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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, vs. Marcus Delon Polk, Defendant and Appellant.	)	Supreme Ct. No. 20200108 Dist. Ct. No. 09-2019-CR-02952

APPELLEE'S BRIEF

Appeal from Criminal Judgment
Entered on January 27, 2020
East Central Judicial District, Cass County, North Dakota
The Honorable Frank L. Racek Presiding

ORAL ARGUMENT REQUESTED

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[¶ 6] STATEMENT OF CASE

[¶ 7] The Defendant appeals from a criminal judgment entered after a jury found him guilty of aggravated assault-domestic violence under N.D.C.C. § 12.1-17-02(1)(a). The Defendant contends that the evidence was insufficient prove the essential element of serious bodily injury. In addition, the Defendant claims the district court abused its discretion when it excluded the testimony of three police officers who had taken reports from the victim on previous occasions.

[¶ 8] The State asserts that the victim's testimony was sufficient to establish the element of serious bodily injury. Further, the district court properly excluded the three police officers' testimony because it would have constituted improper impeachment under N.D.R.Ev. 608(b). It is well within the court's discretion to exclude testimony that would confuse the jury and lead to a "trial within a trial."

[¶ 9] **STATEMENT OF FACTS**

[¶ 10] J.K. is a widow with two adult children who relies on disability for income and a stipend from her deceased parents that she receives through the help of a payee. (Trial Tr. 58:12-25, 62:3-24; 63:2-3.) J.K. has a number of medical problems and a long history of alcohol abuse. (App. at 13; Trial Tr. 65:24-25; 66:1; 111:1-5; 112:8-11.) J.K.'s husband died of a stroke when the children were six months old and three years old. (Trial Tr. 59:12-19.) J.K. never remarried. (Trial Tr. 59:22-24.) However, she met Marcus Polk ("Defendant) in approximately 1998 and had an "on-again, "off-again" relationship with him for years. (Trial Tr. 61:10-25; 72:24-25; 73:1.) The Defendant lived in J.K.'s home for periods of time, although there were other times when the Defendant lived elsewhere. (Trial Tr. 62: 1-2, 13-14; 72:4-23.) During the summer of 2019, the relationship began to deteriorate again. (Trial Tr. 75:18-25.)

[¶ 11] On the afternoon of July 15, 2019, Fargo police officers Nick Kjonaas and Adam Schock knocked on the door of J.K.'s home. (Trial Tr. 50:6-14.) When J.K. opened the door, she looked scared, timid, and she was speaking quietly. (Trial Tr. 50:16-24.) It was immediately apparent that J.K. had bruising around her lower neck or collarbone area. (Trial Tr. 55:11-23; 127:20-25.) Although J.K. had a history of alcoholism, Officer Kjonaas "didn't have any strong indicators that she was under the influence." (Trial Tr. 56:4-6.) Rather, the 57-year-old J.K. seemed frail and weak. (App. at 31; Trial Tr. 56:4-6.) Officer Schock, who had met J.K.

before, thought she seemed intoxicated because her speech was slurred. (Trial Tr. 127:20-21; 135:5-10.)

[¶ 12] J.K. was not initially forthcoming with information, so the officers asked her to step outside "in hopes that she would speak more freely." (Trial Tr. 50:22-24; 51:1-2.) Officer Schock asked J.K. if the Defendant was in the house. (Trial Tr. 129:1.) J.K. first said "no" but later admitted the Defendant was inside. (Trial Tr. 129:1-2.) The officers had J.K. sit down next to the front step. (Trial Tr. 129:5-6.) J.K. said she had a head injury, so Officer Schock called for an ambulance. (Trial Tr. 136:21-25; 137:1-3.)

[¶ 13] Officer Schock called for the Defendant to come out of the house, and the Defendant complied. (Trial Tr. 129: 8-11.) The Defendant had no visible signs of injury. (Trial Tr. 133:8-12.) Officer Schock asked the Defendant about the bruising around J.K.'s neck. (Trial Tr. 130:6-7.) The Defendant's explanation was that J.K. drinks a lot, falls, and has seizures. (Trial Tr. 131:22-24.) Officer Schock also asked the Defendant about the poor condition of J.K.'s home. Officer Schook described it as "unlivable," noting that it was "very dirty" and "smell[ed] like urine and feces. (Trial Tr. 132:1-4.) Officer Schock observed dog feces on the floor that looked like it had been there for a long time, and the basement "look[ed] like a large litter box." (Trial Tr. 132:4-15.) The Defendant claimed he had been trying to help J.K. clean up the house. (Trial Tr. 132:24-25.)

