20140048
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CLERK OF SUPREME COURT
JUNE 12, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	Supreme Court No. 20140048
vs.	)	
	)	District Court No. 09-2013-CR-01831
Darrius Cortez Patterson,	)	
	)	
Defendant-Appellant.	)	

Appeal from Criminal Judgment and Commitment dated January 6, 2014.
Cass County District Court
East Central Judicial District
The Honorable Steven E. McCullough, Presiding

APPELLEE'S BRIEF

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[¶1] **TABLE OF CONTENTS**

[¶2] **TABLE OF AUTHORITIES**

Paragraph No.

State Cases:

Other Authorities:

[¶3] JURISDICTIONAL STATEMENT

[¶4]The district court had jurisdiction over this case pursuant to N.D. Const. Art. VI, § 8 and N.D.C.C. § 27-05-06(1). The Supreme Court has jurisdiction over this appeal under N.D. Const. Art. VI, § 6 and N.D.C.C. § 29-28-06(2). This appeal of the criminal judgment and commitment is timely under N.D.R.App.P. 4(b)(1)(A).

[¶5] STANDARD OF REVIEW

[¶6] "A de novo standard of review applies to whether facts rise to the level of a constitutional violation, including a claim that prosecutorial misconduct denied a defendant's due process right to a fair trial." State v. Pena Garcia, 2012 ND 11, ¶ 6, 812 N.W.2d 328 (citation omitted). "The control and scope of opening and closing arguments is largely a matter left to the discretion of the trial court, and a case will not be reversed on the ground that the prosecutor exceeded the scope of permissible closing argument unless a clear abuse of discretion is shown." State v. Skorick, 2002 ND 190, ¶ 11, 653 N.W.2d 698 (citation omitted).

[¶7] ISSUE PRESENTED

I. [¶8] Should the trial court have declared a mistrial because of the testimony given by Jennifer Jordan and/or because of the remarks made by the prosecution during the State's opening and closing arguments?

[¶9] STATEMENT OF THE CASE

[¶10] An Information charging Defendant with delivery of cocaine within one thousand feet of a school and with having two or more prior convictions

resulting in a 28-year minimum, mandatory imprisonment was filed on May 29, 2013. (Appellant's App. at 1.) The Defendant waived his right to a preliminary hearing on July 18, 2013, and a not guilty plea was entered. (Appellant's App. at 2.) A jury trial was held October 15-17 resulting in a guilty verdict. (Appellant's App. at 2-3.) A pretrial sentencing investigation was ordered and the sentencing hearing was held January 6, 2014. (Appellant's App. at 3.) Defendant was sentenced to the 28-year minimum, mandatory sentence as required by law. (Appellant's App. at 38-39.) A motion to extend time for filing Notice of Appeal was filed February 7, 2014. (Appellant's App. at 40-42.) An Order to Extend Time for Filing was entered February 10, 2014. (Appellant's App. at 3.) A Notice of Appeal was filed February 7, 2014. (Appellant's App. at 44.) Additionally, a Rule 35 Motion to Reduce Sentence was filed on February 7, 2014. (Appellant's App. at 3.) The State filed its Response to Rule 35 Request for Reduction of Sentence on February 11, 2014. (Appellant's App. at 3.) The trial court issued its Order Denying Defendant's Request for Reduction of Sentence on February 13, 2014. (Appellant's App. at 3.)

[¶11] **STATEMENT OF FACTS**

[¶12] In the latter part of 2011 Jennifer Jordan (Jordan) was working as a confidential informant (CI) with the Fargo Police Department. (Transcript (Tr.) at 64:11-18.) Jordan became a CI by asking law enforcement for help to get out of the drug using life. (Tr. at 65:10-12.) She tried to get clean of drugs but kept being approached by dealers, including Defendant. (Tr. at 65:10-12.) She had

moved to Fargo from Chicago where she had become addicted. (Tr. at 75:8-12.) She had a criminal record for theft, forgery, and shoplifting. (Tr. at 80:1-21.) Once in Fargo, she continued her shoplifting ways for a few years. (Tr. at 80:22-81:8.) She also had a false information conviction. (Tr. at 81:5-6.)

[¶13] As a CI, she was being paid, not receiving credit regarding pending criminal charges because she had no charges pending at the time. (Tr. at 76:21-77:3.) In fact, she even told the police that she didn't want to be paid; she just wanted Defendant and the others who were trying to get her to buy drugs to leave her alone. (Tr. at 77:5-11.) She did not have an intimate relationship with the Defendant. (Tr. at 79:5-7.)

[¶14] On September 9, 2011, Fargo Police Department narcotics officers conducted a controlled buy using Jordan as a confidential informant (CI). (Tr. at 104:4-11.) The subject of the controlled buy was Defendant. (Tr. at 105:15-25.) Jordan made a phone call from her apartment to Defendant asking to buy crack cocaine. (Tr. at 125:14-15.) He agreed to meet her at the gas station just south of her apartment building. (Tr. at 125:24-25.) She was given buy money, searched, and a transmitter/microphone was placed on her person. (Tr. at 125:12-19.) She then left the apartment to do the controlled buy. (Tr. at 125:8-9.) The officers stayed in her apartment and did not have visual contact with Jordan. (Tr. at 125:19-21.) They could follow what happened through the audio transmission. (Tr. at 26:4-11.) Detective Bret Witte was doing surveillance and did have visual contact with Jordan. (Tr. at 100:16-22 & 104:1.)

