ORIGINAL

IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA

20040298 CA

Supreme Court No. 20040298
District Court No. 03-K-485

STATE OF NORTH DAKOTA

Plaintiff-Appellee,

vs.

LOREN BERNSTEIN

Defendant-Appellant.

Appeal from a Final Judgment entered by the District Court
for Bottineau County, Northeast Judicial District, State of North Dakota.
The Honorable John C. McClintock, Jr. presiding.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

This reply to the argument contained in the State's submission to this Court will be succinct. Even if the trial court did, as the State argues, consider the element of Mr. Bernstein's intent, the State's brief fails to address the problem of whether the Court's determination that the proffered evidence, which directly bore on Mr. Bernstein's intent, was irrelevant and inadmissible.

A. Even if the State is Correct That the Trial Court Considered the Issue of Mr. Bernstein's Intent, it was Error for the Judge to Refuse to Admit Mr. Bernstein's Testimony and Proffered Exhibit A.

The State takes the somewhat untenable position that the "Trial Court considered all relevant evidence presented," Appellee's Brief 4:14 (Appellee), and, further, that the trial judge adequately considered the intent element of the crime. Id. at 5:3-5. In addition, the State seems to believe that Mr. Bernstein's argument centers on a contention that he actually had license or privilege to enter the premises at issue. Id. at 5:10-12.

First, and getting back to a clear statement of the issue before this Court, the question is whether the excluded evidence was relevant to any element of the charged crime. The true state of affairs as to the actual existence of license or privilege is not dispositive of the issue of intent.

In his Opening Brief, Mr. Bernstein rather convincingly showed intent was an element of the charged crime to be proven by the State at trial. The State seems to concede this point. Appellee 5:7-9.

What the State fails to address is, then, how, even assuming the element of intent was considered by the trial judge in the form of Mr. Bernstein's reasonable belief as to his right of entry into his father's house or otherwise, it could have been legally correct to determine that evidence directly bearing on Mr. Bernstein's state-of-mind was irrelevant to his intent in entering the subject property.

Thus, even if this Court accepts the State's argument that the trial court considered the element of intent in finding Mr. Bernstein guilty, it must still reverse the judgment of guilt, as the finder-of-fact failed to consider all offered evidence relevant to that issue.

When the trial judge excluded the state-of-mind evidence as being irrelevant, he committed reversible error.[1]

B. The Proffered Evidence was not Inadmissible Hearsay.

As a fall back position, the State weakly argues the proffered evidence, even if relevant, was inadmissible hearsay. Appellee 6:22-7:2. This, also, is a flawed argument.

Hearsay is, as all lawyers and judges know from memory, an out of court statement offered in evidence for the purpose of proving the truth of the matter asserted. N.D.R.Ev. 801(c)(West 2005). The evidence at issue in this case was not offered to prove its substantive truth. Rather, the out-of-court statements of Mr. Bernstein's father were offered to show their effect on Mr. Bernstein's state-of-mind in entering his father's house.

[1] The State does not appear to contend the error was harmless.

Further, the evidence was substantively admissible as well. The proffered out-of-court statements were what are commonly known in the law of hearsay as "verbal acts." Verbal acts are statements that, when made, change the legal relationship of the declarant and his or her listener. United States v. Moreno, 233 F.3d 937, 940 (7th Cir. 2000)(consent to search residence admissible as verbal act); Hydrite Chem. Co. v. Calumet Lubricants Co., (7th Cir. 1995)(offer and acceptance of contract admissible); State v. Welker, 536 So. 2d 1017, 1019-20 (Fla. 1988)(consent to record telephone conversation admissible).

Therefore, the State's argument in this regard also fails.

II. CONCLUSION

For the reasons stated above, as well as for those contained in the Appellant's Opening Brief, the State's position should not be accepted by this Court and Loren Bernstein's conviction should be reversed.

Dated this 7th day of March, 2005.

Ss// James G. Wolff
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CERTIFICATE OF ELECTRONIC FILING AND ELECTRONIC SERVICE

I certify that on the 7th day of March, 2005, I transmitted, via electronic mail, the foregoing Appellant's Reply Brief in Adobe Portable Document Format and directed the document to:

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