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AUGUST 23, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20170078

State of North Dakota,)
Plaintiff/Appellee,)
)
vs.)
)
Delvin Lamont Shaw,)
Defendant/Appellant.)

APPEAL FROM THE CRIMINAL JUDGMENT
NORTH EAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY CRIMINAL. NO. 18-2014-CR-01319
THE HONORABLE JON J. JENSEN PRESIDING

BRIEF

BENJAMIN C. PULKRABEK

ATTORNEY AT LAW
402 - 1st ST. NW
MANDAN, ND 58554
701-663-1929
N.D. State Bar ID No. 02908
PULKRABEK@LAWYER.COM

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ABBREVIATIONS

Transcript - Tr.
Four - IV
Appendix - App.
Page - P.
Line - L.

STATEMENT OF THE ISSUES

[¶1] ISSUES:

I. Did the trial judge in his Order Denying Motion to Suppress Evidence - NDREv 404(b) and 403 comply with all of the required analysis in NDREv 404(b), 403 and State vs Shaw 2016 NW 171 883 NW2d 889?

II. Whether the language and procedure used by the trial judge in this case was sufficient to determine that the State's witness Dametrian Welch was an unavailable witness?

NATURE OF THE CASE

[¶2] In this case Defendant/Appellant Delvin Lamont Shaw was charged with two offenses, burglary and murder.

[¶3] The information charging these two offenses was filed on June 26, 2014.

[¶4] The first jury trial began on June 15, 2015 and ended on June 22, 2015 with a jury verdict that found Mr. Shaw guilty of the charge of burglary and guilty of the crime of murder.

[¶5] That judgment and two guilty verdicts were appealed on June 25, 2015.

[¶6] The North Dakota Supreme Court judgment/opinion on September 22, 2016 reversed that judgment and remanded this case to the district court.

[¶7] On October 4, 2016 a notice pursuant to Rule 404 and 403 was filed by the State.

[¶8] On November 17, 2016 a Request regarding Rule 404 was filed.

[¶9] An Order denying Motion to Dismiss and Statements/Acts of victim was filed on November 18, 2016.

[¶10] On November 23, 2016 and objection to State (Rule 404) was filed.

[¶11] The Courts Order denying Motion to Suppress Evidence was filed on November 30, 2016.

[¶12] An Order Restricting Extra judicial statement were filed on December 2, 2016.

[¶13] The prior Bad Acts Evidence Instructions was filed on February 7, 2017.

[¶14] An Order granting admission of prior testimony of Laconstance Martin was filed on February 2, 2017.

[¶15] A response objecting to prior bad acts was filed on February 13, 2017.

[¶16] An Order denying multiple motions was filed on February 15, 2017.

[¶17] The second jury trial began on February 21, 2017 and ended on February 28, 2017 with the jury finding Defendant/Appellate Shaw guilty of the crimes of burglary and murder. The verdicts were filed on February 28, 2017.

[¶18] The Notice of Appeal was filed on March 1, 2017.

[¶19] The Notice of Filing the Notice of Appeal was filed on March 2, 2017.

[¶20] A Request for Amended Order for Transcripts was filed on March 9, 2017.

[¶21] A Clerk's Certificate of Appeal was filed on March 3, 2017.

[¶22] A Notice of Filing the Notice of Appeal was filed on April 7, 2017.

[¶23] A Third Notice of Appeal was filed on April 7, 2017 along with a Second Amended Order for Transcript and a Notice of Filing the Notice of Appeal.

[¶24] A Clerk's Supplemental Certificate of Appeal was filed on April 19, 2017 and another Clerks Supplemental Certificate was filed on May 3, 2017.

[¶25] An Order for extension of times was filed on May 25, 2107.

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

STATEMENT OF FACTS

[¶27] In June of 2014 an apartment in Grand Forks, North Dakota belonging to Jose Lopez was broken into by two men. After the break in one of the men shot and killed Mr. Lopez.

[¶28] An information charging Delvin Lamont Shaw with the burglary of Mr. Lopez's apartment and the murder of Mr. Lopez was filed on June 26, 2014. App. P.23

[¶29] The first trial in the case began on Jun 15, 2015 and ended on June 22, 2015 with the jury finding Mr. Shaw guilty of the burglary and the murder of Mr. Lopez. Mr. Shaw then appealed the judgment to the North Dakota Supreme Court. The North Dakota Supreme Court reversed the murder and burglary convictions and remanded the case back to the district court for a new trial.