[¶15] When Jordan arrived at the parking lot, Defendant and another male were already there in a parked car. (Tr. at 72:21-73:8.) Defendant was in the passenger seat. (Tr. at 73:18 .) She got into the vehicle (Tr. at 91:4-5.) She went into the store with the other man to purchase an energy drink. (Tr. at 73:21-24.) She got back into the car, received the crack cocaine from Defendant, and gave him the money. (Tr. at 73:23-74:5.) She then went back to her apartment and gave the drugs to the officers. (Tr. at 73:23-24 & 75:13-17.) They again searched her and found nothing. (Tr. at 18:18-25.)

[¶16] Levi Giraud, a crime analyst with the Fargo Police Department, testified regarding the distance between the Petro station and the nearest school, McKinley Elementary. (Tr. at 54:22-55:6.) He prepared a map to determine the distance using computer software and maps prepared by Fargo's engineering department. (Tr. at 55:17-19 & 56:14-18.) The map that was generated showed the longest distance is 816 feet. (Tr. at 61:3-4.)

[¶17] In his opening statement, defense counsel stated: "The evidence will show that she (Jordan) had a prior relationship with Mr. Patterson including a sexual relationship and also including herself possibly even selling drugs to Mr. Patterson." (Tr. at 10:11-14.) In describing her relationship with Defendant, Jordan testified:

> Q. So prior to you and your probation officer going to see the police, had you had some sort of relationship with Darrius Patterson?
> A. Yeah, I've known him since - - 2008 is when I first met him.
> Q. Okay. And what was exactly - - from 2008 to 2011, what was your relationship with Darrius Patterson?

Q. Just purchasing crack cocaine from him.
MR. O'DAY: Objection, Your Honor.
THE COURT: Sustained. You're going to have to - -
MR. O'DAY: Move to strike.
THE COURT: It's stricken. Disregard the last testimony. You are going to have to avoid any prior bad acts unless you can notice.
Q. (By Mr. Euren) Did you have any kind of an intimate relationship with Darrius Patterson?
A. No.

(Tr. at 67:23-68:5.)

[¶18] The State stated in its opening argument:

Quite often the defense case has to do with simply cross-examination of the State's witnesses, but they do have the right to present testimony and evidence itself also. And, again, I ask you to listen carefully, number one. But, also, don't make up your minds until all the witnesses and all the evidence have been presented and the Judge reads the finals (sic) instructions and sends you off to deliberate. At that point in time you can start sifting through things, start making decisions as to what you believe actually happened. Before that any witness can come up and contradict or give a slightly different story. So don't make up your mind ahead of time. We're asking you to be fair and impartial throughout the process.

(Tr. at 8:19 – 9:7.)

[¶19] In its rebuttal closing statement, the State stated:

The State accepts the burden of beyond a reasonable doubt. Mr. Patterson's liberty here is at stake. If you find him guilty, the probability is he's going to go to prison. There's at least another conviction on his record for sure if you find him guilty. That's not the point. The point is what's the evidence. Look at the evidence. Does the evidence prove that on September 9, 2011, Darrius Patterson delivered cocaine to Jennifer Jordan within a thousand feet of a school. If you believe that from all of the facts and testimony and evidence in this case, then you must find him guilty. And, again, I submit to you that the evidence was adduced here that - - those are the facts you should determine are that facts in the case.

(Tr. at 151:13 – 152:11.)

[¶20] The trial court's jury instructions included: "The opening statement and closing arguments of counsel are intended to help you in understanding the evidence, applying the law, and in determining the facts, but they are not evidence." (Appellant's App. at 8:11-13.) "The Defendant has a constitutional right not to testify. You must not draw any inference of guilt from the Defendant's silence. The prosecutor cannot mention the Defendant's silence, and you must not discuss or consider it." (Appellant's App. at 29:2-4.)

[¶21] LAW AND ARGUMENT

I. [¶22] There was no basis for the trial court to declare a mistrial.

[¶23] The basic argument is that prosecutorial misconduct occurred. There are three separate instances alleged. One is for witness questioning; the other two for argument statements. Each of these situations will be discussed separately.

[¶24] A. Testimony of Jennifer Jones.

[¶25] In his opening statement, defense counsel stated that the relationship between Jordan and Patterson would be explored. The State's question went to that issue. Unfortunately, Jordan answered with information regarding prior bad acts which had not previously been noticed. Later, in her testimony, Jordan stated that she did not have an intimate relationship with the Defendant. "[A] defendant may not claim error for arguments that are invited." State v. Pena Garcia, 2012 ND 11, ¶ 7, 812 N.W.2d 328. The harm, however, was limited and corrected. There was only one instance of this information coming out in testimony. Defense counsel objected, which was sustained, and asked for it to be stricken, which it

was. The trial judge went on to charge the jury to "[d]isregard the last testimony".