[¶ 14] After speaking with J.K. and the Defendant, Officer Schock arrested the Defendant and took him to jail. (Trial Tr. 133:21-24.) Officer Schock also sent

a report to Adult Protective Services ("APS"). (Trial Tr. 134:2-3.) He had been in the home a "couple of times" and believed the condition of the home indicated that J.K. was unable to properly care for herself. (Trial Tr. 133:3-5; 134:2-13.)

[¶ 15] Following his arrest, the Defendant was charged with aggravated assault-domestic violence under N.D.C.C. § 12.1-17-02(1)(a), terrorizing-domestic violence under N.D.C.C. § 12.1-17-04(1), and violation of order prohibiting contact under N.D.C.C. § 12.1-31.2-02(4). (Appendix "App." at 8-9.) The Defendant pled guilty to the violation of order prohibiting contact charge. (App. at 3.) On the remaining charges, a jury trial was held before the Honorable Frank L. Racek, district court judge, from December 10, 2019 to December 12, 2019. (App. at 5-6.) The jury found the Defendant guilty of aggravated assault-domestic violence. (App. at 3, 41.)

[¶ 16] At trial, J.K. recounted the events leading up to her encounter with police officers on July 15, 2019. J.K. testified that about two or three days before officers Kjonaas and Schock knocked on her door, she was sleeping on her stomach on her bed when the Defendant hit her more than three times in the head with his fist. (Trial Tr. 81:2-22; 101:20-22.) The Defendant "cussed" at her, got up, and stormed out. (Trial Tr. 82:1-4.) J.K. flipped over on her back. (Trial Tr. 82:4-6.) The Defendant came back into J.K.'s bedroom and strangled her. (Trial Tr. 82:4-12.)

[¶ 17] J.K. said that when the Defendant strangled her, he had his thumbs by the "V" of her neck and squeezed her neck. (Trial Tr. 82:10-15.) She described it

as "painful," and there was a point when she could not breathe. (Trial Tr. 82:21-23.) J.K. said the Defendant continued to cuss her out, and after strangling her for "maybe a minute," he got off her and went to the foot of the bed. (Trial Tr. 83:4-14; 103:24-25; 104:1.) J.K. said the Defendant told her, "If I killed you, I wouldn't care if I spent the rest of my life in prison—life in jail, I would spend the rest of my life in jail." (Trial Tr. 83:20-22.) She did not call the police that day because she "just learned it doesn't do any good after a while." (Trial Tr. 84:7-11.)

[¶ 18] J.K. testified that she sustained injuries during the incident, including three lumps on her head and bruises. (Trial Tr. 86:12-13; 104:8; 106:5-7.) She explained that she does not like to look in the mirror, so she did not realize that she had bruising until two or three days later. (Trial Tr. 86:10-18; 104:19.) When police knocked on her door on July 15th, J.K. initially said the Defendant was not in her house because she was "protecting him." (Trial Tr. 77:3-11; 78:15.) She explained, "You don't want to turn somebody in, but then you're scared not to." (Trial Tr. 78:6-7.) J.K. said she did not feel better once she stepped outside to talk to the police, and she was still trying to protect the Defendant. (Trial Tr. 78:11-18.)

[¶ 19] Although she only vaguely remembered the ambulance ride, J.K. recalled being seen at the hospital for her injuries. (Trial Tr. 79:8-14; 85:4-7.) She believed that she had told medical staff what happened. (Trial Tr. 85:8-18; 105:1-22; 106:1-13.) However, she indicated that she did not recall specific details of these conversations and said she had "been in and out of the hospital so many times."

(Trial Tr. 105:7-22; 107:1-11.) J.K. also acknowledged that she probably had been drinking earlier in the day on July 15th. (Trial Tr. 106:5-7; 108:15-23.)

[¶ 20] J.K. testified that when the Defendant was living with her, he purchased groceries and alcohol for her, drove her to doctor's appointments, cooked meals, and mowed the lawn. (Trial Tr. 67:19-25; 68:1-14; 73:22-25; 74:2-19.) J.K. testified that since the Defendant's arrest in this case, she had begun working with Cass County Social Services and was receiving meal deliveries and help with tasks such as housework and shopping. (Trial Tr. 98:1-25; 99:1-4.)

