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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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DEC 17 2007

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff/Appellee,	)	Supreme Court No. 200700250
	)	
vs.	)	District Court No. 09-06-K-0978
	)	
Edward Dana Curtis,	)	
	)	
Defendant/Appellant.	)	
	)	

APPELLEE'S BRIEF

APPEAL FROM THE CRIMINAL JUDGMENT AND COMMITMENT ENTERED ON AUGUST 17, 2006 IN EAST-CENTRAL DISTRICT COURT, CASS COUNTY STATE OF NORTH DAKOTA, THE HONORABLE BURT L. RISKEDAHL, PRESIDING

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[¶5] II. Whether the district court properly declined to apply the Civil Dispute Doctrine when there was neither a unique property law issue nor an issue traditionally settled in a civil forum?

[¶6] III. Whether the district court properly exercised its discretion in denying the Appellant's Rule 29 motion for acquittal when the court, after viewing the evidence in a light most favorable to the prosecution, found that there was sufficient evidence for which a reasonable jury could find guilt beyond a reasonable doubt?

[¶7] IV. Whether the issue of "weight of the evidence" is waived or not properly preserved for appeal absent a timely Rule 33 motion for a new trial submitted at the district court level?

[¶8] STATEMENT OF THE CASE

[¶9] The State has reviewed the Appellant's Statement of the Case at paragraph one of Appellant's brief ("Ap. Br.") and has no objections. The State respectfully urges this Court to affirm the conviction and judgment of the East Central Judicial District Court.

[¶10] STATEMENT OF FACTS

[¶11] On October 14, 2005 , Edward Dana Curtis ("Curtis") deposited a check in the amount of $55,540 drawn on a Canadian bank account into a newly formed account at Northland Educators Federal Credit Union ("Northland"). (Trial Tr. pp. 24-26). Thereafter, Northland converted the Canadian check to reflect the then existing exchange rate and applied a tentative deposit in the amount of $45,341 in US Dollars conditioned upon the check clearing the bank of origination. (Trial Tr. pp. 24-26).

[¶12] Northland then forwarded the check to a central clearing bank as a foreign collection item for processing. (Trial Tr. p. 41). On October 27, 2005, Northland received notification from an intermediary bank that the check had cleared and could be deposited into Curtis' account. (Trial Tr. pp. 42-43). Shortly thereafter, Shelly Flaagan, an employee of Northland, notified Curtis the check had cleared and funds were available for withdrawal. (Trial Tr. p. 34). Curtis immediately ordered $10,000 in cashier's checks and $29,600 in money orders. (Trial Tr. p. 104).

[¶13] On October 28, 2005, Northland was informed by the intermediary bank that the check had not actually cleared and the funds would be withdrawn from Northland's account. (Trial Tr. pp. 43-44). Marietta Wahl, manager for Northland, acting upon the notification, then personally called Curtis to inform him that the check was returned and had not actually cleared. (Trial Tr. pp. 43-44). Curtis responded "Holy shit, I've already spent

some of that money. I've given some of the checks out and I've given some of the money orders out." (Trial Tr. p. 44). Ms. Wahl informed Curtis at that time that he needed to return whatever checks or money orders that he had not already spent and it would be applied to the amount that he ultimately owed Northland. (Trial Tr. pp. 44-45). Thereafter, Curtis failed to contact Northland and failed to return any remaining checks or money orders. (Trial Tr. p. 45).

[¶14] Based upon the lack of contact after Curtis was informed of the insufficient check not clearing, Ms. Wahl contacted the Fargo Police Department to report the matter. (Trial Tr. p. 51). Officer Mark Voightschild was assigned to take a report and initiate an investigation. (Trial Tr. p. 72). The officer was not able to take a statement from Curtis, however, he was able to secure a web site posting made by Curtis. (Trial Tr. pp. 73-74). The posting indicated that Curtis was well aware of his "bank discrepancy" and that he "set up a pretty good game." (Trial Tr. pp. 75). The posting is a request for legal briefs to "advertise and poke them all with ... [he] loves poken but the nitty gritty that keeps [him] out of jail [he] never [has] time for." (Trial Tr. pp. 75).

[¶15] At trial the State presented the testimony of four witnesses. The first witness was Valerie Nedrebo who testified that she assisted Curtis in opening the account, watched him fill out and sign the standard bank signature card and took several calls from Curtis inquiring if the money was available for withdrawal. (Trial Tr. p. 28-32). The second witness called was Shelly Flaagan who testified that she took at least one call from Curtis inquiring about the money, she called Curtis when the check reportedly cleared and prepared his order for the money orders and the cashier's checks at denominations Curtis chose after she explained the limitations. (Trial Tr. pp. 33-38). The third witness called was Marietta

Wahl who testified that she was the one who received notice that the check had not cleared, had called Curtis personally to inform him of this fact and also indicated that she had received thirteen returned receipts for money orders issued in the amount of $800 all with issue dates issued after she had discussed the matter with Curtis on October 28, 2005. (Trial Tr. pp. 39-71). The last witness called by the State was Officer Mark Voightschild who testified that he discovered Curtis' online posting which helped prove Mr. Curtis' criminal intent. (Trial Tr. pp. 71-77).

