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IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

CASE ID: CR18-1581

Plaintiff,

vs.

ORDER ON DEFENDANT'S MOTION FOR
NEW TRIAL

AUGUSTINE L. CAVITTE,

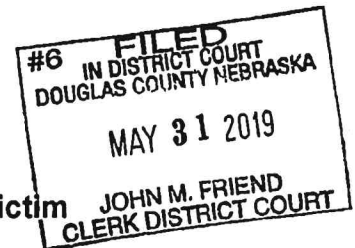
Defendant.

This matter came on for consideration of Defendant's Motion for New Trial. Representing the Defendant, Augustine Cavitte ("Cavitte") Bethany Stensrud and Abbi Romshek, Assistant Public Defenders and Jay Klimes and Desiree Stormont, Deputy County Attorneys. Cavitte stands convicted by a jury on March 20, 2019 of Domestic Violence Assault in the Second Degree, under Neb. Rev. Stat. § 28-319, a class IIIA Felony, punishable from 0-3 years' incarceration and 12-18 months post release supervision.

ANALYSIS

I. Evidence of Prior Altercations between Defendant and victim

A motion for new trial may be granted under Neb. Rev. Stat. § 29-2101 because of (1) irregularity in the proceedings of the court, or the prosecuting attorney, or the witness for the state, or any order of the court, or abuse of discretion by which the defendant was prevented from having a fair trial; or (2) misconduct of the jury or prosecuting attorney, or the witnesses for the State is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).



Appendix H.

In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Thomas*, 262 Neb. 985, 989, 637 N.W.2d 632, 643 (2002). Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *State v. Jacob*, 253 Neb. 950, 971, 574 N.W.2d 117, 135 (1998)(citing *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995)).

As stated in the Defendant's own brief, the Court found that the statements included, regarding mutual combat, were not bad acts and therefore, Neb. Rev. Stat. § 27-404 does not apply. Defendant also cites *State v. Woods*, 6 Neb. App. 829, 577 N.W.2d 564 (1998) as analogous to the current circumstances in Cavitte and asks the court to reverse its previous order and grant its motion for new trial. However, the statements do not fall under Neb. Rev. Stat. § 27-404 as they are not prior bad acts and the statements made were intrinsic evidence. Intrinsic evidence, or evidence necessary to tell a complete story of the crime, is admissible to provide the context in which the crime occurred. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). In addition, the statements made by Officer Kreikmeier regarding both individuals being arrested are not evidence and rather contextual information as to conversation between Cavitte and the detective.

II. Prosecutor's Conduct

In Defendant's brief, she references two statements made during closing arguments by the State that mentioned Cavitte's lack of articulation of self-defense to the Omaha Police Department. There is also a reference to a statement regarding Cavitte

having 10 months to bring it up to police or prosecution, however, no direct citation from the record is provided nor is there any indication as to the specific content of the second statement made during closings. Without a citation to the exact language or words used within the trial, the Court cannot reasonably make a determination as to whether those statements to the jury rise to the level of prosecutorial misconduct nor whether they rise to the level of requiring the Court to grant a new trial to Cavitte. If the Court however, relies upon the encompassing assertions of the Defendant, the State argues that the statements did not illegally shift the burden of proof, nor did they violate Ms. Cavitte's due process right to post arrest silence.

A. Did State shift burden during closing?

The Defendant relies upon *State v. Rocha* as the basis for its request for new trial regarding an illegal burden shifting during closing arguments. In *State v. Rocha*, the State cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence. *State v. Rocha*, 295 Neb. 716, 757, 890 N.W. 2d 178, 208, (2017). The Defendant asks this Court to find that the statements made by the State in this case were equally as egregious as those made in *Rocha* that resulted in a new trial. In *Rocha*, the state inquired as to whether the defense had requested its own testing of bloodstains, which it had not. *Id.* The court asserted that those specific statements regarding bloodstain testing may have led the jury to believe that the defendant had an obligation to test the evidence to prove his innocence. *Id.* at 758, 890 N.W.2d178, 209 (2017).

The statements made by the State in closing arguments, while not explicitly identified, are referenced by the Defendant as mentioning the lack of self-defense information prior to the day of trial by Ms. Cavitte. This type of statement should be differentiated from the specific statement made in *Rocha* regarding testing and possible evidentiary results or a lack thereof. Blood testing, as referenced in *Rocha*, elicits in the mind of an individual, a specific action step that needs to be taken. In this case, the statements made by the State pertain to the defendant's own differing statements to law enforcement and the statements made on the stand, 10 months later at trial. An attack on the credibility of a defendant's statements, the change in facts from one statement to another, does not rise to the level of illegal burden shifting to the defendant nor does it violate Cavitte's due process rights to post arrest silence.

B. Defendant's right to post arrest silence

The analysis of this issue begins with the United States Supreme Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976). As the Defendant discussed in her brief, in *Doyle*, two defendants were convicted of selling marijuana. *Id.* at 611. During their trial, each defendant took the stand and testified that another person had framed them. *Id.* at 612-13. The prosecutor asked each defendant why he had not told the police that he was being framed when he was arrested. *Id.* at 613-14. Defense counsel timely objected to these questions, but the objections were overruled. *Id.* at 614. The United States Supreme Court reversed the defendant's convictions holding that "a state prosecutor may not seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest." *Id.* at 611.