[¶ 21] Ashley Brandonberger of FM Ambulance testified that she was one of the paramedics who responded to the call at J.K.'s residence. (Trial Tr. 142:9-12.) J.K. told paramedics that she was "having a lot of pain in her face and her head." (Trial Tr. 143:13-14.) Brandonberger noted that J.K. had bruising in several different stages of healing in multiple places on her body. (Trial Tr. 145:9-18.)

[¶ 22] Dr. Jason Schenck examined J.K. in the emergency room ("ER") at Essentia Health. (Trial Tr. 151:15; 152:17-24.) He testified that J.K. presented to the ER for the "chief complaint of head injury." (Trial Tr. 152:23-24.) J.K. reported that she had been assaulted and that she had been pushed and struck in the head. (App. at 31; Trial Tr. 164:17-19.) Dr. Schenck noted that J.K. had tenderness on her scalp. (Trial Tr. 162:21-24.) He ordered a CT scan, which was negative for acute signs of traumatic injury. (Trial Tr. 158:8-12.) However, Dr. Schenck clarified that this finding is not inconsistent with a concussion. (Trial Tr. 158:10-14.) Dr. Schenck explained that "concussion is a diagnosis made on clinical

grounds," taking into consideration the mechanism of injury and symptoms such as headache, nausea, and vomiting. (Trial Tr. 158:14-17.) In J.K.'s case, Dr. Schenck noted that the head injury, the reported mechanism of injury, and the headache would meet criteria for concussion. (Trial Tr. 167:24-25; 168:1.)

[¶ 23] Dr. Schenck also observed bruising just above J.K.'s clavicles on both sides. (Trial Tr. 153:10-15; 154:5-8.) Dr. Schenck described bruising as "an injury to the tissues and that causes bleeding, which by definition then you've injured the vessels in there." (Trial Tr. 186:14-20.) He noted that "[p]retty much any kind of trauma" causes bruising, which results in blood pooling underneath the skin." (Trial Tr. 146:3-4.) He agreed that bruising can involve an impediment of blood flow. (Trial Tr. 186:18-25; 187:1; 189:12-17.)

[¶ 24] The bruising on J.K.'s left side was "linear bruising," which is "typically caused by a force that's spread out over a linear pattern." (Trial Tr. 155:1-10.) Toward the center of J.K.'s neck, Dr. Schenck observed fainter bruising that was "kind of circular in pattern." (Trial Tr. 155:23-25.) Dr. Schenck explained that important veins run just above the clavicle—the subclavian artery vein, internal jugular artery vein, external artery, and the jugular artery vein. (Trial Tr. 154:11-16.)

[¶ 25] Dr. Schenck testified that J.K.'s bruising appeared to be "at least a day or two old" and that he did not specifically ask J.K. about it. (Trial Tr. 166:19-24; 167:9-13.) He noted that domestic violence victims are not all immediately forthcoming about the cause of their injuries, and it is "very common" for them to

downplay their injuries. (Trial Tr. 179:2-10.) Melissa Longtine testified that she is a Licensed Professional Clinical Counselor and had worked at Rape and Abuse Crisis Center for eighteen years. (Trial Tr. 192:14-25; 193:20-22.) She stated that she had seen about sixty domestic violence cases per year. (Trial Tr. 196:1-8.) Longtine noted that "[m]ost victims care about and love the person who has offended them and don't want anything bad to happen to them." (Trial Tr. 201:1-3.) Therefore, victims may minimize, say that the abuse did not happen, or blame themselves. (Trial Tr. 202:21; 203:1-3.)

[¶ 26] Dr. Schenck testified that in the ER, he focused on J.K.'s chief complaint of head injury. (Trial Tr. 165:1-3.) J.K.'s bruising was not the focus because bruising generally does not require emergent treatment. (Trial Tr. 171:14-21.) Dr. Schenck testified:

> [W]hen I'm doing an exam, I'm mostly looking for injuries that I need to evaluate and treat emergently. Bruises, unless they're causing a large developing hematoma, aren't something that you would do anything with acutely, other than treat symptomatically, treat with pain control, that type of thing, if necessary.

