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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20140048

State of North Dakota,

Plaintiff-Appellee

- vs -

Darrius Patterson,

Defendant-Appellant

APPEAL FROM THE CRIMINAL JUDGMENT
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CR. NO. 09-2013-CR-00923
THE HONORABLE STEVEN E. McCULLOUGH, PRESIDING

BRIEF

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ABBREVIATIONS

Transcript - Tr.

Ev.- Evidence

STATEMENT OF THE ISSUE

[¶1] ISSUE: **I. 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 states closing and opening arguments?**

NATURE OF THE CASE

[¶2] An information was filed on May 29, 2013 charging the Defendant, Appellant Darrius Cortez Patterson with: Count 1- delivery of cocaine within 1,000 feet of a school. To this charge Mr. Patterson plead "not guilty".

[¶3] Mr. Patterson's defense to the above charge was entrapment.

[¶4] The trial ended on Oct. 16, 2013, with the jury finding Mr. Patterson guilty of delivering of cocaine within 1,000 feet of a school.

[¶5] The criminal Judgment in this case was entered on Jan. 6, 2014.

[¶6] A Motion to extend the time of filing the notice of appeal was filed on Feb. 7, 2014.

[¶7] A Notice of Appeal and an Order for Transcript was filed on Feb. 7, 2014.

[¶8] A Notice of Filing the Notice of Appeal was filed on Feb. 7, 2014.

[¶9] An Order to extend the time of filing of the Notice of Appeal was entered on Feb. 10, 2014.

[¶10] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶11] In this case Jennifer Jordan was the confidential informant (CI) used by the Fargo Police Department. Ms. Jordan prior to moving to Fargo, North Dakota lived in Chicago, Illinois. While living in Illinois Ms. Jordan became addicted to drugs and was convicted of several crimes.

[¶12] After Ms. Jordan moved to Fargo, North Dakota she was convicted of several more crimes. She was also having a hard time staying away from drugs and several people were trying to sell her drugs. To get rid of these drug sellers, Ms. Jordan

decided to become a CI for the Fargo Police Department.

[¶13] According to Ms. Jordan, one of the people who had been trying to sell drugs to her was Darrius Cortez Patterson. So after Ms. Jordan became a CI she lined up a cocaine buy from Mr. Patterson. The location of the buy was a parking lot by the Petro Serve Station. That parking lot has an address of 2902 North Broadway, Fargo, North Dakota. It is within 1,000 feet of the McKinley Elementary School. The parking lot is next door to Ms. Jordan's apartment. The address of Ms. Jordan's apartment is 514 30th Ave, Fargo, North Dakota.

[¶14] On September 9, 2011, prior to Ms. Jordan going to the parking lot to make the cocaine buy, Fargo police searched her for drugs, fitted her with a wire and gave her money to purchase the cocaine from Mr. Patterson. After the above preliminaries had been completed, Ms. Jordan went to the parking lot. Mr. Patterson arrived at the parking lot in a car driven by Jack Parchman. Mr. Parchman got out of the car and went with Ms. Jordan to the Petro Serve Station so she could purchase a power drink. Upon Ms. Jordan's return to the car she gave Mr. Patterson the money and he gave her the cocaine. After the purchase of cocaine, Ms. Jordan left the car and delivered the cocaine to the Fargo police. The Fargo police then took the cocaine to the Cass County State Attorney's office and reported the sale of cocaine to the Cass County States Attorney. The Cass County States Attorney then charged Mr. Patterson with the sale of cocaine withing 1,000 feet of a school.

[¶15] Mr. Patterson's trial began on October 15th, 2013. At that trial the State called six witnesses, Mr. Patterson called no witnesses and he didn't testify. Mr. Patterson's defense to the charge in this case was entrapment.

[¶16] The jury on October 16, 2013 found Mr. Patterson guilty of the sale of cocaine with in 1,000 feet of a school.

[¶17] During the testimony of Jennifer Jordan the following was said: Tr. Oct. 15, page 67, line 23 to page 68, line 12:

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?"

A. "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."

[¶18] The prosecutor in the states closing statement said: Tr. Oct 16, page 151, line 23 to page 152, line 2: "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."

[¶19] The prosecutor in the states opening statement said: Tr. Oct 15, page 8 line 19-22: "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."

ARGUMENT

[¶20] **ISSUE I. 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 states closing and opening arguments?**

[¶21] In this case Mr. Patterson did object to the testimony of Ms. Jordan about her relationship with Mr. Patterson from 2008 to 2011 being "just purchasing crack cocaine from him" Mr. Patterson also asked to have that testimony stricken and the court so ordered. However, Mr. Patterson never asked the court to declare a mistrial.

[¶22] As to the above statements made by the prosecutor in his closing argument and opening statement, Mr. Patterson made no objections.