While *Doyle v. Ohio* sets the initial standard for the prohibition against the use of absent post-arrest statements for impeachment, it is not the final word on the issue. In a series of post-*Doyle*, cases, the United States Supreme Court has clarified and limited its holding. In *Greer v. Miller*, 483 U.S. 756 (1987), the United States Supreme Court held “the sequence of events in this case – a single question, an immediate objection, and two curative instructions – clearly indicates that the prosecutor’s improper question did not violate Miller’s due process rights.” *Id.* at 766. The facts of *Greer* illustrate how similar it is to the present matter. In *Greer*, the defendant was convicted in state court of murder. *Id.* at 758. The defendant took the stand in his own defense and implicated two other people in the murder. *Id.* The prosecutor asked the defendant, on cross-examination, why he had not told police this when he was arrested. *Id.* at 759. The defendant’s attorney immediately objected and asked for a mistrial. *Id.* The trial court sustained the objection but denied the request for a mistrial. *Id.* The prosecutor moved on to another issue and did not mention the issue again. *Id.* The defendant’s conviction had been reversed by a number of lower appellate courts, but the United States Supreme Court affirmed the conviction. The United States Supreme Court noted that it has only applied *Doyle* in situations where the trial court permitted the prosecutor to argue and make the post-arrest silence an issue. *Id.*

Nebraska courts have applied the *Doyle* standard and its progeny, including *Greer*, in cases where the prosecutor has inquired into post-arrest silence. One of those cases is *State v. Lofquest*, 227 Neb. 567 (1988), where the Nebraska Supreme Court granted a defendant’s request for a new trial. However, the decision of the Nebraska Supreme Court in *Lofquest* differs from the case at hand because as the court noted, “the

dispositive factor in this case becomes the nature of the prosecutor's remarks at appellant's trial." *Id.* at 569. There was clearly a violation of *Doyle* in *Lofquest* as the prosecutor was allowed to ask the defendant numerous condescending questions on cross-examination and closing arguments about his post-arrest silence. *Id.* The defendant's attorney made numerous timely objections, but they were all overruled. *Id.*

The Nebraska Supreme Court additionally addressed prosecutorial misconduct in closing arguments in their decision in *State v. Custer*, 292 Neb. 88 (2015). In *Custer*, the defendant was convicted of First-Degree Murder and in their closing arguments, the prosecutor made comments regarding Custer's failure to report the shooting to police. The court in *Custer* stated that in assessing allegations of prosecutorial misconduct in closing arguments, the court first assesses whether the statements made were improper. *Id.* at 111. The second prong is for the court to determine the extent to which the comments had a prejudicial effect on the Defendant's right to a fair trial. *Id.* The prosecutors in *Custer*, stated that he had 15 months and the advantage of hearing other witnesses' testimony in order to prepare his testimony in his defense. *Id.*

The case at bar is more analogous to the facts set forth in *Custer* rather than the issue confronted in *Lofquest* and the Court will apply the reasoning from *Custer*. There was no long and protracted questioning on the issue of the defendant's post-arrest silence and the jury was instructed by the judge immediately following the objection to disregard the time lapse in reporting self-defense. Regardless of the fact the objection was overruled, this Court was meticulous in its application of the law and the prosecution's conduct certainly did not rise to the level of prosecutorial misconduct. This court overruled the objection but still instructed the jury to disregard the portion of testimony about length

of time between the self-defense claim and the post-Miranda statements. As the court found in *Custer* with similar statements made in closing arguments, the statements did not rise to the level of prosecutorial misconduct.

C. The Court provided a sufficient curative instruction to mitigate any material influence on the jury.

Before it is necessary to grant a new trial due to prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice actually occurred. *State v. Harker*, 1 Neb. App. 442, 498 N.W.2d 345, 348 (1993). While making its determination, the court is also to consider whether any steps were taken to reduce the impact of any information given to the jury that may have been improper. Whether curative measures were taken to reduce or eliminate the impact of improprieties at trial is a factor to be considered in determining whether a mistrial should have been granted. *Id.* at 443, 498 N.W.2d 645, 348. If there is some incorrect conduct in a jury trial which, on review of the entire record, did not materially influence the jury in its verdict adverse to a substantial right of the defendant, the error is harmless. *State v. Harker*, 1 Neb. App. 442, 442-443, 498 N.W. 2d 345, 348 (1993).

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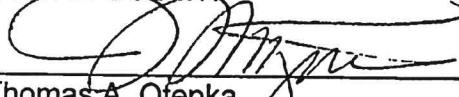
In this case, upon review of the statements made by the State during closing, the Court utilized a curative measure to reduce or eliminate the impact of any potential improprieties by instructing the jury to disregard the 10 month period of time. As with other evidentiary rulings made during the course of a trial, the Court has the broad discretion to make the determination as to what evidence is admissible and when necessary, what admonitions or curative instructions are necessary to prevent injustice. In addition, the Court instructed the jury in Jury Instruction No. 9 that any testimony that the jury was told to disregard by the Judge was not evidence. Through both the curative instruction and the information in Jury Instruction No. 9, sufficient mitigation occurred to prove that no substantial miscarriage of justice occurred.

CONCLUSION

For all the foregoing reasons, the Defendant's Motion for New Trial is overruled.

DATED this 31 day of May, 2019.

BY THE COURT:



Thomas A. Otepka
District Court Judge

cc: Jay Klimes
Desiree Stormont
Bethany Stensrud
Abbi Romshek