(Trial Tr. 171:16-21.)

[¶ 27] As an ER doctor at Essentia for thirteen years, Dr. Schenck estimated that he had seen approximately five to ten strangulation cases per year. (Trial Tr. 172:22-25; 173:1-6.) Dr Schenck testified that in the majority of strangulation cases, "we just see . . . soft-tissue bruising," and J.K.'s bruising could be consistent with strangulation. (Trial Tr. 173:24-25; 175:21-25; 176:1.) On cross-examination, defense counsel asked Dr. Schenck a hypothetical question: "[I]f you had someone

indicating they had been strangled for a minute by a large male, what injuries would you expect to see?" Dr. Schenck responded that he would expect to see linear bruising. (Trial Tr. 176:15-20.)

[¶ 28] Defense counsel also asked, "And so if someone is being strangled and the hand is right here, is that consistent with those bruises that you saw?" (Trial Tr. 189:18-20.) Dr. Schenck replied, "It is." Defense counsel inquired, "If someone has a hand around their neck right here, if that is consistent with bruising starting at your clavicle?" (Trial Tr. 199:3-5.) Dr. Schenck responded, "It could, just depending on which part of your hand you have the most pressure on." (Trial Tr. 199:6-7.) Defense counsel asked, "So we're looking at handprints, potentially, down here is what the State is alleging. So if someone's breathing could be cut off by a hand down here?" (Trial Tr. 190:11-14.) Dr. Schenck replied, "So with the hand like this, you have your thumb all the way across your trachea. And so, yes, if you push hard enough in there, you're going to put pressure across your trachea and that's going to impede airflow." (Trial Tr. 190:15-18.)

[¶ 29] Following the district court's denial of the Defendant's Rule 29 motion, the State argued that the Defendant should not be permitted to call three police officers who had taken previous reports of domestic violence from J.K.. (Trial Tr. 224:10-14.) Defense counsel contended that the previous reports were "consistent with what we've heard here as far as showing that she's claiming things that just aren't occurring." (Trial Tr. 226:7-9.) Further, defense counsel noted that

despite J.K.'s claims that the Defendant had assaulted her, J.K. had no visible injuries. (Trial Tr. 225:18-25; 226:1-6.)

[¶ 30] Citing N.D.R.Ev. 608(b), the State argued that it would be improper to allow extrinsic evidence of uncharged cases to impeach J.K. when J.K. was no longer on the witness stand. (Trial Tr. 224:10-14; 226:13-16.) The State asserted that a decision to decline charges does not mean the complainant is lying—"[i]t simply means that a prosecutor has determined that there isn't enough evidence at that point in time to prove the case beyond a reasonable doubt." (Trial Tr. 227:1-6.)

[¶ 31] The district court sustained the State's objection and excluded the witnesses, reasoning that the testimony regarding unrelated incidents was not probative of anything in the case. (Trial Tr. 227:9-11.) The court explained: "She calls the police, apparently they decide they don't have enough evidence to proceed. But that's not—that's not evidence of whether it was truthful or untruthful." (Trial Tr. 227:11-14.) The court concluded that the testimony would not help the jury resolve whether the Defendant committed the charged offense. (Trial Tr. 227:18-25.)

[¶ 32] **STANDARD OF REVIEW**

[¶ 33] By timely moving for a judgment of acquittal, a defendant preserves the issue of sufficiency of the evidence for appellate review. State v. Schweitzer, 2007 ND 122, ¶ 17, 735 N.W.2d 873. A defendant challenging the sufficiency of the evidence on appeal "must show that the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt." State v. Jacobson, 419 N.W.2d 899, 901 (N.D. 1988). The Court has noted that its role is "to merely review the record to determine if there is competent evidence that allowed the jury to draw an inference 'reasonably tending to prove guilt and fairly warranting a conviction.'" Id. (quoting State v. Matuska, 379 N.W.2d 273, 275 (N.D. 1985)). The Court does not "weigh conflicting evidence nor judge the credibility of witnesses." State v. Brandner, 551 N.W.2d 284, 286 (N.D. 1996).

[¶ 34] A guilty verdict may be based entirely on circumstantial evidence, but the "evidence must be probative enough to establish guilt beyond a reasonable doubt." Id. A verdict based on circumstantial evidence carries the same presumption of correctness as other verdicts, and the Court "will not disturb it on appeal unless it is unwarranted." Id. The Court "will reverse the decision of the trier of fact only if the record presents no substantial evidence to support the verdict." Matuska, 379 N.W.2d at 275.