[¶16] The defense called three witnesses in its case in chief. Most notable of the three witnesses was the testimony of Curtis himself. (Trial Tr. pp. 95-114). Curtis' testimony mainly hinged upon his informing the jury that our monetary system is fraudulent and that no money ever really changed hands, thus the bank either counterfeited the money it gave him or he really didn't receive anything of value to be considered for a charge of theft. (Trial Tr. pp. 98-101). During his direct testimony. Curtis frankly commented to the jury that he had done nothing more than "cheat a cheater". (Trial Tr. p. 100).

[¶17] The State, in closing, explained that the charges were not focused upon the depositing of the foreign check, but rather upon Curtis' intentional actions after the bank informed him that there had been an error and the money had to be returned. (Trial Tr. pp. 123-124). After a short period of deliberations the jury returned with a unanimous verdict of guilty. (Trial Tr. p. 139).

[¶18] **LAW AND ARGUMENT**

[¶19] **I. The district court properly declined to give additional aid in issuing subpoenas for witnesses after the court had been informed by stand-by counsel that the requested witnesses could not provide relevant testimony to the issue of theft.**

[¶20] When a district court refuses to issue subpoenas requested by a defendant the matter may rise to the level of a Sixth Amendment violation thus requiring this Court to review the matter de novo. State v. Treis, 1999 ND 136, ¶ 11, 597 N.W.2d 664. In contrast, when an issue is not raised by the defendant before the district court the issue is not properly preserved for appeal. State v. Kopp, 419 N.W.2d 169, 172 (N.D. 1988). In addition, even potential constitutional issues must be brought to the attention of the district court to be properly preserved for review. State v. Fehl-Haber, 2007 ND 99, ¶ 12, 734 N.W.2d 770. An issue may be reviewed, absent being properly preserved, if the matter rises to the level of obvious error in accordance with N.D.R.Crim.P. 52(b). Id. A constitutional error only rises to the level of obvious error if the error was "egregious" or grave." Treis, 1999 ND 136, ¶ 12.

[¶21] In the case at bar Curtis was not denied the ability to subpoena relevant witnesses to testify on his behalf; nor did he properly preserve the matter for appeal. The first time any issue with potential witness subpoenas was brought to the attention of the court was on June 7, 2007. At that hearing Curtis informed the court that he wished to proceed pro se because he wished to subpoena members of the FBI and Homeland Security against the advice of counsel. (June 7, 2007, Hearing Tr. p. 7). Curtis' counsel, Steve Mottinger, properly indicated to the court at that time that he would not subpoena the requested

witnesses because they had nothing relevant to offer. (June 27, 2007, Hearing Tr. pp. 3-4, 8) Curtis then addressed the court personally and indicated that he wanted the witnesses subpoenaed for his protection. (June 27, 2007, Hearing Tr. p. 6)

[¶22] The court then found that Curtis could act as his own counsel, however, standby counsel was assigned at Curtis' request. In accordance with that finding the court continued Mr. Mottinger's appointment in that capacity. Mr. Mottinger willingly accepted the appointment and indicated on the record that although he was standby counsel he was first and foremost an officer of the court and would not issue subpoenas for witnesses who could not provide relevant testimony on the issues.

[¶23] At the end of the State's case the matter was once again touched upon shortly after the court denied Curtis' Rule 29 motion for acquittal. During a brief discussion on the record Curtis indicated to the court that he didn't understand why the FBI, BCI and Homeland Security agents he requested were not available. Again Mr. Mottinger addressed the court indicating that he discussed the witness subpoena request with Curtis and did not issue the subpoenas because the requested witnesses had nothing relevant to offer. The court agreed and did not find a need to issue the requested subpoenas.

[¶24] While the issue was brought up on two separate occasions Curtis never objected to the courts handling of the issue nor did he demand the subpoenas be issued before presenting his case. In addition, he never presented to the court his reason for believing that the requested witnesses were relevant other than to indicate that he wanted the agents from multiple agencies present for his own protection.

[¶25] The district court handled the matter appropriately and took reasonable steps to ensure that Curtis was afforded the tools necessary for a fair trial on the issues. There is

no obvious error in how the district court handled the issue with the requested subpoenas.

