STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2092

State of Minnesota,
Respondent,

vs.

Trisha Kumba Farkarlun,
Appellant.

Filed February 4, 2013
Affirmed in part and remanded; motion denied
Stoneburner, Judge

Hennepin County District Court
File No. 27-CR-07-103598

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

Judd Gushwa, Minneapolis City Attorney, Minneapolis, Minnesota (for respondent)

Trisha Kumba Farkarlun (pro se appellant)

Considered and decided by Bjorkman, Presiding Judge; Stoneburner, Judge; and Toussaint, Judge.*

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

On remand from the supreme court for reconsideration of appellant's appeal of a 2010 gross-misdemeanor conviction of falsely reporting police misconduct in violation of

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

Minn. Stat. § 609.505, subd. 2(a)(2) (2010), we conclude that (1) the district court did not err in denying appellant's suppression motion, (2) the district court did not abuse its discretion in the scope or conduct of the *Schwartz* hearing, (3) the district court did not abuse its discretion by denying appellant's motion for a new trial based on alleged juror misconduct, and (4) the record is sufficient to support appellant's conviction under the supreme court's recent opinion in *State v. Crawley*, 819 N.W.2d 94 (Minn. 2012), which narrowly construed Minn. Stat. § 609.505, subd. 2 to apply to defamation only. We therefore affirm the conviction. But because the record is insufficiently developed to address appellant's challenge to restitution, we remand for a restitution hearing or order explaining why appellant is not entitled to such a hearing.

FACTS

In the early morning hours of July 28, 2007, appellant Trisha Kumba Farkarlun reported to medical personnel at a hospital that she had been raped by two Minneapolis police officers. The alleged rape occurred shortly after the officers responded to an altercation between Farkarlun and her then girlfriend. Against Farkarlun's wishes, the hospital notified the Minneapolis police department of the allegations. Based on information provided to the police department by the nurse who conducted the sexual-assault examination, the accused officers were readily identified. The patrol supervisor for the accused officers immediately contacted the on-call internal-affairs investigator and relayed the accusation, providing the names of the accused officers and the location of the alleged assault.

The on-call internal-affairs investigator contacted a second internal-affairs officer, and they agreed to meet at the hospital to begin an investigation into the criminal complaint, as well as an administrative investigation into the accusation against the police officers. Prior to going to the hospital, the primary investigator obtained a list of calls that the accused officers had responded to that morning, including the location of each call.

At the hospital, the investigators met with the examining nurse who briefly described what she learned from Farkarlun. The nurse testified that she observed bruises on Farkarlun's neck, wrists, and inner thigh. The investigators then went into Farkarlun's room, introduced themselves to Farkarlun as internal-affairs officers, and gave her a data-practices advisory. The advisory explained how any information she gave them might be used, including the fact that some information may be accessible to parties outside their internal-affairs division. Farkarlun agreed to talk to the investigators. She provided a narrative statement regarding the sexual assault and answered the investigators' questions, which elicited more detail about the events leading up to, during, and after the assault.

Farkarlun stated that the assault took place a few minutes after she walked away from her girlfriend's house where the officers had briefly detained her in relation to a dispute to which the officers had been dispatched. Farkalun said that the officers approached her in the squad car, that the Caucasian officer got out and dragged her into an alley, and the African American officer followed in the squad car. The Caucasian

officer held her down and at one point handcuffed her while the African American officer sexually penetrated her.

The investigation of Farkarlun's allegations included examining global positioning data from the identified officers' squad car, interviewing people in the area of the alleged crime scene, examining the scene, examining Farkarlun's clothing and person, examining the accused officers' uniforms, and comparing the DNA samples collected from the accused officers against a DNA sample obtained from Farkarlun at the hospital. The DNA evidence taken from Farkarlun was shown not to have come from either of the accused officers. GPS records showed that their squad car was not at the location of the alleged sexual assault. Based on the results of the investigation, Farkarlun was charged with falsely reporting police misconduct in violation of Minn. Stat. § 609.505, subd. 2(a)(2).

