

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellee, vs. Wade Laurence Duchaine, Defendant-Appellant	Supreme Court No. 20170037 Case No. 51-2016-CR-00483
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On appeal from the Criminal Judgment entered January 25, 2017
Ward County District Court
North Central Judicial District
State of North Dakota
The Honorable Thomas J. Schneider, Presiding

APPELLANT'S BRIEF

Scott O. Diamond
ND Bar # 05773
3523 45th Street South
Suite 100
Fargo, ND 58104
Telephone: (701) 639-6521
Fax: (701) 639-6501
Email: Scott@scottdiamondlaw.com
Attorney for the Defendant-Appellant

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[¶1]

Statement of the Issues

- I. Whether the district court erred in denying the Wade Duchaine's motion for a change of venue.
- II. Whether the evidence was sufficient to sustain Wade Duchaine's conviction.

Statement of the Case

[¶2] This is an appeal of a Criminal Judgment entered against Wade Laurence Duchaine, (hereinafter referred to as “Mr. Duchaine”) after a jury trial. (Appellant’s App. at 30). On March 7, 2016, Mr. Duchaine was charged with Burglary. (Appellant’s App. at 6). On April 12, 2016, the district court conducted a preliminary hearing and the State filed an Information on the following day. (Appellant’s App. at 7). On August 4, 2016, the defense filed a motion for a change of venue. (Appellant’s App. at 9). On August 15, 2016, the district court denied the defense’s motion for a change of venue without a hearing. (Appellant’s App. at 17). On January 24, 2017, the district court conducted a jury trial on the sole count of Burglary. (Appellant’s App. at 1). Mr. Duchaine was found guilty. See id. Mr. Duchaine was sentenced to a term of imprisonment and probation. (Appellant’s App. at 20). Mr. Duchaine now appeals the verdict and the Criminal Judgment entered against him. (Appellant’s App. at 30).

Statement of the Facts

[¶3] On July 14, 2015, someone entered the home of Jay Wold and Rozanna Larson, in Minot, North Dakota. (Tr. at 109, ln. 16 - 113, ln. 14). Jay Wold was not home at the time, but received a text and a phone call from his minor child that an unknown individual had entered the home. (Tr. at 112, ln. 4 - 14). Jay Wold immediately returned home. See id. On the way to the house, Jay Wold called the police. (Tr. at 114, ln. 3 - 9). The minor child did not see who had entered the house. (Tr. at 108, ln. 22 - 23).

[¶4] Upon returning home, Jay Wold searched the house. (Tr. at 112, ln. 25 - 113, ln. 3).

Jay Wold saw the individual in a hallway and told him to come into the living room of the house. (Tr. at 113, ln. 12 - 114, ln. 7). At this point, they were approximately three feet apart. (Tr. at 113, ln. 24 - 25). Jay Wold had a very short period of time to observe the individual, because as they were coming down the hallway, the individual ran out of the house. (Tr. at 114, ln. 11 - 15; at 123, ln. 24 - 124, ln. 1). Jay Wold attempted to chase the individual outside of the house, but could not follow him and returned home. (Tr. at 114, ln. 16 - 19). When Jay Wold returned home, the police had arrived. (Tr. at 114, ln. 23 - 115, ln. 3). The individual who entered the home of Jay Wold and Rozanna Larson was not located in the area. (Tr. passim).

[¶5] Jay Wold provided a description of the individual to law enforcement. (Tr. at 115, ln. 4 - 14). Jay Wold described the individual as a Native American, approximately five feet, eight inches in height, with a pony tail and silver, wire rimmed glasses. See id.

[¶6] Craig Sandusky is a special agent with the Bureau of Criminal Investigation. (Tr. at 139, ln. 3 - 9). Craig Sandusky heard the description of the individual provided by Jay Wold over the radio. (Tr. at 140, ln. 1 - 9). Craig Sandusky responded to the radio call and informed the police officers on the scene that he “believed the description sounded like Wade Duchaine.” (Tr. at 140, ln. 21 - 24).