[¶ 35] The trial court has discretion to allow cross-examination of a witness regarding specific instances of conduct under N.D.R.Ev. 608(b). State v. Hoverson, 2006 ND 49, ¶ 13, 710 N.W.2d 890. On appeal, this Court applies "an abuse of

discretion standard of review to a district court's evidentiary rulings and will not reverse the court's ruling unless it is arbitrary, capricious, or unreasonable, or a misinterpretation or misapplication of the law. State v. Mosbrucker, 2008 ND 219, ¶ 6, 758 N.W.2d 663.

[¶ 36] **LAW AND ARGUMENT**

[¶ 37] **I. The evidence was sufficient to sustain the conviction for aggravated assault.**

[¶ 38] The Defendant was convicted of aggravated assault-domestic violence, an offense that requires proof of "serious bodily injury." See N.D.C.C. § 12.1-17-02(1)(a) (providing that a person is guilty of aggravated assault if the person "[w]illfully causes serious bodily injury to another human being"). The term "serious bodily injury" is defined as "injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs." N.D.C.C. § 12.1-01-04(27).

[¶ 39] Claiming there was insufficient evidence of serious bodily injury, the Defendant cites several factors: (1) J.K.'s medical records did not mention strangulation; (2) Dr. Schenck acknowledged other potential causes for linear bruising, and J.K. has a medical history of seizures and falls; and (3) The location of the bruising was inconsistent with J.K.'s report. (Def.'s Br. ¶¶ 30-32.) However, the Defendant's argument must fail. The jury unanimously found the Defendant

guilty beyond a reasonable doubt. To succeed on a sufficiency-of-the-evidence challenge, the Defendant must show "the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict." State v. Schmeets, 2007 ND 197, ¶ 8, 742 N.W.2d 513. The Defendant has not met this burden.

[¶ 40] J.K. testified that when the Defendant strangled her, there was a point when she could not breathe. (Trial Tr. 82:21-23.) J.K.'s difficulty or inability to breathe is evidence that she suffered an impediment of air flow or blood flow to her brain or lungs. The jury could have reasonably concluded that J.K.'s testimony alone was sufficient to establish the element of serious bodily injury. In United States v. Thomas, the Eighth Circuit rejected a defendant's claim that the victim's testimony was insufficient to establish the essential element of suffocation or attempted suffocation. 877 F.3d 1077, 1079 (8th Cir. 2017). The victim testified that the defendant "pushed her onto a couch, plugged her nose, covered her mouth, and threatened to 'put [her] out.'" Id. at 1078. She said that she "struggled to breathe, was afraid she might lose consciousness, and feared for her life." Id. The Court concluded that the victim's testimony established the elements of the crime and noted the well-established principle that '"the uncorroborated testimony of a single witness may be sufficient to sustain a conviction.'" Id. at 1079 (quoting United States v. L.B.G., 131 F.3d 1276, 1278 (8th Cir. 1997)).

[¶ 41] Nevertheless, the Defendant contends that the evidence regarding J.K.'s bruising was inconsistent with—and insufficient to show—strangulation. Although the medical records from J.K.'s ER visit do not mention strangulation, the

observation of "multiple contusions" is included in Dr. Schenck's emergency department provider notes. (App. at 37.) The purpose of the ER is, of course, to provide emergency medical care. As an ER physician, Dr. Schenck focuses on injuries that require emergent treatment. Dr. Schenck explained that bruises do not fall into this category. (Trial Tr. 171:16-21.) J.K.'s chief complaint during her ER visit was head injury. (Trial Tr. 152:23-24.) Certainly, it is logical that a patient's attention will be drawn to the injury that is causing pain at the time. The fact that J.K. apparently did not mention the bruises to medical staff does not mean the bruises are inconsequential, nor does it mean the strangulation did not occur.

