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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1617**

State of Minnesota,
Respondent,

vs.

Lawrence Bernard Marovich,
Appellant.

**Filed October 27, 2009
Reversed and remanded
Stauber, Judge**

Steele County District Court
File Nos. 74CR071193; 74CR06997

Lori Swanson, Attorney General, Paul R. Kempainen, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Douglas L. Ruth, Steele County Attorney, Christy M. Hormann, Assistant County Attorney, 303 South Cedar Street, Owatonna, MN 55060 (for respondent)

Marie L. Wolf, Interim Chief Public Defender, Rochelle R. Winn, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from his conviction of second-degree controlled substance crime,
appellant argues that the district court abused its discretion and violated his Sixth

Amendment rights by prohibiting him from cross-examining the state's key witness, a paid confidential informant, about his ongoing drug use after appellant's offense, because it was probative of the informant's bias and relevant to his ability to recall and relate his version of events to the jury. Because the district court abused its discretion and violated appellant's constitutional rights in restricting cross-examination of the confidential informant, we reverse and remand.

FACTS

On April 12, 2006, appellant Lawrence Marovich allegedly sold 3.5 grams of methamphetamine (meth) to a drug task force (DTF) confidential informant (CI) in a controlled buy. Appellant was subsequently charged with one count of second-degree controlled substance crime in violation of Minn. Stat. § 152.022, subds. 1(1), 3(a) (2004).

Prior to appellant's April 2008 trial, the CI testified in an unrelated case that in March 2007, 48 hours prior to another controlled buy, he purchased and used meth outside of his DTF involvement, in violation of his CI agreement with DTF. Despite the fact that the CI's conduct constituted a crime and violated his agreement with DTF, the state did not pursue criminal charges against him or terminate his paid CI status.

Due to the CI's admitted drug use, the state, in this case, moved in limine requesting that appellant be prohibited from questioning the CI about specific instances of his drug use occurring after appellant's April 12, 2006 controlled buy. Appellant challenged the motion, claiming that the evidence of drug use was relevant to the CI's ability to recall the circumstances surrounding the controlled buy. The district court

granted the motion, only allowing appellant to question the CI about whether the CI was using drugs in April 2006, during the time of appellant's controlled buy.

In April 2008, appellant's trial proceeded, and the CI was cross-examined only regarding his drug use prior to April 2006, the effects drugs had on him, and his confidential informant agreement with the DTF. The prosecutor downplayed the significance of the CI's drug use, claiming that he had begun to "turn things around" prior to his participation in the controlled buy that led to appellant's arrest. At the close of trial, appellant was found guilty and sentenced to 58 months. This appeal followed.

DECISION

Appellant argues that he should have been allowed to cross examine the CI regarding his drug use in March 2007, because it showed that the CI was biased and unable to perceive, remember, and recount events to the jury. The state contends that appellant waived the right to challenge the district court's ruling on the basis of bias by failing to raise the argument below. The state also claims that appellant was given adequate opportunity to cross-examine the CI about the effect that his drug use had on his ability to remember the events surrounding the controlled buy.

After reviewing the record, we agree that appellant did not argue that the evidence of appellant's drug use was admissible for purposes of establishing bias. Generally, we consider only those matters that were raised and decided by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But because the scope of cross-examination was a critical issue in this case, and because the state thoroughly briefed the issue of bias, we address it in the interests of justice. *See id.* (stating that an appellate court may review

a matter that was not properly preserved “when the interests of justice require and doing so would not unfairly surprise a party to the appeal”).

The scope of cross-examination is left largely to the district court’s discretion and will not be reversed absent a clear abuse of discretion. *State v. Parker*, 585 N.W.2d 398, 406 (Minn. 1998). A district court may limit cross-examination based on concerns of harassment, prejudice, confusion, repetition, or marginally relevant testimony. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986). “Nevertheless, the discretionary authority of the judge to control the scope of cross-examination is limited by the Sixth Amendment.” *State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn. 1995).

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to confront and cross-examine witnesses. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 1110 (1974) (quotation omitted). Cross-examination of the state’s witnesses is one of the primary interests protected by the Confrontation Clause. *Id.* Cross-examination is essential because it is the “principal means by which the believability of a witness and the truth of his testimony are tested.” *Id.* at 316, 94 S. Ct. at 1110. Part of this testing is exposing the witness’s biases or motivation for testifying. *Id.* Jurors, being the sole judges of a witness’s credibility, are entitled to a complete picture, including a defense theory of bias, in order to make an informed decision. *Id.* at 317, 94 S. Ct. at 1111. Where the accuracy and truthfulness of a witness’s testimony are key elements in a case, the jury should be afforded an opportunity to hear testimony regarding the witness’s potential bias. *See id.*

A criminal defendant establishes

a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witnesses.

Van Arsdall, 475 U.S. at 680, 106 S. Ct. at 1436 (quotation omitted). The defendant must also establish that the the jury had insufficient other information to make a “discriminating appraisal” of the witness’s bias or motive to fabricate. *Lanz-Terry*, 535 N.W.2d at 641 (quotation omitted).

Here, the jury was presented with testimony implying that the CI was biased and had difficulty recalling certain events. The CI testified about his cravings for meth, the accompanying side effects of meth use, his agreement with DTF, and his inability to recall all of the details of the meetings he had with DTF. But cross-examination of the CI was limited. Appellant was prohibited from inquiring about the CI’s ongoing drug use after his controlled buy in this case, and specifically regarding the circumstances of his admitted drug use in March 2007. The district court’s decision compromised the fairness of the proceedings for several reasons. First, it prevented appellant from revealing that the CI may have provided testimony favorable to the state to avoid criminal charges for his conduct in March 2007, and to continue his paid position as a CI. Second, it limited appellant’s ability to counter the state’s claim that the CI was a reliable witness because he had rehabilitated himself. Finally, it denied appellant the opportunity to question the CI about his current drug use and the potential effect that it had on his memory. Because

the jury might have judged the credibility of the CI's testimony differently had it known this information, we conclude that the district court abused its discretion and violated appellant's Sixth Amendment right to confrontation by limiting the scope of cross-examination.

The state argues that the violation was harmless. Violations of the Confrontation Clause are subject to harmless-error analysis. *Van Arsdall*, 475 U.S. at 684, 106 S. Ct. at 1438. We will not reverse based on a Confrontation Clause violation if, "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Id.* In determining whether an error was harmless, we consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.*

Here, the state relied almost exclusively on the CI's testimony and conduct to convict appellant, and the CI was the only eyewitness to the 2006 controlled buy. Full cross-examination of the CI was also crucial to appellant's ability to challenge the CI's credibility. Without unrestricted cross-examination, appellant could not fully develop his defense that the CI was biased, counter the state's claim that the CI had begun to rehabilitate himself, or challenge the CI's ability to recall the circumstances surrounding the controlled buy. As appellant argues, it could be "a powerful motive for [the CI] to

testify in a manner favorable to the state.” Because we cannot say that the error was harmless beyond a reasonable doubt, a new trial is required.

Reversed and remanded.