[¶23] Mr. Patterson believes that the above testimony of Ms. Jordan and the above statements made by the prosecutor were obvious errors that effected his substantial rights. Therefore, he believes that N.D.R. of Crim. Pro. 52(b) applies to his case.

[¶24] N.D.R. of Crim. Pro. 52(b) **Obvious error**. An obvious error or defect that affects substantial rights may be considered even though it was not brought to the court's attention.

[¶25] The standard of review when obvious error is claimed is found in State vs Kraft 412 WW2d 303 (ND 1987) " The power to notice obvious error is exercised cautiously and only in exceptional circumstances where the defendant has suffered a serious injustice. State vs. Janda, 397 N.W.2d 59, 70 (N.D. 1986); Explanatory Note to Rule 52, N.D.R. Crim. P.; see also State vs. Johnson , 379 N.W.2d 291, 293 (N.D), cert. denied, 106 S ct. 1792 (1986). In assessing the possibility of error concerning substantial

rights under Rule 52(b), it is necessary to examine the entire record and the probable effect of the actions alleged to be error in light of all the evidence. Johnson, supra. Furthermore, Rule 52 applies to both the trial court and the appellate court. Explanatory Note to Rule 52, supra."

[¶26] In this case after the trial judge had stricken Ms. Jordan's testimony about purchasing cocaine from Mr. Patterson from 2008- 2011, he told the prosecutor to avoid prior bad act unless you have given notice. The prior bad acts that the trail judge was referring to are found in N.D.R of Evidence 404(b):

Crimes, wrongs, or other acts.

(1) *Prohibited uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted uses; Notice in a criminal case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. The prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial or during trial if the court, for good cause, excuses lack of pretrial notice.

[¶27] In the case now before the court there is nothing in the record to indicate that the prosecutor ever, prior to trail or during trial, gave the defense any notice of intent to introduce any of Mr. Patterson's prior crimes, wrongs, or other acts at trial.

[¶28] Prosecutors, at trial, are responsible for the testimony of their witnesses.

Therefore, prior to trial, prosecutors should have discussed with each of the State's witness his or her testimony and warned or at least cautioned each of the State witnesses about inadmissable testimony.

[¶29] State vs. Osier 1997 ND 170, 569 N.W. 2d 441, discusses bad act evidence and Rule 404(b) evidence in [4] under 1981:

[¶30] "Under this rule, evidence of prior bad acts or crimes is generally not admissible "unless it is substantially relevant for some purpose other than to point out the defendant's criminal character and thus to show the probability that he acted in conformity therewith." State vs. Biby, 366 N.W.2d 460, 463 (N.D. 1985). The rule acknowledges the inherent prejudicial effect prior bad act evidence may have on the trier of fact. State vs. Micko, 393 N.W.2d 741, 744 (N.D. 1986). The rule does not authorize automatic admission merely because the proponent advances a proper purpose for the evidence; instead, the relevance and probative value of the evidence must be demonstrated. Dahlen vs. Landis, 314 N.W.2d 63, 70 (N.D. 1981)."

[¶31] Osier then goes on to discuss the dangers of propensity evidence [6] "In similar circumstances, we have warned of the dangers of opening the door to this type of propensity evidence and of tempting a jury to convict a defendant for his past actions rather than on evidence of the charge misconduct. State vs. Forsland, 326 N.W.2d 688, 693 (N.D. 1982); State vs. Flath, 61 N.D. 342, 237 N.W. 792, 794 (1931); see also State vs. Micko, 393 N.W.2d at 745; State vs. Stevens, 238 N.W.2d 251, 258 (N.D. 1975), overruled on other grounds, State vs. Himmerick, 499 N.W.2d 568, 572 (N.D. 1993) [plea of not guilty in a criminal bench trial case preserved for appeal the issue of sufficiency of the evidence.]

[¶32] Mr. Patterson's theory of defense in this case was entrapment. The trial judge in Tr. Oct. 15, page 135, line 5-9: The Court: "Agreed. That's where I was stuck on, but I think I'm better giving it because it's their theory of the case and they are probably are going to try to say that there's an inference there. So I think I'm safer giving it than not giving it." The trial judge then gave the entrapment instruction to the jury.

[¶33] According to the Constitution of the United States and the Constitution of North Dakota, defendants in criminal trials are entitled to have trials where their substantial rights are protected. One of the N.D.R. of Ev. that protects a defendants substantial rights is Rule 404(b) of the N.D.R. of Ev. This rule is to be used before trial or during trial if the court excuses pretrial notice for good cause shown to determine whether a defendants other crimes, wrongs, or acts should be admitted into evidence at his trial.

[¶34] In the case now before the court there is no question that one of the State witnesses, Ms. Jordan, during the State's case gave testimony about prior crimes, wrongs, or acts of Mr. Patterson when she testified about his selling to her crack cocaine from 2008 to 2011. There is also no question that prior to this testimony by Ms. Jordan, no hearing had been conducted under Rule 404(b) of N.D.R. of Ev. to determine the admissibility of Ms. Jordan's testimony.

