20180233
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 24, 2018
STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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| State of North Dakota | ) | Supreme Court No. 20180233 |
| | ) | Ramsey County District |
| Plaintiff/Appellee | ) | Court Case No. 36-2016-CR-00555 |
| | ) | |
| vs. | ) | |
| | ) | |
| Austin Thorsteinson, | ) | |
| | ) | |
| Defendant/Appellant | ) | |
| | ) | |

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Appeal from the

Criminal Judgment dated May 31, 2018.

District Court, Ramsey County, North Dakota
The Honorable Donovan Foughty, Presiding

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# BRIEF OF APPELLANT

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## I. Jurisdictional Statement

[¶1] "Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law." North Dakota Constitution, Article VI, Section 6. A defendant may appeal from a verdict of guilty or a final judgment of conviction. N.D.C.C. § 29-28-06.

## II. Statement of the Issues

I. [¶2] Whether the district court in admitting prior bad acts evidence against Mr. Thorsteinson.

II. [¶3] Whether the district court erred in refusing to give Mr. Thorsteinson's offered instruction of reckless conduct.

## III. Statement of the Case

[¶4] This is an appeal of a criminal judgment entered after a jury trial. (App. 61). On or about December 9th, 2016, Austin Thorsteinson (herein after referred to as "Mr. Thorsteinson") was charged with A Felony Child Abuse. (App. 9) On October 13th, 2017, the State of North Dakota provided a Notice pursuant to Rule 404, indicating that the State intended to offer Rule 404(b) evidence of Mr. Thorsteinson's alleged prior bad acts. (App. 11). Mr. Thorsteinson objected through counsel. (App. 16). Following a motion hearing the district court entered an order allowing the state to introduce 404(b)(2) evidence. (App. 22). On March 6th, 2018, a jury trial was commenced. On March 8th, 2018, Mr. Thorsteinson

was found guilty of child abuse. On May 31st, 2018, Mr. Thorsteinson was sentenced to 20 years in the Department of Corrections with 10 years of that suspended. (App. 61). Mr. Thorsteinson now appeals the criminal judgment entered against him. (App. 63).

**IV. Statement of the Facts**

[¶5] On November 22nd, 2016, CS, a two-year-old child, received a head injury which resulted in a stroke. A portion of CS's skull had to be removed by a physician in Fargo. The portion of the skull that was removed could not be reattached following the surgery and CS presently has an artificial replacement. (Tr. at page 187).

[¶6] As Mr. Thorsteinson was the last person to be alone with the child prior to the injury occurring, Mr. Thorsteinson was subject to a number of interviews and even participated in a video reenactment where he demonstrated to law enforcement how he believed the injury was inflicted on CS. (Tr. at page 141). Shortly thereafter a warrant was issued for Mr. Thorsteinson's arrest was issued alleging that he had committed the A Felony offense of child abuse. Mr. Thorsteinson was subsequently arrested on that warrant.

[¶7] On October 13th, 2017, shortly before the first jury trial was held in this matter, the State filed a notice of intent to introduce evidence of prior bad acts under North Dakota Rules of Evidence 404(b). (App. 12). The State sought to introduce three separate

occurrences of what it claimed to be prior bad acts. (App. 13). The first was an accident involving CS that took place in July of 2016. (Tr. at page 43). While left alone with Mr. Thorsteinson CS incurred an injury on his forehead from the bathtub faucet. Mr. Thorsteinson was never charged or convicted of anything relating to this incident and law enforcement had never been involved in its investigation. Mr. Thorsteinson had maintained that this was an accidental occurrence and that he did not harm CS.

[¶8] The second piece of offered of noticed 404(b)(2) evidence by the State was an occurrence in September of 2016 where Daunisha Cost, CS's mother, and Mr. Thorsteinson's at the time girlfriend, secretly recorded an argument that she had with Mr. Thorsteinson in her vehicle. Mr. Thorsteinson is heavily intoxicated in this video, and admits to consuming a number of beers or other alcoholic beverages prior to this incident. (Tr. at page 284). CS is not harmed whatsoever in this recording and is scarcely even mentioned aside from a mention by Mr. Thorsteinson about CS crying. The final bad act evidence noticed by the State was a bruise left on CS's buttocks after having been spanked by Mr. Thorsteinson. Mr. Thorsteinson admitted that he had spanked CS as a disciplinary action and did not do so to be abusive.