[¶7] Based on Craig Sandusky’s statement, Jay Wold was shown a photo lineup. (Tr. at 115, ln. 18 - 19). The lineup contained 6 photos, one of which was Wade Duchaine. (Tr. at 116, ln. 3 - 7). Jay Wold indicated that he was “80 to 90 percent” sure that the photo of Wade Duchaine matched the individual who entered his home. (Tr. at 119, ln. 7 - 12). Jay Wold agreed that by saying that he was 80 to 90 percent sure, that he was expressing that he

was 10 to 20 percent not sure of his identification. (Tr. at 125, ln. 7 - 9). Jay Wold felt unsure because the individual who entered his house did not match Mr. Duchaine's photograph with regard to certain characteristics, including weight. (Tr. at 125, ln. 10 - 25). Jay Wold informed law enforcement that the individual who entered his home appeared to be much thinner than Wade Duchaine. (Tr. at 151, ln. 22 - 152, ln. 2).

[¶8] Based on this partial, uncertain identification, law enforcement showed Jay Wold additional photographs, in which Wade Duchaine was the only individual. (Tr. at 119, ln. 14 - 16; at 127, ln. 1 - 10; at 153, ln. 10 - 25). As law enforcement showed Jay Wold these additional photographs, they continued to ask him whether the photograph showed the person who had entered his home. (Tr. at 127, ln. 14 - 24). Jay Wold thought the photographs which were provided by law enforcement made it "a lot clearer", but was still unwilling to say he was certain that Wade Duchaine was the individual who entered his home. (Tr. at 119, ln. 20 - 25). During the course of the trial, Jay Wold stated that he was believed Wade Duchaine was the individual who entered his home that night, but offered no explanation as to what he learned in the interim to make a positive identification possible. (Tr. at 120, ln. 7 - 21).

[¶9] Rozanna Larson is the Ward County State's Attorney. (Tr. at 135, ln. 9 - 25). The Ward County State's Attorney is an elected position. See id. Rozanna Larson received a message from Jay Wold about the incident and immediately returned home. (Tr. at 136, ln. 8 - 14). Rozanna Larson checked around the home and determined that some jewelry and other personal property was missing from the home. (Tr. at 137, ln. 1 - 6).

[¶10] David Goodman works for the Minot Police Department and conducted an

investigation into who had entered the home. (Tr. at 143, ln. 24 - 145, ln. 9). Law enforcement was not able to collect any fingerprint or DNA evidence of any evidentiary value at the scene. (Tr. at 147, ln. 21 - 148, ln. 12). None of the jewelry or personal property that was taken from the home was ever recovered. (Tr. at 154, ln. 19 - 155, ln. 3). In August 2015, David Goodman spoke to Mr. Duchaine about the burglary. (Tr. at 149, ln. 8 - 13). Mr. Duchaine informed David Goodman that he was not the individual who entered the home of Jay Wold and Rozanna Larson. (Tr. at 149, ln. 14 - 18).

[¶11] On March 7, 2016, Mr. Duchaine was charged with Burglary. (Appellant's App. at 6). While Mr. Duchaine was in custody, he made a statement to Nicole Brasfield, a Ward County Sheriff's Deputy, who was working as a court officer on that day. (Tr. at 162, ln. 15 - 163, ln. 14). Nicole Brasfield was with Mr. Duchaine after Court. (Tr. at 163, ln. 14 - 16). Nicole Brasfield noticed that Mr. Duchaine was "pretty upset" about having been charged with Burglary. See id. Nicole Brasfield believed that Mr. Duchaine said something to the effect that if he knew he was in the State's Attorney's house, he would have wrecked it more, but then immediately retracted the statement and said he was not in anyone's house. (Tr. at 163, ln. 16 - 19).

[¶12] On January 24, 2017, the district court conducted a one day jury trial on the single count of Burglary. (Tr. at 3, ln. 1 - 8). At the conclusion of the trial, Mr. Duchaine was found guilty. (Tr. at 189, ln. 9 - 15). Mr. Duchaine now appeals the verdict and the Criminal Judgment entered against him. (Appellant's App. at 30).

Law and Argument

[¶13] This is an appeal of a criminal judgment entered after a jury trial. (Appellant’s App. at 30). This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. § 29-28-03 and N.D.C.C. § 29-28-06.