Prior to trial, Farkarlun challenged admission of the statement that she made to the investigators at the hospital on the ground that it was "involuntary." Farkarlun also challenged the constitutionality of the statute under which she was charged. The district court held that Farkarlun's statements were voluntary and the statute is constitutional.

At trial, the jury was instructed that the elements of the crime charged are:

> FIRST, [Farkarlun] informed or caused information to be communicated to a peace officer whose responsibilities include investigating or reporting police misconduct that a peace officer has committed an act of misconduct.
>
> SECOND, [Farkarlun] knew that the information was false.
>
> THIRD, [Farkarlun's] act took place on or about July 28, 2007, in Hennepin County, Minnesota.

Farkarlun did not challenge the third element and conceded that the allegations involved a peace officer and that the internal-affairs investigators' duties involved investigating police misconduct. Her defense emphasized the intentional or negligent inadequacy of the investigation of her allegations and argued that, due to the shoddy investigation, the state's evidence was insufficient to prove beyond a reasonable doubt that her report was false. Farkarlun also argued that the state had not proved the first element because she did not know that she was communicating the misconduct to officers who had a duty to investigate. The jury found her guilty as charged.

Farkarlun moved for a new trial based on juror misconduct. After a *Schwartz* hearing in which the district court interviewed each juror individually, the district court denied the new trial motion. Farkarlun was sentenced to 365 days in jail, with all but 20 days stayed, and a $1,000 fine, with all but $300 stayed. She was also ordered to pay $3,000 in restitution. Farkarlun challenged the restitution and requested a restitution hearing, but no hearing was held.

Farkarlun appealed her conviction, challenging the constitutionality of the statute, admission of her statement to internal-affairs officers, denial of her motion for a new trial on juror-misconduct grounds, and the restitution order. Based on our holding in *State v. Crawley*, 789 N.W.2d 899, 910 (Minn. App. 2010), that Minn. Stat. § 609.505, subd. 2 is unconstitutional because it criminalizes false speech that is critical of the police but not false speech that favors the police, this court reversed Farkarlun's conviction. *State v. Farkarlun*, No. A09-2092 (Minn. App. Dec. 14, 2010). This court did not consider Farkarlun's other appeal issues.

The supreme court subsequently granted review in *Crawley*, 789 N.W.2d 899 (Minn. App. 2010), *review granted* (Minn. Dec. 14, 2010), and in this case, *Farkarlun*, No. A09-2092, *review granted* (Minn. Feb. 15, 2011). Ultimately, the supreme court narrowly construed Minn. Stat. § 609.505, subd. 2, to criminalize only defamatory speech not protected by the First Amendment and held that the statute, so construed, is constitutional. *State v. Crawley*, 819 N.W.2d 94 (Minn. 2012). The supreme court then remanded this case to our court for proceedings consistent with its holding in *Crawley.*

This court ordered supplemental briefing. Appellant failed to file a supplemental brief. Respondent filed a supplemental brief and a motion to dismiss the appeal based on appellant's failure to comply with the order for supplemental briefing.

D E C I S I O N

A. Motion to dismiss

Because this court has been directed on remand to consider Farkarlun's appeal in light of the supreme court's recent opinion in *Crawley*, we deny respondent's motion to dismiss the appeal.

B. Reconsideration of conviction in light of *State v. Crawley*

In *Crawley*, the supreme court narrowly construed Minn. Stat. § 609.505, subd. 2, as applying to only defamatory statements. 819 N.W.2d at 107-08. To prevail on a defamation claim, the plaintiff must prove that (1) a defamatory statement is "communicated to someone other than the plaintiff"; (2) "the statement is false"; (3) "the statement tends to 'harm the plaintiff's reputation' and to lower the plaintiff 'in the estimation of the community'"; and (4) "the recipient of the false statement reasonably

understands it to refer to a specific individual." *Id.* at 104 (internal citation and quotations omitted). To prove the crime of falsely reporting police misconduct, the state "must prove that the person informed a police officer, whose responsibilities include investigating or reporting police misconduct, that another officer has committed an act of police misconduct, knowing that the information is false." *Id.* at 107. Additionally, "the State must prove that the officer receiving the information reasonably understands the information to refer to a specific individual." *Id.*