[¶26] In the alternative, if the Court should find that Curtis preserved the matter appropriately for appeal, the State would still contend that the district court handled the matter appropriately. Similar to Treis, the district court, by affirming Mr. Mottinger's estimation of the witnesses relevance, properly found that the witnesses were not relevant and subpoenas were properly withheld by Mr. Mottinger.

[¶27] **II. The district court did not err in not applying the Civil Dispute Doctrine when there was neither a unique property law issue nor an issue traditionally settled in a civil forum.**

[¶28] Under the Civil Dispute Doctrine, a court in some situations may dismiss a criminal action when there is a unique property law question or when the action involves an issue traditionally settled in a civil forum. See State v. Perreault, 2002 ND 14, ¶ 10, 638 N.W.2d 541 (citing State v. Meyer, 361 N.W.2d 221 (N.D. 1985) and State v. Brakke, 474 N.W.2d 878 (ND 1991)). In State v. Meyer, this Court held that a criminal action is ill-suited to a settlement of the dispute as to whether or not the necessary requirements have been met to make the allegedly obstructed road a road by prescription under N.D.C.C. § 24-07-01. See Meyer at 222. In State v. Brakke, this Court likewise held that the a criminal action is not the appropriate forum to resolve the issue of whether a cotenant who plants crops on land which is subsequently lost through partition also loses entitlement to the growing crops. See Brakke at 882.

[¶29] In this case, there is no unique property law question. The issue is simply whether the Defendant acted knowingly in exercising unauthorized control over the property of Northland with the intent to deprive them thereof. The level of intent is a factor involved

in nearly every criminal action. Whether a person's actions or conduct rise to an identified level of intent is routinely decided in criminal matters. The issue in this case is very distinguishable from the issue in Brakke of whether a cotenant who plants crops on land which is subsequently lost through partition also loses entitlement to the growing crops. Whether the Defendant acted knowingly with the intent to deprive is not a unique property issue; rather it is a criminal issue.

[¶30] There is no issue commonly resolved in a civil forum. As noted, the issue of whether a person's conduct falls within a certain level of intent is commonplace in criminal actions. The issue in this case is very distinguishable from the issue in Meyer of whether or not the necessary requirements have been met to make a road by prescription under N.D.C.C. § 24-07-01. Whether the Defendant acted knowingly and with the intent to deprive is not an issue commonly resolved in a civil forum.

[¶31] Clearly the case as presented to the jury required them to find that Curtis' actions, after being informed of the bank error in clearing the check, rose to the level of knowingly exercising control over the property of Northland with the intent to deprive them of the money. The jury received evidence and testimony that Curtis maintained control over and uttered numerous money orders even after being informed by Marietta Wahl that his check had not actually cleared. The evidence also clearly indicated that Curtis was aware that he was exercising control over money that should have been returned to Northland.

[¶32] **III. The district court properly exercised its discretion in denying the Appellant's Rule 29 motion for acquittal when the court, after viewing the evidence in a light most favorable to the prosecution, found that there was sufficient evidence for which a reasonable jury could find guilt beyond a**

reasonable doubt.

[¶33] Rule 29(a) of the North Dakota Rules of Criminal Procedure allows a motion by the defendant or the court to enter a judgment of acquittal if the evidence viewed in the light most favorable to the State does not rise to the level "upon which a reasonable mind could find guilt beyond a reasonable doubt." State v. Hafner, 1998 ND 220, ¶ 21, 587 N.W.2d 177. In order to preserve such a motion on appeal a defendant is required to advance the appropriate Rule 29(a) motion before the court. State v. Yineman, 2002 ND 145, ¶ 13, 651 N.W.2d 648.

[¶34] In State v. Krull, this Court further explained the standard of review on appeals related to sufficiency of evidence as follows:

> In an appeal challenging the sufficiency of the evidence, this Court "look[s] only to the evidence most favorable to the verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction." State v. Knowels, 2003 ND 180, ¶ 6, 671 N.W.2d 816 (quoting State v. Kunkel, 548 N.W.2d 773, 773 (N.D. 1996)).

2005 ND 63, ¶ 14, 693 N.W.2d 631. This Court noted that in looking at the sufficiency of the evidence it "will not weigh conflicting evidence, nor judge the credibility of witnesses." Id. (quoting State v. Klose, 2003 ND 39, ¶ 19, 657 N.W.2d 276). Moreover, this Court has indicated that in order to reverse a conviction on appeal for sufficiency of evidence it will only reverse if "no rational fact finder could have found the defendant guilty beyond a reasonable doubt." State v. Jacob, 2006 ND 246, ¶ 6, 724 N.W.2d 118 (quoting State v. Steen, 2000 ND 152, ¶ 16, 615 N.W.2d 555).

