language to deny the state's motion to admit the stabbing of TSR under Minn. R. Evid. 404(b) as

other-crimes evidence. There are differences between immediate-episode evidence and the *Spreigl* evidence at issue in *Wakefield* that we discuss more fully in addressing the scope of the ruling. But the holding of *Wakefield* is absolute in its statement of “under no circumstances,” and we conclude that the district court’s ruling was not a clear and unequivocal error or an abuse of discretion. 278 N.W.2d at 309.

This determination, however, does not end our inquiry. The state and the defense in their arguments to the district court and on appeal engage in a shifting-border debate on what evidence is included in the crime of “stabbing TSR.” The defense argued as part of its motion to dismiss the pending charges that all facts underlying TSR’s stabbing would be unavailable to the state on the retrial of the charges. The state and the defense structure their opposing arguments around the question of whether *Wakefield* applies only to *Spreigl* evidence or whether it extends further and eliminates the use of any immediate-episode evidence. Immediate-episode evidence applies to offenses that are “linked together in point of time or circumstances so that one cannot be fully shown without proving the other.” *State v. Kendell*, 723 N.W.2d 597, 608 n.9 (Minn. 2006) (quotation omitted). These arguments tend to create a false dichotomy because it is premature to speculate what evidence the state would seek to introduce as immediate-episode evidence. *See State v. Jones*, 518 N.W.2d 67, 70 (Minn. App. 1994) (noting that in assessing critical impact in pretrial appeals this court cannot predict what the testimony will be or assume same evidence will be presented as at earlier trial), *review denied* (Minn. July 27, 1994).

We start from the principle that *Wakefield* is generally viewed as a case that governs *Spreigl* or 404(b) evidence. See *State v. Ross*, 732 N.W.2d 274, 281 (Minn. 2007) (characterizing *Wakefield* as governing admissibility of *Spreigl* evidence). This court applied *Wakefield* to the admissibility of relationship evidence in *State v. O'Meara*, 755 N.W.2d 29, 31-34 (Minn. App. 2008), holding that evidence of the defendant's conduct against his ex-wife, the victim of the charged offense, should not have been admitted under Minn. Stat. § 634.20 (2004) because the defendant had been acquitted of charges brought for that conduct. But we acknowledge that immediate-episode evidence is by its nature more intrinsic to proof of the charged offense than either relationship evidence or *Spreigl* evidence.

Immediate-episode evidence is generally viewed as a separate category from evidence of other bad acts under Minn. R. Evid. 404(b). See *Kendell*, 723 N.W.2d at 608 (describing immediate-episode evidence as separate category); *State v. Spreigl*, 272 Minn. 488, 496-97, 139 N.W.2d 167, 173 (1965) (excluding immediate-episode offenses from notice requirement). But immediate-episode evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice.” Minn. R. Evid. 403 (providing bases for exclusion of otherwise relevant evidence); *State v. Townsend*, 546 N.W.2d 292, 296 (Minn. 1996) (weighing probative value of immediate-episode evidence against danger of unfair prejudice); *State v. Wofford*, 262 Minn. 112, 115-19, 114 N.W.2d 267, 270-72 (1962) (analyzing prejudicial impact of immediate-episode evidence).

In its second pretrial order, the district court concluded that the 403 balancing rule does not apply to acquitted-crimes evidence because of the language of *Wakefield* and the inherent prejudice of admitting any acquitted-crimes evidence. It is, however, likely that the state may seek to admit evidence that does not disclose the existence of the acquitted-crime charge or the specific criminal act, which is nonetheless drawn from the same factual circumstances as the acquitted-crime charge and provides relevant context for the current prosecution. Excluding evidence of a body on the garage floor in a pool of blood may impede the state in “making out its whole case.” *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997) (citation omitted). But excluding evidence more tangential to the charged offense, such as evidence of any motive for Pass to stab TSR, or evidence that TSR’s stab wounds were inflicted by the knife in Pass’s possession, would not infringe to a comparable degree on the state’s right to make out its case that Pass stabbed OAR.

The district court’s first pretrial order prohibited admission of evidence of TSR’s stabbing, but the scope of the order was limited to the specific acts constituting the crime itself. We believe that this is a proper application of *Wakefield*. It is in the second pretrial order that the district court appears to overextend *Wakefield* to prevent the admission of *any* evidence, even if it would relate to the factual context and background of the charged offense, if that evidence was also part of the factual context and background of TSR’s stabbing. We recognize that some of the common evidence is potentially prejudicial and the risk of misuse exists. But the dividing line cannot be speculatively determined in the abstract when the specific contextual evidence that the state seeks to introduce has not been identified.

The question of whether the probative value of a specific piece of testimony or evidence is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” is, in the first analysis, left to the discretion of the district court. Minn. R. Evid. 403; *State v. Pearson*, 775 N.W.2d 155, 160 (Minn. 2009). The record demonstrates that the district court is aware of the importance of guarding against the jury’s possible misuse of evidence related to the stabbing of TSR. The district court has the responsibility to monitor the limits of the permissible content and use of any evidence related to the stabbing of TSR. To avoid the obvious risks, the district court, the state, and the defense may have to carefully review in advance, through offers of proof and motions in limine, the specific facts to which witnesses will be allowed to testify.

Affirmed as modified.