

IN THE SUPREME COURT

20020352

STATE OF NORTH DAKOTA

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| <p>FILED<br/>IN THE OFFICE OF THE<br/>CLERK OF SUPREME COURT</p> <p>JUL 28 2003</p> <p>STATE OF NORTH DAKOTA</p> |
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State of North Dakota, )  
 )  
 Plaintiff - Appellee, )  
 )  
 vs. )  
 )  
 Peter Paul Zephyrin, )  
 )  
 Defendant - Appellant. )

Supreme Court No. 20020352

District Court No. 09-02-K-01528

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**APPELLEE'S BRIEF**

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**APPEAL FROM CRIMINAL JUDGMENT AND COMMITMENT  
 ENTERED ON DECEMBER 16, 2002  
 IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA  
 THE HONORABLE JOHN C. IRBY**

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## STATEMENT OF THE ISSUES

- Issue 1: Whether the Trial Court erred when it denied Defendant's motion to strike the jury panel for absence of minority members merely because Defendant was a member of a minority.
- Issue 2: Whether the Trial Court erred when it denied Defendant's motion for mistrial based upon mid-trial publicity after conducting individualized voir dire.
- Issue 3: Whether the prior photo-lineup identification of Defendant by victim was impermissibly suggestive and/or Defendant denied due process.

## **STATEMENT OF THE CASE**

The State essentially concurs with Zephyrin's Statement of the Case with the following clarification. On July 29, 2002, Zephyrin indicates he persisted in his plea of not guilty. While that is correct, it leaves out that the hearing set on July 29 was for the purpose of allowing Zephyrin to change his plea to guilty. When he arrived at the change of plea hearing his counsel informed the Court he would instead persist in his not guilty plea. Notice of Hearing, dated June 26, 2002 (Docket #12); Transcript of Hearing, July 27, 2002.

## **STATEMENT OF THE FACTS**

Zephyrin has provided an extensive recitation of the facts in his brief. The State essentially concurs with Zephyrin's Statement of the Facts and supplements or clarifies those facts, as appropriate, in the following arguments.

## LAW AND ARGUMENT

**I. The Trial Court did not err when it denied Zephyrin's motion to strike the jury panel for absence of minority members merely because Zephyrin was a member of a minority.**

A. Statutory Claim.

N.D.C.C. Chapter 27-09.1 establishes the procedure for jury selection. In particular, the statutes identify a specific procedure for challenging compliance with the selection procedures. N.D.C.C. §27-09.1-12. The procedure indicates, among other things, the moving party must file a motion, within seven days after discovering the grounds therefore, with a sworn statement of facts which, if true, constitute a substantial failure to comply with the statutory selection procedure. Id. That procedure is the "exclusive" means for challenging the jury selection as not in conformity with the statutory procedure. Id. Failure to follow the statutory scheme is fatal to a statute-based claim. State v. Fredericks, 507 N.W.2d 61, 64 (ND 1993).

The State cannot find within the record that Zephyrin followed this exclusive statutory means for challenging the jury selection process, and Zephyrin seems to concede he did not. Appellate Brief, p.12-13. Zephyrin made a verbal motion to strike the jury panel on this issue at the time of voir dire. T11-13. The Court denied that motion. T12-13. The State is not aware that Zephyrin offered any sworn statement.

B. Constitutional and Other Claims.

In addition to the failed statutory claim (above), the State further asserts Zephyrin has provided no other adequate basis on which to challenge the jury selection process.

Under the 6<sup>th</sup> Amendment, U.S. Const., a defendant has a right to a jury trial with an impartial jury selected from a representative cross-section of the community. State v. Robles, 535 N.W.2d 729 (ND 1995)(*citing Taylor v. Louisiana*, 419 U.S. 522 (1975)). This 6<sup>th</sup> Amendment requirement is binding upon the states through the 14<sup>th</sup> Amendment, U.S. Const. Robles, 535 N.W.2d 729 (*citing Duncan v. Louisiana*, 391 U.S. 145 (1968)). The elements a defendant must show to prove a 6<sup>th</sup> Amendment violation are: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) that representation in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to systemic exclusion of the the group in the jury-selection process. Fredericks, 507 N.W.2d at 65 (*citing Duren v. Missouri*, 439 U.S. 357, 364 (1979)). Once the defendant has made a prima facie showing, the burden shifts to the State to show a significant interest manifestly and primarily advanced by the aspects of the selection process that result in the disproportionate exclusion of the distinct group. Id.