[¶26] A very similar situation occurred in State v. Trout, 2008 ND 200, 757 N.W.2d 556. A police detective testified to information that may have been prior bad acts. Id. at ¶ 5. This Court ruled that, since a curative instruction was given immediately, "[j]uries are generally presumed to follow instructions made by the court, and the issuance of a curative instruction to disregard certain evidence is generally sufficient to remove the threat of prejudice to the defendant." Id. at ¶ 11 (citations omitted).

[¶27] This Court has also stated:

> [T]he introduction of prior bad acts evidence will warrant a reversal of conviction only if the admitted testimony is so prejudicial that substantial injury occurred, and a different decision would have resulted had the error not been made. If independent evidence exists which could lead the trier of fact to the same result, we consider the admission of prior bad acts to be harmless error.

Id. at ¶ 8. (citations omitted). Here there was ample evidence that defendant committed the crime charged.

[¶28] **B. Opening statement and rebuttal closing argument.**

[¶29] First is the question of whether this issue was preserved for appeal. Defendant did not object to either of the statements alleged to be misconduct.

> "When a defendant fails to object to alleged misconduct, we will not reverse unless the misconduct constitutes obvious error. '[O]ur review is limited to determining if the prosecutor's conduct prejudicially affected [the defendant's] substantial rights, so as to deprive [the defendant] of a fair trial.' 'In deciding if there was obvious error, we consider the probable effect of the prosecutor's improper comments on the jury's ability to judge the evidence fairly.' Obvious error is noticed 'only in exceptional circumstances

in which the defendant has suffered a serious injustice.'"

State v. Vondal, 2011 ND 186, ¶ 12, 803 N.W.2d 578 (citations omitted).

[¶30] "[U]nder N.D.R.Crim.P. 52(b), '[O]bvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' To establish obvious error, the defendant has the burden to show (1) error, (2) that is plain, and (3) that affects substantial rights." State v. Thorson, 2003 ND 76, ¶ 9, 660 N.W.2d 581 (citations omitted). "[W]e will apply obvious error only 'to prevent an unjust conviction' or the 'exceptional situations where the defendant has suffered serious injustice.'" State v. Middleton, 2012 ND 181, ¶ 7, 820 N.W.2d 738 (citations omitted). "In assessing the possibility of error concerning substantial rights under Rule 52 (b), we examine the entire record and the probable effect of the actions alleged to be error in light of all the evidence." State v. Johnson, 379 N.W.2d 291, 293 (N.D. 1986) (citation omitted). "Of considerable consequence in our determination will be the relative strength of the case against the defendant." State v. Demery, 331 N.W.2d 7, 12 (N.D. 1983).

[¶31] "We first determine whether the prosecutor's actions were misconduct and, if they were, then we examine whether the misconduct had prejudicial effect." Vondal, 2011 ND 186, ¶ 12, 803 N.W.2d 578. These were both isolated incidents within the full context of the trial. State v. Chicano, 2013 ND 8, ¶ 24, 826 N.W.2d 294. Neither was a misstatement of the law or facts. "[T]o be prejudicial, the improper closing argument must have stepped beyond the bounds of any fair and reasonable criticism of the evidence, or any fair and

reasonable argument based upon any theory of the case that has support in the evidence." Id. at ¶ 22 (citations omitted). In context, the opening statement was telling the jury that the Defendant may present evidence other than by calling witnesses and they need to wait to make up their minds until all the evidence is in in order to be fair and impartial. The rebuttal closing statement, in context, was to focus the jury on the evidence, not possible punishment if the Defendant was found guilty. The trial court's instructions included that statements of counsel are not testimony and that the jury was not to concern itself with possible punishment. Based upon the clear evidence of guilt, these statements would have little effect on the jury's decision. "To determine whether a prosecutor's misconduct rises to a level of a due process violation, we decide if the conduct, in the context of the entire trial, was sufficiently prejudicial to violate a defendant's due process rights." Id.

> [¶32] The control and scope of opening and closing arguments is largely a matter left to the discretion of the trial court, and a case will not be reversed on the ground that the prosecutor exceeded the scope of permissible closing argument unless a clear abuse of discretion is shown. Unless the error is fundamental, the defendant must demonstrate that the prosecutor's comments during closing argument were improper and prejudicial. Ordinarily, 'inappropriate prosecutorial comments, standing alone, do not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding.'

State v. Skorick, 2002 ND 190, ¶ 11, 653 N.W.2d 698 (citation omitted). The alleged misstatements were not fundamental error and Defendant has not shown that they were prejudicial. Although there were two statements alleged, they were

at opposite ends of the trial and were in the context of significant evidence against the Defendant.

[¶33] **CONCLUSION**

[¶34] Therefore, the State respectfully requests this Court determine that no misconduct occurred and affirm the jury verdict.

Respectfully submitted this 12th day of June, 2014.

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[¶35] **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on the 12th day of June 2014, to: pulkrabeklaw@lawyer.com

Gary E. Euren