[¶ 42] Dr. Schenk testified that domestic violence victims are not always forthcoming about the cause of their injuries, and it is "very common" for them to downplay their injuries. (Trial Tr. 179:2-10.) Melissa Longtine of Rape and Abuse Crisis Center testified that most domestic violence victims care about the offender and may minimize, deny that the abuse happened, or blame themselves. (Trial Tr. 201:1-3; 202:21; 203:1-3.) J.K. and the Defendant had been in a relationship for many years, and J.K. was dependent on the Defendant for basic needs like groceries, meals, and transportation to doctor's appointments. (Trial Tr. 67:19-25; 68:1-14; 73:22-25; 74:2-19.) The jury may have reasonably concluded that J.K. minimized or omitted details at the ER because she cared about the Defendant and was afraid of what would happen to him.

[¶ 43] The Defendant erroneously relies on Dr. Schenck's acknowledgment that strangulation is not the only possible cause of linear bruising. It is a matter of

common knowledge that all sorts of things can cause bruising. Toddlers learning to walk can get bruises when they take a tumble; accidentally striking one's leg against a table or car door can cause bruises. Jurors are free to use common sense in their deliberations, and they undoubtedly knew that various causes of bruising exist. Dr. Schenck's testimony about alternate causes of bruising likely came as no surprise.

[¶ 44] The jury heard J.K.'s testimony, the testimony of Dr. Schenck and the other medical witnesses, and J.K.'s medical records were admitted as an exhibit. It is within the province of the jury to weigh the evidence and evaluate the credibility of witnesses. State v. Syring, 524 N.W.2d 97, 98 (N.D. 1994). "The existence of conflicting testimony or other explanations of the evidence does not prevent the jury from reaching a conclusion the evidence is clear beyond a reasonable doubt." State v. Krull, 2005 ND 63, ¶ 14, 693 N.W.2d 631. Moreover, the jury "may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty." Id. In this case, the jury rejected the theory that something other than strangulation caused J.K.'s bruises and determined that J.K. suffered serious bodily injury.

[¶ 45] The Defendant incorrectly asserts that J.K.'s testimony about the strangulation was inconsistent with the evidence. Specifically, the Defendant argues that although J.K. said the Defendant's hands were around her neck, and his thumbs were at the "V" of her neck, there was "no bruising on her neck consistent with that description." (Def.'s Br. ¶ 31.) The theory, evidently, is that bruising can

only occur at the exact spot where pressure is applied. However, Dr. Schenck's testimony does not support this claim.

[¶ 46] Defense counsel asked Dr. Schenck, "And so if someone is being strangled and the hand is right here, is that consistent with those bruises that you saw?" (Trial Tr. 189:18-20.) Dr. Schenck replied, "It is." (Trial Tr. 189:21.) Defense counsel inquired, "If someone has a hand around their neck right here, if that is consistent with bruising starting at your clavicle?" (Trial Tr. 199:3-5.) Dr. Schenck responded, "It could, just depending on which part of your hand you have the most pressure on." (Trial Tr. 199:6-7.) The linear bruising on J.K.'s left side was consistent with the type of injury that Dr. Schenck would expect to see in a patient who had reportedly been strangled by a large man. (Trial Tr. 176:15-20; 177:14-19.)

[¶ 47] J.K.'s testimony established that she had difficulty breathing when the Defendant strangled her. Although J.K.'s testimony was sufficient, in and of itself, to establish serious bodily injury, other evidence corroborated her statement. Kasmir's scared, timid demeanor when she opened the door for law enforcement, her initial instinct to cover for the Defendant, and her omission of details when she spoke with medical personnel are all behaviors that are consistent with someone who has experienced domestic violence. The bruising just above J.K.'s clavicles is consistent with her report of strangulation. The Defendant's explanation for the bruising—that J.K. must have fallen—does not comport with the location and appearance of the bruising. It seems highly improbable that an accidental fall would

cause bruising just above the clavicles on both sides. Considering the totality of the evidence at trial, there was ample proof of serious bodily injury.

[¶ 48] **II. The district court did not abuse its discretion in excluding witnesses.**

[¶ 49] The Defendant contends that the trial court erred when it excluded the testimony of three police officers regarding previous reports of domestic violence that the officers had taken from J.K. (Def.'s Br. ¶ 34.) After the district court denied the Defendant's motion for judgment of acquittal, the Defendant argued that it should be allowed to call the officers to impeach J.K.'s credibility. (Trial Tr. 226:7-9.) The district court excluded the witnesses, concluding that the testimony regarding unrelated incidents was not probative, it was not evidence of J.K.'s truthfulness or untruthfulness, and it would not help the jury resolve the issues in this case. (Trial Tr. 227:9-14, 18-25.) The district court agreed with the State's reasoning that a declination of charges in the previous cases does not constitute evidence of whether J.K. was truthful. (Trial Tr. 227:9-14.)