It appears Zephyrin's sole argument is that the jury, or the jury pool, did not contain any minorities. Zephyrin is of a minority race. T164. The State concedes he is part of a "distinct" group as Fredericks had in mind. However, Zephyrin acknowledges he has failed to address in any way his burden under the second and third elements above. As a result, he has not made out a prima facie case and the burden does not shift to the State. He seems to make a bare assertion he has been wronged and the State should prove otherwise. Appellant Brief, p. 12-14. Zephyrin's attempt to place the burden upon the State is simply



not consistent with the requirements of the law or case law. In Fredericks, this Court found that bare assertions, standing alone, of underrepresentation of a distinct group are not sufficient. 507 N.W.2d at 65. Zephyrin has not provided even the limited information which this Court has found insufficient in other cases with similar claims. See, e.g., Fredericks, State v. Marshall, 531 N.W.2d 284 (ND 1995).

Furthermore, it is possible minority members were present within the jury pool whose minority status may not have been apparent through observation alone. The State has no information one way or the other and does not expect Zephyrin does either.

The jury selection procedure within North Dakota, which prohibits exclusion from jury on the basis of race, is neutral on its face. State v. Robles, 535 N.W.2d 729 (ND 1995). Zephyrin has provided nothing to suggest how the process used in his case could be modified to produce a fairer cross-section of the population.

**II. The Trial Court did not err when it denied Zephyrin's motion for mistrial based upon mid-trial publicity after conducting individualized voir dire.**

A defendant is entitled to a fair and impartial trial. See generally, U.S.Const., Amend 6; N.D.R.Crim.P. 21(a); State v. Ellis, 2001 ND 84, ¶4, 625 N.W.2d 544, 546. The matter of the fairness and impartiality of jurors, who have been subjected to news articles about the trial, is ordinarily left to the trial court's discretion. State v. Osier, 1999 ND 28, ¶24, 590 N.W.2d 212 (citing State v. Voeller, 356 N.W.2d 115, 118 (ND 1984)). Absent information to the contrary, a presumption exists that a jury performed its duties in accordance with the law

and was not influenced by outside events or evidence. State v. Voeller, 356 N.W.2d 115, 121 (ND 1984). A conviction is not presumed constitutionally unfair in the absence of a trial atmosphere “utterly corrupted by press coverage”. Voeller, 356 N.W.2d at 121 (*citing* Murphy v. Florida, 421 U.S. 794, 798 (1975) and State v. McLain, 301 N.W.2d 616, 623 (ND 1981)).

A. Publicity.

In the present matter it appears the local newspaper, and at least one television and one radio station, published some news relating to Zephyrin during the course of his trial. T264-287. On day two of the trial the Court asked the jury who among them had heard or seen any news relating to Zephyrin. T264. Eight of the jurors indicated some exposure (out of a total of thirteen). The Court sequestered the jury and allowed the parties to conduct individualized voir dire on those eight.

Publicity *per se* is not necessarily prejudicial or damaging to a defendant. Ellis, 2001 ND 84, ¶6, 625 N.W.2d at 547 (dealing with a change of venue motion due to pre-trial, not mid-trial, publicity). It cannot be said that every news story published concerning a defendant or aspect of trial is prejudicial or even potentially prejudicial. Voeller, 356 N.W.2d at 120 (*citing* State v. Clark, 675 .2d 557, 560 (Utah 1983)). The State has not found within the record any “details” of the published news - no copies of articles nor tapes or transcripts of broadcasts. However, based upon the transcript of the expanded voir dire, it appears some of the news indicated Zephyrin may be charged with property damage at the jail - a matter unrelated to the case before this jury. As for the ongoing trial, it appears a report merely mentioned the jury was currently hearing testimony on

the case. See generally, T265-287. As far as the State can tell from the record, there was nothing within the news that reflected prejudicially upon the facts or evidence being presented in the case before the jury. There was nothing within that news relating to Zephyrin's reputation for truthfulness (Zephyrin testified in his own defense at trial). Nor was there any news that Zephyrin had been convicted of any crime, only that he either had been, or may be, charged with damage at the jail (details are a bit unclear from the voir dire).