[¶9] Mr. Thorsteinson objected to the State introducing prior bad act evidence and claimed that not only was the State attempting to

use prior bad acts evidence as an underhanded means of introducing propensity evidence, but also that the proffered evidence would be unduly prejudicial to Mr. Thorsteinson under N.D.R.Ev. 403. (App. 16). Following a hearing held on the motion on October 26th, 2017, the district court entered a memoranda opinion and order regarding admission of the prior bad acts evidence. (App. 22 & 31). In it's decision, the district court allowed all three occurrences of prior bad acts evidence, finding that not only did the State not intend to use this evidence as propensity evidence, but also that it provided a more complete story. The district court additionally found that the evidence would not be prejudicial to Mr. Thorsteinson. The district court did, however, exclude photographs of CS's injury from the July bathtub incident finding that to be too inflammatory to present at trial.

[¶10] Following the original jury trial held in this matter on November 8th, 2017, the jury was unable to come to a unanimous verdict and ultimately a hung jury was declared. (App. 33).

[¶11] The State elected to retry Mr. Thorsteinson on or about November 17th, 2017 (App. 34) with the retrial to be set on March 6th, 2018.

[¶12] On January 8th, 2018, Mr. Thorsteinson renewed his objection to the prior bad acts evidence noticed by the State. (App. 136). Mr. Thorsteinson reiterated his previous arguments and

added that at the initial trial the State had conceded that it had offered the noticed evidence as a way to establish propensity of character or in other words that Mr. Thorsteinson had a tendency to abuse children.

[¶13] Following a hearing held on February 15th, 2018, the district court denied Mr. Thorsteinson's motion to reconsider 404(b)(2) evidence. (App. 40).

[¶14] During the second trial the State offered all three occurrences of the noticed prior bad acts testimony. (Tr. at page 44), (Tr. at page 284), and (Tr. at page 120). At each instance when this testimony was offered, counsel for Mr. Thorsteinson renewed his objection to that evidence. Each time the objection was overruled.

[¶15] Additionally, for the first time and without any notice that he would be testifying regarding these issues the State's expert witness, Dr. Arne Graff, testified regarding the July 2016 bathtub accident involving CS and Mr. Thorsteinson. Mr. Thorsteinson renewed an objection under 404(b)(2), as Dr. Graff had not been noticed as a witness who would be offering such evidence. (Tr. at page 217). Additionally, in the midst of cross examination of Dr. Graff and upon determining that Dr. Graff was forming his opinion based on effectively propensity evidence, counsel for Mr. Thorsteinson objected Dr. Graff's testimony in its entirety and

requested that it be struck. (Tr. at page 234). That objection was overruled. During Dr. Graff's testimony Dr. Graff did acknowledge that Mr. Thorsteinson's claimed version of events, that he had fallen with CS in his arms and that CS had struck his head on a hard object, was a possible cause of the injury that CS had incurred. (Tr. at page 237).

[¶16] Throughout the presentation of the State's case either through witnesses and argument, the State articulated no theory how any of the exceptions under 404(b)(2) were applicable. For example, the State insisted in closing argument that it need not prove motive. (Tr. at page 350).

[¶17] Following closing arguments the case was submitted to the jury for deliberation. Early into the deliberation the jury submitted a question regarding the definition of reckless conduct. Counsel for Mr. Thorsteinson requested an additional instruction of reckless conduct to be submitted to the jury. The district court declined to offer that instruction.

[¶18] The jury later returned a verdict of guilty and Mr. Thorsteinson was subsequently sentenced to 20 years of imprisonment with the requirement that he serve 10 of those years on May 31st, 2018. Mr. Thorsteinson now appeals.

**V. Argument**

## I. The District Court Erred In Admitting Evidence Of Prior Bad Acts Against Mr. Thorsteinson.

[¶19] The standard of review for evidentiary rulings is the abuse of discretion standard. State v. Hatlewick, 2005 ND 125, ¶9, 700 NW.2d 717. "A trial court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably or if it misinterprets or misapplies the law." State v. Ramsey, 2005 ND 42, ¶8, 692 NW.2d 498.