[¶ 50] The trial court has "broad discretion on evidentiary matters." Brandner, 551 N.W.2d at 286. Indeed, the trial court has "wide latitude" to place reasonable limits on cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). Although the "Confrontation Clause guarantees an opportunity for effective cross-examination," it does not guarantee "cross-

examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985).

[¶ 51] As the California Supreme Court observed, the trial court's wide discretion to exclude impeachment evidence in individual cases is designed "to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." People v. Wheeler, 841 P.2d 938, 945 (Cal. 1992). Even when impeachment evidence is admissible and relevant, the trial court still has the power to exclude it. See e.g. People v. Tidwell, 78 Cal. Rptr. 3d 474, 481 (Cal. Ct. App. 2008) (holding that even though evidence of the victim's allegedly false complaints of rape were relevant and admissible, the "trial court did not abuse its discretion by excluding the evidence because the evidence was weak on the issue of [the victim's] credibility and would require an undue consumption of time").

[¶ 52] In this case, the trial court properly excluded evidence of J.K.'s prior allegations of abuse. The fact that the Defendant was not arrested or charged for the alleged offenses does not equate to proof that J.K. fabricated the events. Further, the absence of visible injury does not mean an assault did not occur. See e.g. Taylor v. Iowa Dep't of Human Servs., 870 N.W.2d 262, 268 (Iowa Ct. App. 2015) ("The lack of a physical injury does not mean a physical assault did not occur; physical assaults do not always result in a visible injury"). The definition of "bodily injury" includes "physical pain." N.D..C.C. § 12.1-01-04(4).

[¶ 53] Courts in other jurisdictions have held that a defendant may not impeach a victim with evidence of a prior, uncharged police report unless the prior

report was demonstrably false. See e.g. Phillips v. State, 545 So. 2d 221, 224 (Ala. Crim. App. 1989) (holding that the "defendant's offer of proof that two prior rape charges had been the subject of nolle prosequi, therefore, did not demonstrate the falsity of those charges"); State v. Hutchinson, 688 P.2d 209, 213 (Ariz. Ct. App. 1984) (affirming the trial court's decision to exclude evidence that the victim had made a rape allegation years earlier, concluding that the defendant's offer of proof "lacked sufficient facts to show that the prior charge was unsubstantiated and the trial court properly refused its admission"); People v. Alexander, 452 N.E.2d 591, 595 (Ill. App. Ct. 1983) (holding that when "one of the prior rape accusations terminated in a finding of no probable cause; the other culminated in two hung juries . . . [t]he intrinsic veracity of the complainant's accusations should not be confused with the inability of the State to meet its burden of proof for a criminal conviction").

[¶ 54] In People v. Weiss, the Colorado Supreme Court held that the "history of falsity provisions of Colorado's rape shield act require that the defendant must demonstrate multiple prior or subsequent sexual assaults to have been false, by a preponderance of the evidence, at the rape shield hearing; otherwise, they are irrelevant, immaterial, and inadmissible in the case at trial." 133 P.3d 1180, 1189 (Colo. 2006). The Court aptly explained that "[p]rosecutorial discretion to bring or not bring charges is extraordinarily wide," and "[m]any considerations go into deciding whether to file a case and, if filed, whether to continue pursuing it." Id. The Court concluded that "[b]ecause a prosecutor may decline to bring charges for any number of reasons, the fact that sexual assault reports by the victim did not

result in charges being brought is not a sufficient offer of proof upon which a trial court may order an evidentiary hearing pursuant to section 18–3–407(2)." Id. at 1188.

[¶ 55] The Defendant's request at trial was not to cross-examine J.K. about her prior reports of assault. Rather, the Defendant's strategy was a step removed—he wanted to impeach J.K.'s general credibility via the testimony of other witnesses without giving J.K. the opportunity to admit or deny the veracity of her prior reports. This method of impeachment is precisely the type that is prohibited under N.D.R.Ev. 608(b). The Defendant correctly asserts that the defense is allowed to impeach the State's witnesses. However, the Defendant's argument fails to recognize the distinction between impeachment by contradiction and impeachment by extrinsic evidence.