Standard of Review

[¶14] Mr. Duchaine presents two issues for review by this Court. The first issues is whether the Court should have granted Mr. Duchaine’s pretrial motion for a change of venue. This issue is reviewed under the abuse of discretion standard. State v. Erickstad, 2000 ND 202, ¶ 7, 620 N.W.2d 136. “A district court abuses its discretion when it acts in an arbitrary, unreasonable or capricious manner, or misinterprets or misapplies the law.” State v. Lang, 2015 ND 181, ¶ 10, 865 N.W.2d 401.

[¶15] The second issue for review by this Court is whether the evidence submitted to the jury was sufficient to support the jury’s verdict. The standard of review for a claim of insufficiency of the evidence is well established. State v. Nakvinda, 2011 ND 217, ¶ 12, 807 N.W.2d 204. “When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the fact finder to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict.” Id. In an appeal challenging the sufficiency of the evidence, this Court will review the evidence and reasonable inferences most favorable to the verdict, to ascertain if there is substantial

evidence to warrant this conviction. State v. Noorlun, 2005 ND 189, ¶ 20, 705 N.W.2d 819. “A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt.” Id. This is a heavy, but not impossible, burden to meet.

I. The district court erred in denying Mr. Duchaine’s motion for a change of venue.

[¶16] Individuals accused of a crime have a constitutional right to a fair and impartial jury. City of Bismarck v. Holden, 522 N.W.2d 471, 473 (N.D. 1994). A touchstone of a fair trial is an impartial jury capable and willing to decide the case on the evidence before it and free from outside influences. McDonough Power Equip. v. Greenwood, 464 U.S. 548, 554 (1984). In order to ensure that a jury is not influenced by matters outside of the evidence presented, Rule 21 of the Rules of Criminal Procedure permits the Court to transfer a trial outside of the county in which the crime is alleged to have occurred. N.D.R.Crim.P. 21. Rule 21(a) specifically requires the district court to transfer a proceeding to another venue when the prejudice against the defendant is such “that the defendant cannot obtain a fair and impartial trial there”. See id.

[¶17] A criminally accused defendant seeking to change the trial venue must show that there is a reasonable likelihood of prejudice that would prevent a fair and impartial jury from being found. State v. Erickstad, 2000 ND 202, ¶ 7, 620 N.W.2d 136. In State v. Austin, this Court identified eight factors for the district courts to consider when ruling on motions for

change of venue. 520 N.W.2d 564, 566 (N.D. 1994). Those factors include:

- (1) whether the publicity was recent, widespread, and highly damaging to the defendant;
- (2) whether the prosecution was responsible for dissemination of the objectionable material;
- (3) the extent of inconvenience to the prosecution;
- (4) whether a substantially better panel could be sworn elsewhere;
- (5) the nature and gravity of the offense;
- (6) the size of the community;
- (7) the defendant's status in the community; and
- (8) the popularity and prominence of the victim.

Id.

[¶18] In this case, the majority of the guideline factors from State v. Austin favor granting the defendant's motion for a change of venue. The victim in this case was Rozanna Larson, the Ward County State's Attorney, and her family. (Tr. at 135, ln. 9 - 25). The Ward County State's Attorney is an elected position. See id. As the Ward County State's Attorney, the victim enjoys a position of popularity and prominence within the community. Rozanna Larson is a prominent public official, who is responsible for the prosecution of crimes within Ward County, who became the victim of this serious crime. This resulted in pretrial publicity regarding the charges and the trial, which centered on the victim and the crime. It is reasonable to believe that this prejudiced the jury and was damaging to Mr. Duchaine. It is also reasonable to believe that a substantially better panel would have been found outside the area.

