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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20170037
Ward County No. 51-2016-CR-00483 STATE OF NORTH DAKOTA

State of North Dakota,)
)
Plaintiff-Appellee,)
)
vs.)
)
Wade Laurence Duchaine,)
)
Defendant-Appellant.)

BRIEF OF APPELLEE
STATE OF NORTH DAKOTA

On appeal from the Criminal Judgment entered January 25, 2017

North Central Judicial District
The Honorable Thomas J. Schneider, Presiding

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[¶3] STATEMENT OF THE ISSUES

1. The district court properly denied Wade Duchaine's motion for a change of venue.
2. The evidence was sufficient to sustain Wade Duchaine's conviction.

[¶4] STATEMENT OF THE CASE

[¶5] The State agrees with Duchaine's Statement of the Case

[¶6] STATEMENT OF THE FACTS

[¶7] On July 14, 2015, someone entered the home of Jay Wold and Rozanna Larson, in Minot, North Dakota. (Tr. at 109, In. 16-113, In. 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, In. 4-14.) Jay Wold immediately returned home. Id. On Jay Wold's way to the house, the minor child called 911. (Tr. at 105, In. 18-20.)

[¶8] Upon returning home, Jay Wold searched the house. (Tr. at 112, In. 25-113, In. 3.) Jay Wold located an individual in his minor child's room. (Tr. at 113, In. 3-14.) The individual started to come toward Jay Wold, face to face, and they were at the most three feet apart. (Tr. at 113, In. 24-114, In. 1.) Jay Wold told the individual to come to the living room. (Tr. at 114, In. 3-7.) It was a sunny day and there were multiple lights on in the home. (Tr. at 122, In. 13-16.) Jay Wold had no trouble identifying who was in his house. (Tr. at 122 In. 17-19.) As Jay Wold was making his way to the kitchen, the individual ran out of the house. (Tr. at 114, In. 11-15.) Jay Wold attempted to chase the individual outside of the house, but could not follow him and returned home. (Tr. at 114, In. 16-19.)

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

[¶10] Craig Sandusky is a special agent with the Bureau of Criminal Investigation. (Tr. at 139, In. 3-9.) Craig Sandusky heard the description of the individual provided by Jay Wold over the radio. (Tr. at 140, In. 1-9.) Craig Sandusky also heard something about a bicycle being left at the house. Id. Craig Sandusky had recently observed Wade Duchaine on a bicycle in the area near the crime scene. (Tr. at 142, In. 24-25.) 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, In. 21-24.)

[¶11] Based on Craig Sandusky's statement, Jay Wold was shown a photo lineup. (Tr. at 115, In. 18-19.) The lineup contained six photographs, one of which was Wade Duchaine. (Tr. at 116, In. 3-7.) Jay Wold went through the pictures and said "no, no, no, no, no, and I said definitely here." Id. Jay Wold indicated he was "80 to 90 percent" sure that the photograph of Wade Duchaine matched the individual who entered his home. (Tr. at 119, In. 7-12.) The photograph of Wade Duchaine was taken in November 2011. (Tr. at 146, In. 16-24.) Additional photographs of Wade Duchaine were shown to Jay Wold. (Tr. at 119, In. 14-16.) These photographs included one taken a matter of months before the burglary. (Tr. at 147, In. 3-16.) Jay Wold said the photographs made it a lot clearer and made him a lot more sure. (Tr. 119, In. 20-25.) Jay Wold did not feel like law enforcement was pressuring him to identify someone. (Tr. at 128, In. 2-4.) Jay Wold saw Wade Duchaine at a later court proceeding. (Tr. 120, In. 1-4.) At trial Jay Wold had no doubt and was one-hundred percent

certain that Wade Duchaine was the individual in his house that day. (Tr. at 120, In. 15-21.)

[¶12] Rozanna Larson is the Ward County State's Attorney. (Tr. at 135, In. 9-25.) Rozanna Larson received a message from Jay Wold about the incident and immediately return home. (Tr. at 136, In. 8-14.) Jay Wold is Rozanna Larson's husband. Id. Rozanna Larson checked around the home and determined that some jewelry and other personal property was missing from the home. (Tr. at 137, In. 1-6.) Rozanna Larson's son also checked around his room and noticed twenty dollars was missing from near his X-Box. (Tr. at 107, In. 8-21.)