[¶ 56] Rule 608(b) provides:

> Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.

This rule applies to impeachment by extrinsic evidence. Rule 607 applies to impeachment by contradiction. See N.D.R.Ev. 607 (providing that "[a]ny party, including the party that called the witness, may attack the witness's credibility").

[¶ 57] In State v. Letarte, the New Hampshire Supreme Court discussed the difference between the two methods of impeachment. 151 A.3d 533, 540 (N.H.

2016). The Court explained: "Whereas Rule 608(b) concerns the use of extrinsic evidence of '[s]pecific instances of the conduct of a witness' offered 'for the purpose of attacking or supporting the witness' ... character for truthfulness,' impeachment by contradiction concerns the use of extrinsic evidence to contradict specific testimony given under oath." Id. (internal citations omitted). In other words, '"Rule 608(b) prohibits the use of extrinsic evidence of conduct to impeach a witness' ... general veracity,' while 'impeachment by contradiction permits courts to admit extrinsic evidence that specific testimony is false, because [it is] contradicted by other evidence.'" Id. (quoting United States v. Castillo, 181 F.3d 1129, 1132 (9th Cir. 1999).

[¶ 58] Essentially, it is permissible to cross-examine a witness to attack his or her credibility, but it is impermissible to call another witness to provide extrinsic evidence for purposes of impeachment. In State v. Biby, the defendant claimed that the trial court abused its discretion in refusing to allow him to call a witness to impeach the credibility of the victim, who had testified in the prosecution's case-in-chief. 366 N.W.2d 460, 463 (N.D. 1985). Rejecting the defendant's argument, this Court noted that the proffered witness, "in the trial court's discretion, could have been cross-examined by the defense concerning specific instances of [the victim]'s conduct only if [the witness] had testified on direct examination as to [the victim]'s character for truthfulness or untruthfulness." Id. at 464.

[¶ 59] Similarly, in Pinson v. State, the defendant attempted to call a witness to impeach the testimony of the alleged rape victim's husband. 518 So. 2d 1220,

1223 (Miss. 1988). The Defendant offered this witness to impeach the husband because the husband had testified that his marriage had broken up because of the rape, that he was living apart from his wife and was not living with any other woman. Id. The witness was offered to show that the husband was living with another woman and therefore, his credibility was suspect. Id.

[¶ 60] The Mississippi Supreme Court upheld the trial court's decision to exclude the testimony. Id. The Court held that "[s]pecific instances of conduct under our Rules of Evidence may not be proved by extrinsic evidence for impeachment purposes; they may only be inquired about on cross-examination." Id. The Court concluded that when the husband denied seeing other women when he was questioned about it on cross-examination, the "defense may go no further." Id.

[¶ 61] Applying these concepts to the present case, the Defendant was free to cross-examine J.K. and challenge her credibility. However, it would have been impermissible to allow the three police officers to provide extrinsic evidence to prove specific instances of J.K.'s conduct. The Defendant claims the State opened the door to the testimony of the three police officers when J.K. made comments such as, "I had become so used to it," and "I just learned it doesn't do any good after a while." (Def.'s Br. ¶ 36.) However, these statements are vague and do not specifically reference the prior police reports that J.K. made. Not only would admission of the three police officers' testimony violate Rule 608, but it also may have led to a "trial within a trial." The jury would have been left to determine whether the prior alleged incidents occurred. The trial court properly concluded that

the officers' testimony would not help the jury resolve the case at hand. (Trial Tr. 227:18-25.) This decision was well within the trial court's discretion.

[¶ 62] **CONCLUSION**

[¶ 63] Based on the forgoing reasons, the State asks this Court to affirm the judgment of the district court. The State requests oral argument to assist the Court in evaluating this matter and to answer any questions the Court may have.

[¶ 64] Respectfully submitted this 11th day of September 2020.

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[¶ 65] CERTIFICATE OF COMPLIANCE

[¶ 66] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8). The page count is twenty-eight pages.

[¶ 67] Dated this 11th day of September 2020.

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[¶ 68] CERTIFICATE OF SERVICE

[¶ 69] A true and correct copy of the foregoing document was sent by e-mail on the 11th day of September 2020, to Monty G. Mertz at fargopublicdefender@nd.gov.

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