Crawley involved a report to the Winona police department that a police officer had forged Crawley's signature on a medical release form at a Winona hospital. *Id.* at 98. Crawley did not identify a specific individual, but stated the form had to have been signed by a police officer because the form was signed "Melissa Crawley at 0600 hours[.]" *Id.* During the investigation of Crawley's allegation, a nurse told the police that she had seen Crawley sign the release, and Crawley was subsequently charged with violating Minn. Stat. § 609.505, subd. 2(a)(2) (2008)[1] (falsely reporting an act of police misconduct). *Id.* Because Crawley was convicted before she had the benefit of the narrowing construction, and the original trier of fact did not address the issues of whether Crawley's statement concerned a specific individual, the supreme court reversed her conviction. *Id.* at 108-09. The case was remanded for a new trial, stating that due process required a jury determination on each element of the crime charged. *Id.*

In this case, the record is undisputed that Farkarlun told internal-affairs investigators that two police officers sexually assaulted her, and that the investigators

[1] The statutory language had not changed by Farkarlun's challenge in 2010.

could identify the accused officers through the information Farkarlun provided. The primary focus of Farkarlun's defense was that the state failed to prove beyond a reasonable doubt that she knowingly reported false information because the investigation was too shoddy to establish that her allegation was false. Although Farkarlun was convicted prior to the supreme court's narrowing construction of the statute, we conclude, on this record, that due process does not require a remand for reconsideration of the verdict that Farkarlun violated the statute. No factual issues exist concerning Farkarlun's violation of the narrowly construed statute. The narrowed construction of the statute does not affect the jury's determination that Farkarlun's report was knowingly false or that Farkarlun knowingly made the allegations to police investigators. Further, the record indicates that the internal-affairs officers understood the information referred to specific individuals, and that the allegation of criminal conduct would harm the officers' reputations. But because Farkarlun's additional challenges to her conviction were not addressed in her initial appeal, we now turn to those issues.

C. Denial of motion to suppress Farkarlun's statement to internal-affairs investigators

Farkarlun also argues that her statement to internal-affairs investigators was involuntary and that the district court abused its discretion by denying her motion to suppress the statement. Farkarlun contends that she did not know that the internal-affairs investigators were police officers, and that if she had known, she would never have given them a statement. When reviewing a pretrial suppression order where the facts are not in dispute and the district court's ruling was a matter of law, we independently review the

facts and determine as a matter of law whether the evidence should be suppressed. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

Farkarlun correctly cites *State v. Blom*, 682 N.W.2d 578, 614 (Minn. 2004), for the proposition that a conviction based on a coerced or involuntary statement deprives a defendant of constitutional due process of law. But *Blom* also states that the voluntariness of a statement is shown by a preponderance of the evidence and is determined by an inquiry into the effect that the totality of the circumstances had on the will of the defendant and whether the defendant's will was overborne when the statement was made. *Id.*

> In examining the totality of the circumstances, we will consider "such factors as the defendant's age, maturity, intelligence, education, experience and ability to comprehend; the lack of or adequacy of warnings; the length and legality of the detention; the nature of the interrogation; and whether the defendant was deprived of physical needs or denied access to friends."

Id. (citation omitted). The Fifth Amendment only applies to custodial interrogation. *See State v. Borg*, 806 N.W.2d 535, 543 (Minn. 2011), *remanded on other grounds*, *State v. Borg*, No. A09-243, 2012 WL 987273 (Minn. App. Mar. 6, 2012), *review denied* (Minn. June 19, 2012). Because Farkarlun was not in custody, was not detained by police officers, was not coerced, was not deprived of physical needs, and did not lack the maturity, intelligence, education, experience or ability to comprehend, she cannot establish that her statement was involuntary in a manner that requires suppression.[2] The

[2] Farkarlun has never argued that she was entitled to a *Miranda* warning at the time she was questioned by internal-affairs investigators.

district court did not err by denying Farkarlun's motion to suppress the statement she gave to the internal-affairs investigators.