[¶19] Conversely, the extent of inconvenience to the prosecution would have minimal. The trial in this case took one day. (Tr. at 1, ln. 1 - 207, ln. 14). The prosecution and subpoenaed witnesses would have needed to reserved the entire day for the trial, regardless of venue, so

any additional inconvenience would have been slight. In the order denying the motion for a change of venue, the district court cited concerns that a different trial venue would require the prosecutor and the witnesses to travel, which would result in mileage costs and possible hotel costs. (Appellant's App. at 18, ¶ 10). Upon conviction, Mr. Duchaine was required to serve a three years imprisonment. (Appellant's App. at 20). Minimal expenses for mileage and, possibly, a few hotel rooms is substantially outweighed by Mr. Duchaine's right to an impartial jury, especially given the charge and possibility of significant prison time. Mr. Duchaine was facing a serious felony charge with a high profile victim. Given the nature and gravity of the offense, the district court should have granted Mr. Duchaine's motion for a change of venue.

[¶20] Mr. Duchaine made his motion pursuant to Rule 3.2 of the North Dakota Rules of Court. (Appellant's App. at 9). Rule 3.2 governs the submission of motions to the Court and states that if any party requests oral argument on the motion, the request must be granted. N.D.R.Ct. 3.2(a)(3). In this case, Mr. Duchaine requested oral argument on the motion prior to trial, in bold letters, clearly written on the notice and on the motion itself. (Appellant's App. at 9 - 10). However, the district court denied the motion with conducting oral argument or a hearing of any kind, eleven days after the motion was filed. (Appellant's App. at 17). By denying the hearing, Mr. Duchaine was denied the opportunity to further develop the record, regarding the pretrial publicity and the prejudice to the jury. Denying Mr. Duchaine a hearing on the motion was a misapplication of the law and a further abuse of the district court's discretion. State v. Lang, 2015 ND 181, ¶ 10, 865 N.W.2d 401. Under the circumstances, a reversal is warranted.

II. Wade Duchaine's conviction should be reversed because the evidence was insufficient to sustain the jury's verdict.

[¶21] Mr. Duchaine was convicted of Burglary in violation of N.D.C.C. § 12.1-22-02. At trial, the defense did not dispute that someone had entered the home of Jay Wold and Rozanna Larson and took some items of personal property. By the same token, that is not questioned on appeal. However, the question is whether the evidence proved that Mr. Duchaine was actually the person who did it. There was very little evidence to connect Mr. Duchaine with the property. There was no fingerprint, DNA or any forensic evidence that linked Mr. Duchaine to the property. (Tr. at 147, ln. 21 - 148, ln. 12). None of the stolen items ever linked to Mr. Duchaine. (Tr. at 154, ln. 19 - 155, ln. 3). In addition, the minor child did not see who had entered the house and could not identify Mr. Duchaine in any way. (Tr. at 108, ln. 22 - 23). Ultimately, the only evidence that linked Mr. Duchaine to the property was Jay Wold's identification and the statement that Nicole Brasfield claims that Mr. Duchaine made. Upon close review, this evidence was insufficient to establish Mr. Duchaine was the individual that entered the house.

[¶22] The jury's verdict rested on the Jay Wold's identification of Mr. Duchaine. There were many problems with this identification. The first major problem is that it was a cross-racial identification. Cross racial identifications are inherently suspect. See Sheri Lynn Johnson, Cross-Racial Identification Errors in Criminal Cases, 69 Cornell L. Rev. 934 (1984). Legal observers and commentators have long recognized that cross-racial identifications by witnesses are disproportionately responsible for wrongful convictions. See id. at 935 - 936. Many studies have determined a significantly increased likelihood of misidentification when a cross-racial identification is made. See id. at 937 - 942. Another

problem with the identification is the circumstances under which it was made. Prior to the identification, Jay Wold raced home to confront an unknown individual in his house. (Tr. at 112, ln. 4 - 14). The stress of such an event makes a proper identification much more difficult. When Jay Wold found the individual in the hallway of his home, he had a very short period of time to observe the individual. (Tr. at 114, ln. 11 - 15; at 123, ln. 24 - 124, ln. 1). Given the fact that Jay Wold was under stress and only saw the individual for a brief period of time, an accurate identification would be almost impossible and should be viewed with scepticism.