[¶35] In this particular case the trial court properly determined that the State had

offered enough evidence, via testimony and exhibits, for a jury of reasonable minded people to find the essential elements of the crime proven beyond a reasonable doubt. In fact, the trial court indicated on the record that, it felt that there was enough evidence for the trier of fact to receive the case.

[¶36] Equally important to the trial court's ruling is the testimony of the State's witnesses as well as the testimony of Curtis himself. The physical evidence offered at trial indicted that Curtis uttered money orders long after being informed by Northland that he needed to return the money. Curtis testified that all he did was "cheat the cheater" and informed the jury that, in his belief, the bank was not really out anything as this was nothing more than a book entry with no actual value gained or lost. Finally, the jury received a web posting of Curtis' that indicated that this was nothing more than a scheme to criminally defraud Northland of their money.

[¶37] The record indicates that there was sufficient evidence presented to support a verdict of guilty. The trial court properly applied the rule in denying the Defendant's Rule 29(a) motion. At the close of the State's case-in-chief the evidence, viewed most favorably for the prosecution, was sufficient for a jury of reasonable minded jurors to find that the essential elements were proven beyond a reasonable doubt.

[¶38] **IV. The issue of "weight of the evidence" is not properly preserved for appeal absent a timely Rule 33 motion for a new trial submitted at the district court level.**

[¶39] A motion for a new trial is an invitation to the trial court to review the evidence on whether the weight and credibility of such evidence supports the conviction. State v. Klose, 2003 ND 39, ¶ 17, 657 N.W.2d 276. Such a motion is typically advanced under

N.D.R.Crim.P. Rule 33, which provides in pertinent part:

> (a) Defendant's Motion. On the defendant's motion, the court may vacate any judgment and grant a new trial to that defendant if the interest of justice so requires. A motion for a new trial must specify the alleged defects and errors with particularity. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
>
> (b) Motions.
>
> > (2) Other Grounds. Any motion for a new trial based on any reason other than newly discovered evidence must be filed within ten days after the verdict or finding of guilty. Any motion for a new trial based on jury misconduct must be supported by an affidavit. Any motion for a new trial based on any other grounds may be made on the file, exhibits, and minutes of the court. Pertinent facts not a part of the minutes may be shown by affidavit except as otherwise provided in these rules. Either party may procure a complete or partial transcript of the proceedings for use on the hearing of the motion. (*emphasis added*).

[¶40] A trial court in reviewing the matter upon motion may weigh the existing evidence in the record and apply its perceived credibility to the witnesses heard. State v. Thiel, 515 N.W.2d 186, 188 (N.D. 1994). If the trial court then determines that the verdict was against the weight of the evidence, it may grant a new trial. Id. Upon a timely motion and appeal, this Court will review a trial court's determination of weight and credibility under an abuse of discretion standard. State v. Barendt, 2007 ND 164, ¶ 22, 740 N.W.2d 87.

[¶41] However, the motion must be properly advanced to the trial court or risk not being considered by the Supreme Court on appeal. State v. Morstad, 493 N.W.2d 645, 646 (N.D. 1992). The basis for this Court's inability to review such matters, absent a proper motion at the trial court level, is that this Court will not sit as a "thirteenth juror" in attempting to determine weight of evidence and witness credibility from the bare record on the matter. Barendt, 2007 ND 164, ¶ 21, 740 N.W.2d 87.

[¶42] Similar to Barendt, Curtis failed to advance a proper Rule 33 motion to the trial court based upon weight of the evidence. The trial court is in the best position to review the weight and credibility of the testimony and evidence as it is offered before the jury. Without the benefit of a proper and timely motion, this Court would be required to review the entire record and apply credibility and weight based on nothing more than a reading of the bare trial transcript.

[¶43] Regardless, the record indicates that there was indeed sufficient evidence to support the conviction of Curtis. During the trial of Curtis for the charge of theft the State called four witnesses to the stand. Two of the witnesses in particular provided testimony which clearly implicated Curtis in the theft of least thirteen money orders issued in the denomination of $800 each. The State entered all thirteen of the returned receipts for the money orders which showed that they were uttered after Marietta Wahl talked to Curtis on October 28, 2005. Additionally, the web posting discovered by Officer Voigtschild tended to show that Curtis' intent was to wrongfully deprive Northland of the funds he received. Finally, Curtis himself explained to the jury that he merely took advantage of the bank's mistake and was justified because the bank generally cheats the people.

[¶44] CONCLUSION

[¶45] For the foregoing reasons, the State respectfully requests that this Court affirm the conviction of Curtis.

Respectfully submitted, this 17th day of December, 2007.

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[¶46] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on this 17th day of December, 2007, upon Daniel James Borgen at dborgen@nd.gov:

GARY L. DELORME