[¶30] Mr. Shaw then appealed the judgment to the North Dakota Supreme Court.

[¶31] The second trial began on February 21, 2017. Prior to the start of that trial the State filed a notice that it intended to introduce testimony regarding Mr. Shaw's involvement in an earlier robbery in an apartment one floor above Mr. Lopez's apartment. The State claimed that the earlier robbery was admissible because it showed that Mr. Shaw had a plan, motive and intent to return to the apartment building because of a threat. App.P.46 Mr. Shaw objected to any testimony regarding the earlier robbery.

[¶32] The trial judge prior to the second trial in his Order Denying Motion to Suppress Evidence conducted a three step analysis of the admissibility of prior bad act evidence under NDREv 404(b) App.P.61.

[¶33] The trial judge in his Order Denying Motion to Suppress Evidence did not do any balancing of the probative value of the bad act evidence against its prejudicial effect in determining whether or not to admit the testimony regarding Mr. Shaw's prior bad acts.

[¶34] Most of the State's witnesses at the first trial were personally present and testified at the second trial. The two exceptions were Laconstance Martin and Dametrian Marcel Welch. The State tried before the start of the second trial but could not find Ms. Martin. During the second trial the State informed the trial judge of what all the State had done in its attempt to find Ms. Martin. The trial judge after hearing the State's explanation

declared Ms. Martin an unavailable witness under NDREv 804 and allowed the State to read in Ms. Martin's testimony from the first trial into evidence at the second trial. Mr. Welch personally appeared at the second trial, but when he was called as a State's witness, he refused to testify. The trial judge because of Mr. Welch's refusal to testify declared Mr. Welch to an unavailable witness under NDREv 804 and allowed Mr. Welch's testimony at the first trial to be read into the record at the second trial.

[¶35] The second trial ended on February 28, 2017 when the jury found Mr. Shaw guilty of the crimes of murder and burglary.

ISSUE

[¶36] ISSUE I. I. Did the trial judge in his Order Denying Motion to Suppress Evidence - NDREv 404(b) and 403 comply with all of the required analysis in NDREv 404(b), 403 and State vs Shaw 2016 NW 171 883 NW2d 889?

ARGUMENT

[¶37] In this case the first issue involves the trial judge's evidentiary ruling in his Order Denying Motion to Suppress evidence.

[¶38] The standard of review for a district judges evidentiary ruling according to State vs Shaw 2016 ND 171 883 NW2d 889 is:

> [¶5] A district court's evidentiary ruling is reviewed under an abuse-of-discretion standard. State v. Roe, 2014 ND 104, ¶10, 846 N.W.2d 797. "A district court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably, or it misinterprets or misapplies the law." State v. Chisholm, 2012 ND 147, ¶10, 818 N.W.2d 707.

[¶39] The answer to Issue I can be found by examining all of the language in the Order Denying Motion to Evidence at App. P.61 to see if it complies with all of the requirements of NDREv 404(b) and 403 and Shaw.

[¶40] This examination begins on page 2 of the Order Deny Motion to Suppress Evidence.

"To decide whether evidence of other crimes or bad acts is admissible, the district court must apply a three-step analysis:

> 1) the court must look to the purpose for which the evidence is introduced; 2) the evidence of the prior act or acts must be substantially reliable or clear and convincing; and 3) in criminal cases, there must be proof of the crime charged which permits the trier of fact to establish the defendant's guilt or of fact to establish the defendant's guilt or innocence independently on the evidence of the prior acts.

Aabrekke, 2011 ND 131, ¶9, 800 N.W.2d 284 (quoting State v. Paul, 2009 ND 120, ¶18, 769 N.W.2d 416). Generally, the third step is satisfied with a cautionary jury instruction about the admissibility of the evidence and its use for a limited purpose. Aabrekke, at ¶ 10; Paul, at ¶ 27; State v. Micko, 393 N.W.2d 741, 744 (N.D.1986).

If a district court concludes the three-part test has been satisfied, the evidence of other crimes or bad acts may still be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." N.D.R.Ev. 403(a). Thus, the court must "balance the probative value of the evidence against its prejudicial effect in determining whether to admit evidence of a defendant's past crimes." Schmeets, 2009 ND 163, ¶ 10, 772 N.W.2d 623 (quoting State v. Raywalt, 436 N.W.2d 234, 238 (N.D.1989). Furthermore, if the State provides notice of its intent to introduce evidence of other crimes or bad acts under N.D.R.Ev. 404(b)(2)(A), "it provides an alert to the district [court] judge that the N.D.R.Ev. 403 balancing test must be done." Schmeets, at ¶16."