[¶23] When shown the six photographs, Jay Wold told law enforcement that he was “80 to 90 percent” sure that the photo of Wade Duchaine matched the individual who entered his home. (Tr. at 119, ln. 7 - 12). A jury should only find a criminally accused defendant guilty if they have “a firm and abiding conviction” of the defendant’s guilt. State v. Schneider, 550 N.W.2d 405, 409 - 410 (N.D. 1996). In this context, the word “firm” refers to a “certainty that the evidence supports the crime charged.” Id. In this case, Jay Wold did not express a certainty. Jay Wold expressed a possibility. Jay Wold agreed that by saying that he was 80 to 90 percent sure that he was expressing that he was 10 to 20 percent not sure of his identification. (Tr. at 125, ln. 7 - 9). By stating that he was “80 to 90 percent” sure, Jay Wold was stating that he believed it to be true, but that he also retained some doubts about it. Jay Wold was unsure, and rightfully so, that Mr. Duchaine was the individual who entered his house. If Jay Wold was not convinced that Mr. Duchaine was the individual who entered his home, the jury could not be firmly convinced by the statement. As a result, this equivocal statement was insufficient to establish reasonable doubt. Even taking Jay Wold’s

identification at face value, it is not enough to find Mr. Duchaine guilty beyond a reasonable doubt.

[¶24] Beyond Jay Wold's initial identification, Jay Wold made a subsequent identification of Mr. Duchaine after being shown additional photographs of Mr. Duchaine and made an in court identification. These subsequent identifications were the result of unduly suggestive police procedures and therefore should not be afforded any evidentiary weight. After being shown the six person photo array and after Jay Wold's equivocal identification, law enforcement began showing Jay Wold additional photographs of Mr. Duchaine. (Tr. at 119, ln. 14 - 16; at 127, ln. 1 - 10; at 153, ln. 10 - 25). These additional photographs were of Mr. Duchaine by himself. See id. Jay Wold testified that as he was shown these individual photographs of Mr. Duchaine, law enforcement officers continued to ask him whether this was the individual who entered his home. (Tr. at 127, ln. 14 - 24). Even with the pressure of law enforcement showing these additional photographs, he was still unwilling to say he was certain that Wade Duchaine was the individual who entered his home. (Tr. at 119, ln. 20 - 25). However, he did tell law enforcement that he felt "a lot more sure based on seeing more photos." Id.

[¶25] The procedure used by law enforcement tainted the subsequent identifications provided by Jay Wold, rendering those identifications meaningless. By continuing to show Jay Wold additional photographs of Mr. Duchaine, law enforcement psychologically affirmed Jay Wold's equivocal "80 to 90 percent sure" identification. During the trial, David Goodman, the lead investigator, testified that by continuing to show photographs of a suspect to an individual, the identifier may begin to identify the person in the photograph, even if

that is not the person whom the identifier actually saw. (Tr. at 158, ln. 2 - 8). David Goodman stated that there is a risk that showing multiple photographs of one individual to the identifier could lead to a false identification. (Tr. at 158, ln. 7 - 11). In fact, in response to questions from the prosecutor, David Goodman indicated that showing additional photographs to an identifier and repeatedly asking whether that was the person the identifier saw was not the interview technique that he was taught, was not how he would have handled the identification and it was not something that any officer “worth his salt” would do. (Tr. at 156, ln. 7 - 157, ln. 3).

[¶26] Despite David Goodman’s testimony about the impropriety of this identification technique, this is exactly the technique that was used in this case. After the six person photo array, Jay Wold was shown multiple photographs of Mr. Duchaine by himself. (Tr. at 127, ln. 1 - 10). It is unclear how many additional photographs Jay Wold was shown, as there was conflicting testimony about this during the trial. Jay Wold remembered a few photographs, including one which was introduced as an exhibit during the trial. (Tr. at 117, ln. 18 - 24; at 127, ln. 1 - 10). David Goodman testified that Jay Wold was shown at least one or two other photographs, but did not recall whether the trial exhibit had been shown to Jay Wold. (Tr. at 152, ln. 21 - 154, ln. 1). In addition, Jay Wold agreed that as he was being shown these photographs of Mr. Duchaine, law enforcement continued to ask him whether that was the person that he had seen. (Tr. at 127, ln. 7 - 24). Based on the lead investigator’s own statements, this sort of procedure was improper, unduly suggestive and created a risk of affirming an incorrect identification. Under the circumstances, the subsequent identification should not have been afforded any weight by a reasonable fact finder.