[¶35] Mr. Patterson believes that Ms. Jordan's testimony about him selling crack cocaine to her from 2008 to 2011 had such an adverse effect on his substantial right to a fair trial that the trial judge should have ordered a mistrial. Mr. Patterson basis for this belief is:

1. Rule 404(b) of the N.D.R. of Ev. is mandatory and not optional.
2. That a trial judge can not cure the State's putting in Rule 404(b) of

N.D.R. of Ev. when the State doesn't follow the procedure required by Rule 404(b) of N.D.R. of Ev.

[¶36] Mr. Patterson's entrapment defense was destroyed by Ms. Jordan when she testified Mr. Patterson was selling her crack cocaine from 2008 to 2011. No jury is going to believe that Mr. Patterson, after selling Ms. Jordan cocaine for three years had to be tricked in the fourth year before he would sell her cocaine.

[¶37] In the State Rebuttal to the defenses closing argument the State said: "If you find him guilty, the probability is he is going to prison. This is at least another conviction on his record for sure if you find him guilty."

[¶38] In order for the above comment to be proper, the State according to 404(b) would have had to have given a notice of an intent to use Mr. Patterson's prior convictions to Mr. Patterson's. No where in the transcript or in the court record is there any notice of intention.

[¶39] During the States rebuttal, when the prosecutor made the above statement, the defense made no objection. At this time Mr. Patterson is claiming the prosecutors rebuttal statement effected his substantial rights to a fair trial. Mr. Patterson also believes that N.D.R. of Crim. Pro. 52(b) allows him to bring a State's error or defect to the court's attention.

[¶40] The same standard of review that applied to the testimony of Mr. Jordan, applies to the above statement the prosecutor made in his rebuttal.

[¶41] After Ms. Jordan's testimony the trial judge said to the prosecutor "You are going to have to avoid any prior bad acts unless you can notice." This statement was a warning to the prosecutor, not to mention any other crimes, wrongs, or acts under N.D.R.

of Ev. 404(b). The prosecutor decided to disregard that warning and mention Mr. Patterson's prior criminal record in his rebuttal argument. A statement of Mr. Patterson's prior criminal record under these circumstances should be enough for a mistrial to be declared. If it isn't, according to Kraft "In assessing the possibility of error concerning substantial rights under Rule 52(b), it is necessary to examine the entire record and the probable effect of the actions alleged to be error in light of all the evidence". Therefore, the prosecution's rebuttal statement should be added to Ms. Jordan's statement and the two together are enough to have a mistrial declared.

[¶42] The statement made by the prosecutor in his opening was "Quite often the defense case has to do with simply cross examination of the State's witnesses but they do have a right to present testimony and evidence also." This statement is legally correct but misleading to a jury because it could get a jury to believe that the defense must present evidence and testimony when in fact the defense doesn't have to present any evidence or testimony.

[¶43] The above prosecutors opening statement wasn't objected to by the defense. Therefore, Mr. Patterson believes that N.D.R. of Ev. 52(b) applies and there is the same standard of review that was applicable to the prosecutors rebuttal.

[¶44] The Plaintiff's opening statement by itself would not be enough to have a mistrial declared. However, according to Kraft "In assessing the possibility of error concerning substantial rights under Rule 52(b), it is necessary to examine the entire record and the probable effect of the actions alleged to be error in light of all the evidence". When the prosecutors opening statement is considered with Ms. Jordans statement and the prosecutors rebuttal statement there is more then enough of a serious

error to declare a mistrial.

CONCLUSION

[¶45] For the above and forgoing reason this case should be remanded to the district court with an order to declare a mistrial and to allow Mr. Patterson to have a new trial.

DATED this 5th day of May, 2014.

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CERTIFICATE OF SERVICE BY MAIL

[¶46] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on May 5th, 2014, she served, by e-mail, a copy of the following:

APPELLANT'S BRIEF AND APPENDIX

to:

Gary E. Euren
Courthouse, P.O. Box 2806
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mailed to: Darrius C. Patterson
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Bismarck, ND 58506

The undersigned further certifies that on May 5th, 2014, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S BRIEF AND APPENDIX.

_/s/Eva Bouman_____
Eva Bouman, Legal Assistant to
Benjamin C. Pulkrabek

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STATE OF NORTH DAKOTA

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on May 12th, 2014, she served, by e-mail, a copy of the following:

APPELLANT'S BRIEF COVER PAGE AND APPENDIX COVER PAGE

to:

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The undersigned further certifies that on May 12th, 2014, she served electronically on the Clerk, North Dakota Supreme Court, the corrected cover pages for APPELLANT'S BRIEF AND APPENDIX.

_/s/Eva Bouman_____
Eva Bouman, Legal Assistant to
Benjamin C. Pulkrabek