[¶41] Page 3 of the Order Denying Motion to Suppress Evidence says that the evidence satisfies the three step analysis and the admissibility requirements of Rule 403.

[¶42] Page 4 under B explains alternatively the evidence is intrinsically related to the charges in the pending case.

[¶43] The trial judges Order is found in the last paragraph of page 4 and page 5 of the Order Denying Motion to Suppress evidence.

[¶44] The language that is missing from and is clearly required to be contained in the Order Denying Motion to Suppress Evidence is set out in the following language in the last sentence of the last full paragraph on page 2:

"Furthermore, if the State provides notice of its intent to introduce evidence of other crimes or bad acts under N.D.R.Ev. 404(b)(2)(A), "it provides an alert to the district [court] judge that the N.D.R.Ev. 403 balancing test must be done." Schmeets, at ¶16." (Emphasis added)

[¶45] Any one reading the above last full paragraph on page 2 of the Order Denying Motion to Suppress Evidence will know that even if to the three part analysis is satisfied, the evidence of other crimes and prior bad act may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Therefore the trial judge in his Order Denying Motion to Suppress Evidence had to include the balancing test required by NDREV 403, Schmeetz and Shaw. Since the trial judge did not this case must be remanded to the district court for a new trial. Prior to that trial the remand should require that the district judge do a balancing test under NDREv 403 to determine whether or not the evidence of other crimes or bad acts probative value substantially outweighs the danger of unfair prejudice.

[¶46] ISSUE II. II. Whether the language and procedure used by the trial judge in this case was sufficient to determine that the State's witness Dametrian Welch was an unavailable witness?

ARGUMENT

[¶47] The standard of review of this issue according to Shaw is:

> [¶5] A district court's evidentiary ruling is reviewed under an abuse-of-discretion standard. State v. Roe, 2014 ND 104, ¶10, 846 N.W.2d 797. "A district court abuses its discretion in evidentiary rulings when it acts

arbitrarily, capriciously, or unreasonably, or it misinterprets or misapplies the law." State v. Chisholm, 2012 ND 147, ¶10, 818 N.W.2d 707.

[¶48] The following language in the trial transcript tells what occurred and was said after Dametrian Welch was called during the trial as a State's witness and the trial judge declared Mr. Welch an unavailable witness. Tr.IV. P.927,L.18 to P.930,L17

Q. Let's talk about the evening of June 23rd, 2014, through the early morning of June 24th, 2014.

On the evening of June 23rd, 2014, did you go out?

A. I refuse. I ain't saying nothing.

Q. Are you refusing to answer the question?

A. Yep.

MS. BASS: Your Honor, I guess I would ask the Court to direct the defendant - - or direct the witness to answer the question.

THE COURT: What's the basis for your decision not to - - why aren't you testifying?

THE WITNESS: Because I don't want to.

THE COURT: Okay, I'm going to order you to testify, Mr. Welch. You are under oath and you're required to testify. I'm going to order that you testify.

THE WITNESS: I ain't testifying.

THE COURT: All right, folks. Why don't we take just a ten - - why don't we take a ten-minute break. I'm going to have the jury step out.

Mr. Hinnenkamp, we'll let you know.

(Jury escorted out of courtroom.)

THE COURT: All right. Have a seat, folks.

Mr. Welch, I need an explanation as to why you're not going to testify.

THE WITNESS: Becaues I feel like, in the first place, like, I didn't know too much about this situation and, like, and then way things work in the system. You know what I mean? And I feel, like, shit, I was done wrong. So I feel like I ain't about to help them no more. I'm done helping them. And that's just the way I feel.

THE COURT: Okay. Now, I've ordered you to testify.

THE WITNESS: Yeah.

THE COURT: Do you understand that? You understand that you could be held in contempt of court for failing to testify?

THE WITNESS: Yep.

THE COURT: And you're still not going to testify?

THE WITNESS: Yep.

THE COURT: And the only reason why you don't want to testify is because you don't want to?

THE WITNESS: Yep.

THE COURT: Okay. And I'm going to consider whether or not I should hold you in contempt. Do you understand that?

THE WITNESS: Yep.

THE COURT: Okay. I'm - - I am going to make a factual finding that Mr. Welch is refusing testify about the subject matter - -

MR. SHAW: Your Honor?

THE COURT: - - in this matter.

Yes, Mr. Shaw?