B. Jury.

A juror may not be disqualified for having heard/read in the news, or having been told by someone, something about the pending case if the Court is satisfied the juror can be fair and impartial. N.D.C.C. §29-17-38. In order to overcome the presumption of impartiality of jurors, a defendant must demonstrate the actual existence of partiality in the mind of the juror. McLain, 301 N.W.2d at 622. The Supreme Court must ascribe great weight to a juror's statement at voir dire that he/she will give the defendant a fair and impartial trial. Id. Of the eight jurors, seven (Butler, Peterson, Root, Munson, Gibson, Johnson and Larson) indicated they could put aside the news, listen to the evidence in the courtroom and render an impartial verdict. One juror, Francis, indicated she could not do so and both Zephyrin and the State concurred in excusing that juror for cause. T272-275.

C. Jury Instructions.

The Court advised the jurors, through its standardized instructions, they were to rely upon the evidence presented at trial, not other information. In the preliminary instructions the Court stated:

*You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. ... The evidence which you are to consider consists of the testimony of witnesses and the exhibits received. T158; Docket #68.*

In the final instructions the Court stated:

*You should find the Defendant guilty only if you have a firm and abiding conviction of the Defendant's guilt based on a full and fair consideration of the evidence presented in the cases and not from any other source. T391, 424; Docket # 68.*

A jury is presumed to follow the instructions provided by the Court. State v. Asbridge, 555 N.W.2d 571, 575 (ND 1996); State v. Breeding, 526 N.W.2d 465, 472 (ND 1995)(absent acceptable proof to the contrary, the Supreme Court must assume the jury followed the Court's instructions). Zephyrin has provided this Court no details of the prejudicial nature of the publicity nor any proof that the publicity had any impact on the jury. The only juror who indicated she may not be able to be impartial was excused from service.

A defendant is entitled to a fair, but not necessarily perfect, trial. Osier, 1999 ND 28, ¶24, 590 N.W.2d at 212 (citing State v. Ellvanger, 453 N.W.2d 810, 815 (ND 1990)). Under the circumstances of this case, Zephyrin has not only failed to show a trial atmosphere "utterly corrupted by press coverage", but has failed to show any prejudice, partiality or other lack of fairness upon which to find the Court clearly erred in denying his motion for mistrial.

**III. The prior photo-lineup identification of Zephyrin by victim was not impermissibly suggestive nor was Zephyrin denied due process.**

**A. Due Process.**

The analysis for whether a witness at an earlier identification can identify the defendant "at trial" focuses on whether the prior identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification". State v. Norrid, 2000 ND 112, ¶9, 611 N.W.2d 866 (quoting Simmons v. US, 390 U.S. 277, 384 (1968)). The related due process test is a two-pronged analysis: (1) whether the identification procedure was impermissibly suggestive, and (2) if so, whether the identification nevertheless is reliable under the totality of circumstances test. Norrid, 2000 ND 112, ¶10, 611 N.W.2d 866 (referring to Stovall v. Deno, 388 U.S. 293, 302 (1967)). The defendant has the burden of proving the identification procedure is impermissibly suggestive, and the State must then show the identification is reliable under the totality of circumstances test. State v. Packineau, 423 N.W.2d 148, 150 (ND 1988).

**B. No Impermissible Suggestion.**

Zephyrin has failed to carry his burden of showing that the photo-lineup used in this case and shown to the victim was impermissibly suggestive. The photo-lineup included six African-American men. T178. Zephyrin is a African-American man. T164. He does not discuss the lineup in much further detail in his brief. His primary focus seems to be that the victim, when shown the photo-lineup, picked out Zephyrin but then, in response to a question on her level of certainty, said 85%. T185. On the other hand, when viewing Zephyrin at the

note that the victim told police during the photo-lineup that while she was 85% sure, the same eyes and nose were right, but the skin was not quite right. The testimony showed that police used Zephyrin's drivers license ID, which was a few years old, and that his skin color on that picture was lighter than when seen in person. T200. It is common knowledge that skin color in a photograph may be impacted by the type of flash used and other ambient light. Furthermore, it might be fair to assume that a victim may get a better sense from a 3-dimensional in-person view of the suspect than from just a 2-dimensional view.