[¶13] 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 that day. (Tr. at 162, In. 15-163, In. 14.) Nicole Brasfield was in the C block for paperwork. Id. Nicole Brasfield was not questioning Wade Duchaine. (Tr. at 163, In. 21-22.) Wade Duchaine stated, "If he knew he was in that bitch state's attorney's house he would have wrecked it more." (Tr. at 163, In. 16-17.) Wade Duchaine then immediately retracted the statement and said he was not in anyone's house. (Tr. at 163, In. 18-20.) Nicole Brasfield believed Wade Duchaine retracted the statement because he realized he stated something. (Tr. at 164, In. 7-10.)

[¶14] On January 24, 2017, the district court conducted a one-day jury trial on the single count of Burglary. (Tr. at 3, In. 1-8.) At the conclusion of the trial,

Wade Duchaine was found guilty. (Tr. at 189, In. 9-15.) Wade Duchaine now appeals the verdict and the Criminal Judgment entered against him. (Appellant's App. at 30.)

[¶15] STANDARD OF REVIEW

[¶16] The State agrees with Duchaine's Standard of Review.

[¶17] LAW AND ARGUMENT

[¶18] 1. The district court properly denied Wade Duchaine's motion for a change of venue.

[¶19] Under N.D.R. Crim. P. 21(a), the trial court shall transfer venue of a criminal action if the court finds there exists in the county in which the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial. A defendant seeking a change of venue under N.D.R. Crim. P. 21(a) must establish a reasonable likelihood of prejudice so pervasive that a fair and impartial jury cannot be selected in the county of original venue. State v. Erickstad, 2000 ND 202, ¶ 7, 620 N.W.2d 136; State v. Austin, 520 N.W.2d 564, 566 (N.D. 1994). A motion for change of venue is addressed to the sound discretion of the trial court, and its decision will not be reversed on appeal absent an abuse of discretion prejudicial to the defendant. Erickstad, at ¶ 7. This Court identified eight factors for the district courts to consider when ruling on motions for change of venue. Austin, 520 N.W.2d at 566. 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 the 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.

[¶20] Id.

[¶21] The prosecution would have been inconvenienced by a change of venue. Duchaine is correct that trial took one day. However, the change of venue motion was filed on August 4, 2016. (Appellant's App. at 16.) The State's response was filed on August 12, 2016. (Appellant's App. at 3.) Trial was set to take place on August 16, 2016. Id. All witnesses had been subpoenaed and altered their schedules to testify. (Appellee's App. at 3.) The inconvenience to the prosecution of changing the venue would have been great.

[¶22] Duchaine's motion for change of venue did not present any evidence as to whether there was any publicity, whether the prosecution was responsible for the dissemination of the objectionable material, whether a substantially better panel could be sworn elsewhere, the size of the community, or the defendant's status in the community. Duchaine did allude to the fact the victim is a well-known public official, but presented no evidence in support.

[¶23] Although prejudice to a defendant may be so obvious that a change of venue may be ordered immediately, generally a trial court should wait until voir dire to determine whether it is possible to select a fair and impartial jury. Erickstad, at ¶ 7. As mentioned above, the motion for change of venue was filed

twelve days before trial. Duchaine would have additional opportunity at voir dire to show the court if it was impossible to select a fair and impartial jury.

[¶24] During voir dire, only one potential juror had heard of any publicity. (Tr. at 26, ln. 4-18.) The potential juror indicated it had been awhile since she had heard of it. (Tr. at 26, ln. 15-20.) Publicity per se is not necessarily prejudicial or damaging to a criminal defendant. Before a change of venue because of pretrial publicity is proper, a defendant must show the publicity was in fact prejudicial. Erickstad, at ¶ 8. What the potential juror had heard was just a blurb of a report, and not something in-depth. (Tr. at 27, ln. 3-5.)

[¶25] No potential jurors knew or had any dealings with Rozanna Larson. (Tr. at 27, ln. 8-10.) No potential jurors knew or had any dealings with any of the victim's family. (Tr. at 67, ln. 20; Tr. at 71, ln. 14.) In fact, there was no evidence during voir dire that would lead anyone to believe a fair and impartial jury could not be selected. Duchaine admitted as much when he passed for cause. (Tr. at 73, ln. 24.) A defendant must renew a motion for change of venue if the defendant believes comments by potential jurors during voir dire establish that an impartial jury could not be selected. Erickstad, at ¶ 10. Duchaine never renewed a motion for change of venue after voir dire.

[¶26] A trial court's decision to deny a motion to change venue will only be reversed when the prejudice to the defendant is so palpable and clear from the record that it was arbitrary, unreasonable and capricious to conclude that a fair and impartial jury could be impaneled. Austin, 520 N.W.2d at 568. All other cases fall within the broad spectrum of the trial court's discretion. Id. Duchaine

has not shown a fair and impartial jury could not be impaneled, and the decision of the trial court should not be reversed.