MR. SHAW: I think you should let him know he has a constitutional right to the Fifth Amendment.

THE COURT: Well, he's refusing to testify, so he's not making any statements. And that is correct. Nobody's told me anything about the Fifth Amendment, but - -

MR. SHAW: And he just told you he doesn't know anything about the system, Your Honor, so I'm just telling you.

THE COURT: Okay. That's - - that's - - he's refusing. You agree he's refusing to testify, Mr. Shaw?

MR. SHAW: Yes, sir.

THE COURT: All right. then I've ordered him to. Looks like the parties are in agreement that he's refusing to testify, which leads me - - Mr. Welch. There's no reason for him to remain in the courtroom is there, Ms. Mattison?

THE COURT: Or Ms. Bass?

MS. BASS: No, Your Honor.

THE COURT: Okay.

So, Mr. Welch, I'm going to have you wait here at the courthouse at least until the end of the day.

Is that possible?

CORRECTIONAL OFFICER: Yes, Your Honor.

THE COURT: Okay. so we'll have you - - but we're going to - -

(Mr. Welch leaves the witness stand the courtroom.)

[¶49] In North Dakota in criminal cases the State has always had far superior powers available to convincing a witness to testify in a criminal case than the defense has had. An example of the State' superior powers were used in the above case at the first rial when the State granted Lacontance Martin immunity in return for her testimony. App. P.28. Then the trial judge then confirmed the State's superior power when he signed an Order granting Immunity. App. P.30.

[¶50] The above immunity to Ms. Martin was made possible by NDCC 31-01-09.

31-01-09. Privilege against self-incrimination – Grant of immunity. No person may be compelled to be a witness against himself or herself in a criminal action. Notwithstanding any provision of law to the contrary, in any criminal proceedings before a court or grand jury or state's attorneys inquiry, if a person refuses to answer a question or produce evidence of any kind on the ground that the person may be incriminated thereby, and if the prosecuting attorney, in writing and with approval of the attorney general, requests the court to order that person to answer the question to produce the evidence, the court after notice to the witness and hearing may so order, and that person shall comply with the order. In the case of a state's attorney's inquiry, such application must be made to the district court. No testimony or other information compelled under the order, or any information directly or indirectly derived from the testimony, may be used against the witness in any criminal proceeding, except a prosecution for perjury, giving a false statement, or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order.

[¶51] All of the privileges in NDCC 31-01-09 only apply to and can be used by the State. There is no provision in NDCC 31-01-09 for the defense in a criminal trial to grant a defense witness immunity in return for that witness testifying for the defense.

[¶52] Another advantage the State has over the defense with witnesses in a criminal trial is the State can offer a witness or a co-defendant a plea bargain in return for that witness or co-defendant testifying against the defendant. In North Dakota the defense can't offer a defense witness or a co-defendant any deal to testify for the defense.

[¶53] In the case now before the court the State at the first trial has no trouble getting Dametrian Welch to testify. When it came to the second trial the State didn't have any incentive to use its superior power to get Ms. Welch to testify. The reason for this is the State knew that if Mr. Welch refused to testify the State could always use N.D.R.EV. 804(a)(2) and (b)(1)(A) to get the testimony Mr. Welch gave at the first trial into evidence. Therefore the State knew it didn't matter whether Mr. Welch decided to testify or not at the second trial because the State could get Mr. Welch's testimony in one way or the other. The State was also aware that Defendant/Appellee Shaw not only couldn't do anything to prevent Mr. Welch's first trial testimony from being admitted into evidence, he couldn't offer Mr. Welch anything to get him to testify at his second trial.

[¶54] The following language in US vs Reed 227 F3d 763 (2000)... Indicates what a trial judge should do when a State's witness refuses to testify. It also indicates that the State must make a good faith effort to get a State's witness to testify.

"The government located Simmons, brought him to court, and asked him to testify at the second trial. Simmons was called to the stand to testify, but he refused to do so. Even though the government offered him additional credit toward his sentence to re-testify, Simmons stood firm in his refusal... The district judge attempted to compel Simmons's testimony as well. Simmons was already in jail, and while a criminal contempt finding may not have posed a very serious threat to him, it was the court's only option. The court warned Simmons that if he refused to testify, he could be subjected to civil and criminal contempt, for which the penalty could include jail time. (4) Simmons still refused to testify. Contrary to what Reed thinks, neither the government nor the court ultimately controlled Simmons's situation. Simmons made it clear that he would rather

give up the possibility of a reduced sentence, be held in criminal contempt, and face the possibility of additional jail time, than testify for the government at Reed's second trial. The only weapons the government had available to it, in its attempt to compel Simmons's testimony, were the threat of more jail time or the possibility of less. It used one of those weapons and good faith requires nothing more." (Emphasis added)