D. Juror misconduct

The decision to grant a new trial based on juror misconduct rests solely within the district court's discretion. *State v. Landro*, 504 N.W.2d 741, 745 (Minn. 1993). The district court's decision to grant or deny a *Schwartz* hearing to investigate claims of misconduct is likewise reviewed for abuse of discretion. *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998).

Farkarlun asserts that one of the jurors was sleeping during parts of the trial and was also disruptive by making facial expressions, loud noises to express his opinions, and was writing notes to other jurors during testimony. During the trial, Farkarlun expressed concerns about this juror to the district court on more than one occasion. These concerns resulted in the district court and prosecutor paying particular attention to the juror. The district court observed that the juror was not sleeping and was not making negative noises or expressing opinions. The district court denied Farkarlun's posttrial motion for a *Schwartz* hearing on these claims, but granted a *Schwartz* hearing on Farkarlun's allegation that this juror was being forceful in attempting to persuade other jurors to his opinions.

After individually interviewing each of the jurors, the district court concluded that there was no evidence that this juror had coerced other jurors or threatened them with violence to get them to change their minds. The district court found no evidence of

outside influences on the jury. On this record, Farkarlun has failed to demonstrate that the district court abused its discretion in denying a new trial based on juror misconduct.

Farkarlun also challenged the manner in which the district court conducted the *Schwartz* hearing, specifically the district court's failure to ask all of the questions submitted by the parties and to follow up on answers suggesting that the jurors discussed the evidence before sequestration. Farkarlun asserts that the district court failed to allow her to sufficiently develop the record to support her claim of juror misconduct. But Minn. R. Evid. 606(b) limits a *Schwartz* inquiry to extraneous and prejudicial information, outside influence, or threats of violence or violent acts. The rule has been interpreted as precluding testimony about "psychological intimidation, coercion, and persuasion" as opposed to express acts or threats and acts of violence. Minn. R. Evid. 606(b) cmt; *State v. Jackson*, 615 N.W.2d 391, 396 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000). The inquiry Farkarlun wanted to pursue was designed to obtain information about the subject juror's psychological influence on other jurors. Because such an inquiry is precluded by the rule, the district court did not abuse its discretion by appropriately limiting the inquiry as directed by Minn. R. Evid. 606(b).

E. Restitution

District courts have broad discretion in awarding restitution. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). "[D]etermining whether an item meets the statutory requirements for restitution is a question of law that is fully reviewable by the appellate court." *State v. Nelson*, 796 N.W.2d 343, 346-47 (Minn. App. 2011) (quotations omitted).

At Farkarlun's sentencing hearing, the state maintained that investigators spent more than 110 hours investigating Farkarlun's rape allegations "with an estimated cost of approximately $6,000 in salary." The state asserted that the accused officers had approximately "another $570" for their time. The state estimated that the total cost of the investigation was "in the neighborhood of maybe eight or nine thousand [dollars]." The state requested restitution in the amount of $3,000, the maximum allowed by statute for conviction of falsely reporting police misconduct. Minn. Stat. § 609.505, subd. 2(b) (2010).

Farkarlun objected to restitution, arguing that the state failed to provide enough detail to support its request and noting that the matter was turned over to the city attorney's office for charging after only four days of investigation. Also, Farkarlun argued that she was unable to pay restitution.

The district court ordered restitution in the amount of $3,000, but advised Farkarlun that she could request a contested hearing on the issue. She requested a hearing on the record and filed a written request for hearing, with an attached affidavit showing her financial circumstances. Farkarlun noted her intent to appeal, and suggested that the restitution hearing be deferred until after the appeal. No hearing was scheduled and no further order regarding restitution was issued. On this record we are unable to review the restitution issue. Because it appears that Farkarlun is entitled to a restitution hearing, we remand to the district court for a restitution hearing or for an order explaining why Farkarlun is not entitled to such a hearing.

Affirmed in part and remanded; motion denied.