

FILED

IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 8, 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ernest Coppage,)	
)	
)	
)	Supreme Court no. 20120267
Petitioner/Appellee,)	
)	
And Cross-Appellant.)	
)	District Court no. 08-06-K-2085
-vs-)	
)	
)	
State of North Dakota,)	
)	
Respondent/Appellant,)	
)	
And Cross-Appellee.)	

CROSS-APPELLANT'S REPLY BRIEF

Appeal from Judgment Entered on June 7, 2012

In District Court, County of Burleigh, State of North Dakota
The Honorable Donald L. Jorgensen

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¶ 1 TABLE OF CONTENTS

<u>Table of Authorities</u>	¶ 2
<u>Argument</u>	¶ 3
<u>Conclusion</u>	¶ 12

¶ 2 TABLE OF AUTHORITIES

Rules

N.D.R.App.P. 10.....	¶ 4
N.D.R.App.P. 28.....	¶ 4
N.D.R.Ev. 403	¶ 8
N.D.R.Ev. 404	¶¶ 8, 10
N.D.R.Ev. 609	¶¶ 8, 10
N.D.R.Crim.P. 16	¶¶ 5, 6

Cases

<u>Disciplinary Board v. Feland</u> , 2012 ND 174, 820 N.W.2d 672.....	¶ 6
<u>State v. Stewart</u> , 2002 ND 102, 646 N.W.2d 712.....	¶ 9
<u>VanDyke v. VanDyke</u> , 538 N.W.2d 197 (N.D. 1995)	¶ 4

¶3 ARGUMENT

¶4 The State's Reply Brief dated October 12, 2012, contains significant information not included in the record, which cannot be condoned or allowed. See N.D.R.App.P. 10(a) (defining "the record on appeal"); N.D.R.App.P. 28(f) (requiring appropriate citations to the record in all appellate briefs); see also VanDyke v. VanDyke, 538 N.W.2d 197, 203 (N.D. 1995) ("Inappropriate attempts to supplement the evidentiary record at the appellate level cannot be condoned."). On page 2, lines 1 through 4, of the State's Reply Brief, the State asserts: "Coppage's complete criminal record from the State of Minnesota, which included a record of the conviction at issue, was disclosed to Morrow during the discovery process via his Minnesota 'rap sheet.'" The State cited the Transcript of the Evidentiary Hearing, page 41, lines 13-22, as support for its assertion. However, the testimony cited does not support the State's assertion. Here is the relevant exchange:

Redirect examination by Mr. Suhr:

Q. Mr. Morrow, did you know about or discuss Mr. Coppage's prior criminal history with him prior to trial?

A. I'm sure I went through what the State provided.

Q. Okay. With regards to the Minnesota conviction, did Mr. Coppage tell you about that?

A. Yes, that's when he indicated he just pushed past an old girlfriend, or a girlfriend at the time, to get out of the room.

Q. And you actually structured your questioning so as to ensure, on direct exam, he didn't open up any doors to his prior history?

A. That's usually my intent. Yes.

Q. A history you'd have to know about before you could work with a client to ensure they didn't approach it?

A. Right.

¶5 Nowhere in this exchange nor anywhere else in the record was any evidence introduced via testimony or an exhibit that "Coppage's complete criminal record from the State of Minnesota, which included a record of the conviction at issue, was disclosed to Morrow during the discovery process via his Minnesota "rap sheet." The quoted exchange establishes only that Morrow was aware of the prior conviction, but did not prove what, if anything, the State provided to Morrow pursuant to N.D.R.Crim.P. 16 or otherwise.

¶6 The State had the opportunity to prove that he had provided Coppage's criminal record to the defense both at the trial and at the evidentiary hearing, but he failed to do that. The State is now, in effect, is presenting testimony to this Court to establish that he complied with N.D.R.Crim.P. 16. This case illustrates once again the gamesmanship the Burleigh County State's Attorney's office uses in criminal trials. See Disciplinary Board v. Feland, 2012 ND 174, ¶ 39, 820 N.W.2d 672.

¶7 The State asserts in its Reply Brief that all of Coppage's claims were been addressed in the State's principal brief. Coppage respectfully asserts that the State did not address the legal or factual claims of prosecutorial misconduct.

¶8 During the trial, when Morrow stated that he had never seen the certified copies of the two prior misdemeanor assault convictions proffered by Suhr, Suhr asserted that he had no obligation to disclose impeachment material.

Tr. T. 501 – 508. Suhr then asserted to the trial court that it had the discretion to admit the more recent misdemeanor assault conviction under N.D.R.Ev. 609. Tr. T. 506:19-23. There is literally no authority or any good faith argument to support Suhr's assertion. There is no theory under which a misdemeanor assault conviction could ever be admitted for impeachment purposes under N.D.R.Ev. 609. Up to and including the State's Reply brief, Suhr has failed to provide a single authority for that argument. Every authority the State has cited to justify introduction of Coppage's misdemeanor assault conviction is distinguishable. During the trial, Suhr also cited N.D.R.Ev. 403, Tr. T. 506:19-23, which is an exclusionary rule, and has maintained continuously that the conviction was not offered under N.D.R.Ev. 404(b). Tr. T. 502:11-16. There is no evidence in the record that even if it had been offered under Rule 404(b) that the State provided Coppage appropriate notice under Rule 404(b).

¶ 9 There was no legitimate use of Coppage's prior misdemeanor assault conviction in this trial. The only remaining purpose Suhr offered the certified copy of Coppage's prior misdemeanor assault conviction was to establish that Coppage had the propensity for violence and acted in conformity with that propensity. The Rules of Evidence specifically prohibit this evidence for precisely the reason why Suhr offered it. See State v. Stewart, 2002 ND 102, ¶ 8, 646 N.W.2d 712. T. Tr. 596:24-25 & 597:1-20.

¶10 The prosecutorial misconduct in this case is egregious because Suhr engaged in obvious planning and preparation to illegally and unfairly use the misdemeanor assault conviction. He intended all along to offer proof of


Coppage's misdemeanor assault conviction. After all, he acquired not one but two certified copies of Coppage's prior misdemeanor convictions, neither of which fall within the scope of Rule 609. T.Tr. 501:17-25; 503:16-25; 504:1-25; 505:7-9. Suhr knew precisely what the factual basis was for Coppage's guilty plea in the more recent case, and that there was no allegation that Coppage had "hit" or "struck" or "beat" the victim in that case. T.Tr.503:16-25; 504:1-15. Suhr did not provide any notice required by N.D.R.Evid. Rule 404(b) and did not object to Morrow's Motion in limine which the Court granted to exclude references to Coppage's past conduct. App. 9 & 10; T.Tr. 6:2-3; T.Tr. 502:1-10.

¶ 11 Suhr achieved the introduction of Coppage's prior assault conviction by misleading the trial court as to the facts and the law, and has yet to cite any authority supporting his actions. Suhr compounded the error by falsely calling Coppage a liar and by arguing that the prior conviction proved that he is a violent person. Coppage is entitled to post-conviction relief because he was deprived of a fair trial upon three separate grounds, or in any combination of the three: 1) prosecutorial misconduct; 2) ineffective assistance of counsel; and 3) plain error.

¶ 12 CONCLUSION

¶ 13 The Judgment of the District Court should be Affirmed.

¶ 14 Respectfully submitted this 8th day of November, 2012.


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