[¶27] By the same token, Jay Wold's in court identification should not be afforded any weight. For the reasons discussed above, this in court identification was so tainted by the prior improper police procedures so as to be worthless.

[¶28] Other than Jay Wold's identification, the only other evidence that linked Mr. Duchaine to the house was the statements made to by Mr. Duchaine to law enforcement. Mr. Duchaine made two statements to law enforcement officers, David Goodman and Nicole Brasfield. David Goodman testified that Mr. Duchaine informed him that he had not entered the home of Jay Wold and Rozanna Larson. (Tr. at 149, ln. 14 - 18). This denial could not be used to establish Mr. Duchaine's guilt. The second statement was to Nicole Brasfield. Nicole Brasfield testified that she was with Mr. Duchaine after Court, that she noticed that Mr. Duchaine was pretty upset about the charges and that Mr. Duchaine said something to the effect that if he knew he was in the State's Attorney's house, he would have wrecked it more, but then immediately retracted the statement and said he was not in anyone's house. (Tr. at 162, ln. 15 - 163, ln. 19). Although Mr. Duchaine disputes the accuracy of this statement, for purposes of this appeal, it will be taking on its face.

[¶29] The statement by Nicole Brasfield should not be given any evidentiary weight. The statement does not make any sense. Nicole Brasfield testified that Mr. Duchaine claimed to have been in the house and not in the house in the same statement. Simply put, a statement that states one thing and states the exact opposite in the same statement is meaningless and has no evidentiary value. The only way a jury could assign evidentiary weight to the statement is to believe the first part and disbelieve the second part. It is unreasonable for the jury to choose to believe one half of a statement and then choose to

disbelieve the remainder of the statement. When the statement is considered as a whole, it contains two logically contradictory statements. Under the circumstances, the statement has no evidentiary value.

[¶30] Neither the statement made to Nicole Brasfield, nor Jay Wold identification, were sufficient to establish that Mr. Duchaine was the individual who entered the house belonging to Jay Wold and Rozanna Larson. As a result, the evidence was insufficient that Mr. Duchaine was the individual who committed the Burglary and insufficient to sustain the jury's verdict.

Conclusion

[¶31] The district court erred by denying Mr. Duchaine's motion for a change of venue and therefore Mr. Duchaine's conviction should be reversed and remanded for a new trial. In the alternative, Mr. Duchaine's conviction should be reversed and remanded for a judgment of acquittal because the evidence presented at trial was insufficient to support the verdict.

Dated this 11th day of May, 2017.

/s/ Scott O. Diamond
Scott O. Diamond
ND Bar # 05773
3523 45th Street South
Suite 100
Fargo, ND 58104
Telephone: (701) 639-6521
Fax: (701) 639-6501
Email: Scott@scottdiamondlaw.com
Attorney for the Defendant-Appellant

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota, Plaintiff-Appellee, vs. Wade Laurence Duchaine, Defendant-Appellant	Supreme Court No. 20170037 Case No. 51-2016-CR-00483 Certificate of Service
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[¶1] I hereby certify that on the 11th day of May, the following documents:

1. Appellant’s Brief;
2. Appellant’s Appendix; and
2. Certificate of Service;

were served, via email, upon the following individual:

Email: jensrud@nd.gov
Jeremy Alan Ensrud
Attorney at Law

and were served, via first class mail, upon the Defendant-Appellant, as follows:

Wade Laurence Duchaine, # 21394
c/o North Dakota State Penitentiary
3100 E Railroad Ave
Bismarck, ND 58506.

Dated this 11th day of May, 2017.

/s/ Scott O. Diamond
Scott O. Diamond
ND Bar # 05773
3523 45th Street South
Suite 100
Fargo, ND 58104
Telephone: (701) 639-6521
Fax: (701) 639-6501
Email: Scott@scottdiamondlaw.com
Attorney for the Defendant-Appellant