C. Photo-Lineup Not Preserved for Appeal.

The State is not entirely clear as to the exact nature of Zephyrin's appeal on this photo-lineup claim. He starts by asserting the original photo-lineup was impermissibly suggestive. His argument appears to evolve into a lack-of-sufficient-evidence-to-convict claim at the end. If the 85% identification is the essence of Zephyrin's claim, then the State asserts that matter was not properly preserved for appeal. Generally, issues not properly preserved for appeal will not be heard on appeal because the trial court has not had a chance to rule upon it. State v. Hepper, 316 N.W.2d 338, 340 (ND 1982). While Zephyrin spent plenty of time in opening statement, cross-examination and closing argument discussing weaknesses with the photo-lineup and identification in general, he did not submit a pre-trial motion to suppress it and did not object to the victim's testimony. Accordingly, the State asserts that issue was not preserved for appeal.

D. Denial of Rule 29 Motion was Appropriate.

If Zephyrin's claim is there was insufficient evidence to convict him, then

he raised a Rule 29 motion for judgment of acquittal at the close of the State's case, which the District Court duly denied. The Court, in ruling upon a Rule 29 motion, must review the evidence in the light most favorable to the prosecution and deny it if there is substantial evidence upon which a reasonable juror could find guilt beyond a reasonable doubt. State v. Himmerick, 499 N.W.2d 568 (ND 1993); State v. Kingsley, 383 N.W.2d 828 (ND 1986). Zephyrin says that in the absence of a proper identification by the victim, the evidence does not support a conviction. The State asserts the victim's identification was appropriate. In addition, there were many other exhibits and testimony identifying Zephyrin as the perpetrator including, among others: (1) he periodically stayed with his former girlfriend, including on the day of the robbery, who indicated Zephyrin had no money before the robbery, but had at least a \$120 immediately after the robbery (T209-10, 216- 19); (2) the type of slip-on tennis shoes worn by the robber and evident in the somewhat grainy pictures at the Red-D-Cash are unusual and Zephyrin had that type of shoe (T188-89, 327); (3) Zephyrin's tennis shoes left a somewhat distinctive tread pattern which was similar to the one found on the door apparently kicked in by the robber at Red-D-Cash (T327); (4) a single golf club was found at the girlfriend's residence, which she had never seen before and which Zephyrin believed was his, and which was similar to the one brandished by the robber (T214, 381); (5) a pair of gloves, a grey sweatshirt and a cap/visor with an "02" insignia, similar to the type worn by the robber, were found at the girlfriend's residence (T187, 214, 221); (6) no one other than Zephyrin had access to the girlfriend's residence on the day of the robbery (T216-17); (7) the girlfriend's residence was within walking distance of the Red-

D-Cash (T212, 320); (8) the robber took the victim's truck which was later found empty only a couple of blocks from the girlfriend's residence (T235, 320); and (9) after Zephyrin was arrested and given his Miranda rights, and while riding in a squad and passing a truck stop, Zephyrin stated to police something the effect that "I should have jacked that place instead of Red-D-Cash"(T335). Furthermore, Zephyrin did not provide persuasive evidence to contradict the State's case. *See generally*, T375-88.

For the reasons given above, and throughout the testimony at trial, the State asserts the Court's denial was properly decided.

#### **CONCLUSION**

For the foregoing reasons, the State requests this Honorable Court affirm the Judgment and Conviction in the District Court and deny Zephyrin's requests for appellate relief.

Respectfully submitted this 28th day of July, 2003.



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Plaintiff-Appellee, )  
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vs. )  
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Peter Paul Zephyrin, )  
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Defendant-Appellant. )

**AFFIDAVIT OF SERVICE BY MAIL**  
Supreme Court # 20020352  
Cass County District Court # 09-02-K-01528

STATE OF NORTH DAKOTA )  
) SS.  
COUNTY OF CASS )

Brian P. Burdick, being first duly sworn on oath, deposes and states that he/she is of legal age and that on this date she deposited in the United States Mails at Fargo, North Dakota, a true and correct copy of the following documents and a 3½ inch computer disk in the above-entitled action:

**APPELLEE'S BRIEF**

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

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Fargo, ND 58106-0396

Penny Miller  
Clerk of Supreme Court  
State Capitol  
Bismarck, ND 58505

Dated this 28th day of July, 2003.

Burdick

Subscribed and sworn to before me this 28th day of July, 2003.

HEIDI BIERDEMAN  
Notary Public  
State of North Dakota  
My Commission Expires May 2, 2006

Bierdeman  
Notary Public