[¶55] In the case now before the court neither the trial judge nor the State made the efforts used in Reed to get Mr. Welch to testify. In paragraph [¶48] above all the trial judge did when Mr. Welch refused to testify was:

1. Made a factual finding Mr. Welch refused to testify;
2. Ordered Mr. Welch to testify and informed Mr. Welch if he didn't he would consider finding him in content;
3. Ordered that Mr. Welch be held in the Grand Forks County Courthouse for the rest of the day.

[¶56] Defendant/Appellee Shaw believes that since he hasn't got any legal authority to make deals with witnesses the trial judge in his case should have done more than just tell Mr. Welch that he could be in contempt, that there could be a hearing to determine if Mr. Welch was in contempt, and ordering that Mr. Welch be held in the Grand Forks courthouse until the end of the day.

[¶57] Mr. Shaw believes the very least his trial judge should have done is:

1. Hold a contempt hearing for Mr. Welch;
2. At the conclusion of that hearing if Mr. Welch still refused to testify find Mr. Welch in contempt;
3. Hold Mr. Welch in the Grand Forks County jail until Mr. Shaw's trial ended;
4. Had Mr. Welch brought back before him at least one more time during the trial to see if he still refused to testify;
5. Inquired of the State whether or not it was going to use any of its superior witness powers in an attempt to get Mr. Welch to testify.

[¶58] In Reed the State showed its good faith by attempting to use one of its superior powers to get the witness to testify. In the case now before the court, the State

didn't even try to use any of its superior witness powers to try to get Mr. Welch to testify. To find out the State's position on getting Mr. Welch to testify the trial judge should have at least inquired if the State was going to make any attempt to get Mr. Welch to testify. Instead the trial court asked no questions of the State and the State did nothing to indicate a good faith effort to get Mr. Welch to testify.

[¶59] The State's response to making any of the above attempts to get Mr. Welch to testify will probably be that any attempt to get Mr. Welch to testify would have been a waste of time and would accomplish nothing. As to State's duty under the good faith requirement, the State will probably claim all the State has to do is produce the witness and then the State doesn't have to do anything if that witness refuses to testify. Besides after States witness refuses to testify it's the trial judge not the State that declares that witness is unavailable under NDREv 804(a)(2).

[¶60] The following is the criteria necessary before a trial judge during a trial can declare a states witness unavailable NDREv 804(a)(2):

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(2) refuses to testify about the subject matter despite a court order to do so;

CONCLUSION

[¶61] For the above and foregoing reasons this case should be remanded to the district court for a new trial. Prior to that trial the district court should be required to do the balancing test under NDREv 403 to see if the prior crimes and bad acts the State wants to enter into evidence at trial are more probative then prejudicial. Also before or during

trial the trial judge must hold a hearing to determine whether or not Mr. Welch is going to testify. If he isn't the trial judge should:

1. Hold a contempt hearing for Mr. Welch before the trial ends;
2. If Mr. Welch still refuses to testify Mr. Welch should be found in contempt;
3. Hold Mr. Welch at the Grand Forks County jail during Defendant/Appellee Shaw's entire trial;
4. Call Mr. Welch back to court at least once after the first contempt hearing and before the end of Defendant/Appellee Shaw's trial to see if Mr. Welch still refuses to testify;
5. Ask the State whether or not it intends to use any of its superior witness powers to get Mr. Welch to testify;
6. If the State doesn't intend to use any of its superior witness powers to get Mr. Welch to testify, inquire why the State isn't going to use any of these powers and determine whether or not the State's refusal to use any of its superior witness powers to get Mr. Welch to testify is a refusal made in good faith?

DATED this 23rd day of August, 2017.

/s/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek, ID #02908
Attorney at Law
402 - 1st St. NW
Mandan, ND 58554
701-663-1929
Pulkrabek@lawyer.com

CERTIFICATE OF SERVICE BY MAIL

[¶62] 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 August 23rd, 2017, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: Carmell F. Mattison
Asst. States Attorney
carmell.mattison@gfcounty.org

Mailed to: Delvin Lamont Shaw
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on August 23rd, 2017, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX AND BRIEF.

/s/ Sharon Renfrow
Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office

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