[¶27] 2. The evidence was sufficient to sustain Wade Duchaine's conviction.

[¶28] Duchaine is not challenging the sufficiency of the evidence that a burglary was committed at the home of Jay Wold and Rozanna Larson. (Appellant's Brief at ¶ 21.) Duchaine is only challenging the sufficiency of the evidence that he in fact committed the crime. Id.

[¶29] 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.

[¶30] The two strongest pieces of evidence against Duchaine are the eyewitness identification by Jay Wold and the Duchaine's own confession to the crime. Duchaine argues the identification should be viewed with skepticism. (Appellant's Brief at ¶ 22.) Viewing the identification with skepticism would be contradictory to the correct standard of reviewing the evidence in the light most favorable to the prosecution. Duchaine relies on the statements of Jay Wold after he was shown the lineup of six individuals. This lineup included a photograph of Duchaine from approximately four years earlier. (Tr. at 146, In.

16-24.) Despite the fact the photograph was four years old, Jay Wold indicated he was "80 to 90 percent" sure that the photograph of Duchaine matched the individual who entered his home. (Tr. at 119, In. 7-12.) Additional photographs of Duchaine were shown to Jay Wold. (Tr. at 119, In. 14-16.) These photographs included one taken a matter of months before the burglary. (Tr. at 147, In. 3-16.) Jay Wold said the photographs made it a lot clearer and made him a lot more sure. (Tr. 119, In. 20-25.) Jay Wold saw Duchaine at a later court proceeding. (Tr. 120, In. 1-4.) At trial, Jay Wold had no doubt and was one-hundred percent certain that Duchaine was the individual in his house that day. (Tr. at 120, In. 15-21.) Jay Wold was asked on cross-examination and again on redirect and never wavered from his identification of Duchaine. (Tr. at 128, In. 14-16), Tr. at 129, In. 3-7.)

[¶31] While Duchaine was in custody, he made a statement to Nicole Brasfield, a Ward County Sheriff's Deputy, who was working as a court officer that day. (Tr. at 162, In. 15 – 163, In. 14.) Nicole Brasfield was in the C block for paperwork. Id. Nicole Brasfield was not questioning Duchaine. (Tr. at 163, In. 21-22.) Duchaine stated, "If he knew he was in that bitch state's attorney's house he would have wrecked it more." (Tr. at 163, In. 16-17.) Duchaine then immediately retracted the statement and said he was not in anyone's house. (Tr. at 163, In. 18-20.) Nicole Brasfield believed Duchaine retracted the statement because he realized he stated something. (Tr. at 164, In. 7-10.)

[¶32] Nicole Brasfield's testimony is an example of a transcript not doing justice to what the jury heard. Duchaine characterizes the admission and retraction of

guilt as one steady stream of consciousness. Nicole Brasfield testified the retraction was the result of the Duchaine realizing what he had just said. The resulting retraction was, "I wasn't -- something to the effect that: I wasn't in nobody's house [.]" (Tr. at 163, ln. 18-19.) Giving the prosecution the benefit of all inferences reasonable to be drawn in its favor, it is easy to see the retraction as the jury did, a half-hearted attempt to backtrack an inadvertent admission of guilt.

[¶33] Jay Wold's unwavering, one-hundred percent certain, identification of Duchaine as the burglar coupled with Duchaine's own admission provide sufficient evidence to support the jury's finding of guilt.

[¶34] CONCLUSION

[¶35] The State respectfully asks the Court to uphold the district court's order denying the motion for change of venue and the jury's verdict.

Dated this 14th day of June, 2017.

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STATE OF NORTH DAKOTA

State of North Dakota,)	
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Plaintiff-Appellee,)	Supreme Court No. 20170037
)	Ward County No. 51-2016-CR-00483
vs.)	
)	
Wade Laurence Duchaine,)	AFFIDAVIT OF SERVICE
)	BY MAIL
Defendant-Appellant.)	

.....

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Vanessa K. Kroshus states under oath as follows:

[¶ 1] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶ 2] I am of legal age and on the 14th day of June, 2017, I served the Brief of Appellee upon Scott Diamond, by placing a true and correct copy thereof in an envelope addressed as follows:

SCOTT DIAMOND
ATTORNEY AT LAW
3523 45TH ST S STE 100
FARGO, ND 58104

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Vanessa K Kroshus

Vanessa K. Kroshus

Subscribed and sworn to before me
this 14th day of June, 2017.

Elizabeth Brocker

NOTARY PUBLIC