[¶20] This Court has previously noted that evidence to prior bad acts 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 v. Osier, 1997 ND 170, ¶4, 567 NW.2d 441. The limited admissibility of evidence of prior bad acts admitted against a criminal defendant is controlled by rule 404(b) of the North Dakota Rules of Evidence. N.D.R.Ev. Rule 404(b) provides that:

> (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.

[¶21] Rule 404(b) "recognizes the inherent prejudicial effect prior bad act evidence may have on the trier fact and limits the admissibility of that evidence to specifically recognized exceptions." State v. Aabrekke, 2011 ND 131, ¶8, 800 NW.2d 284.

**A. The District Court Erred In Conducting The Four-Step Analysis Before Admitting 404(b) Evidence Of Alleged Prior Bad Acts.**

[¶22] In order for evidence of prior bad acts to be admissible against a criminal defendant, the State must provide notice of the intent to use such evidence. N.D.R.Ev. Rule 404(b)(2). In this case, the State provided notice pursuant to Rule 404, indicating that the State intended to offer three separate occurrences of 404(b) evidence. (App. 13). In it's brief, the State indicated that this proffered evidence will show a "pattern of behavior" towards "the alleged victim." The State made no real effort to argue or even raise the specter of any of the enumerated exceptions under N.D.R.Ev. Rule 404(b)(2).

[¶23] In addition to the notice requirement, this Court has also indicated that "in considering evidence of other prior crimes, wrongs, or bad acts, the mere invocation of an exception does end

the inquiry; rather, our decisions consistently have recognized that a district court must apply a three-step analysis to determine whether the evidence is admissible." State v. Aabrekke, 2011 ND 131, ¶9, 800 NW.2d 284. This Court has instructed trial courts that prior to admission of evidence of bad acts, "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 innocence independently of the evidence presented, without consideration of the evidence of the prior acts." Id. See also State v. Dieterl, 2013 ND 130, ¶11, 833 NW.2d 473.

[¶24] Taking each step of the analysis one by one, the district court erred in conducting the necessary analysis. In it's brief, the State indicated that this proffered evidence will show a "pattern of behavior" towards "the alleged victim." In essence the State failed to even make an attempt to advance a proper purpose for this evidence and indeed specifically mention a prohibited use by stating it demonstrated a pattern of conduct, or in other words, a propensity to commit crimes. The district court, in it's memorandum decision allowing for admissibility for such evidence opined on its own that the September 2016 recording was admissible to show that the injury to CS occurred due to the defendant's jealousy

towards CS's father who was continuing to have contact with Mr. Thorsteinson's then girlfriend at the time. (App. 22). This particular motive or intent was never once articulated or argued by the State whatsoever at trial. This was error in the district court's analysis by essentially fabricating a proper use from nothing and that error was further exacerbated when the evidence was actually admitted at trial, objected to, and allowed to proceed despite that purported use not being utilized.

[¶25] The district court similarly opined that the photographs of a bruised buttocks were probative because they demonstrated a motive or intent to abuse. The district court made the leap by using physical discipline that there is an increased probability that Mr. Thorsteinson willfully abused CS, or in the simplest terms, that he had a propensity for abusing children. Once again, not only did the court come up with this facially improper reason on its own but using physical discipline, such as spankings, on a child in the state of North Dakota is not a crime provided that it does not cause death, serious bodily injury, disfigurement, or gross degradation. N.D.C.C. § 12.1-05-05(1). This evidence was only offered for propensity evidence.

[¶26] Finally, regarding the July 2016 bathtub incident, the district court determined, following the submission of a supplemental offer of proof by the State, that the accident that occurred in the bathtub

was admissible because there was "sufficient and reliable evidence the injury did occur when the child was alone in the care of the defendant." In conducting this analysis, once again the district court failed to acknowledge that the State had not even alleged a permissible use under 404(b) and simply fabricated what it deemed to be a permissible use, in this case motive or intent, again without the State ever articulating at any time how this evidence demonstrated motive or intent.

[¶27] The error became reversable when this evidence ultimately was presented at trial over Mr. Thorsteinson's repeated objections. Viewing the evidence in the context of trial, the district court simply allowed the evidence to come in. The district court did not take into account that there had been no attempt whatsoever to articulate any one of the permissible uses under 404(b) presented by the State. The State effectively just laid the evidence bare for the jury's consideration and impermissibly gave them the opportunity to infer that Mr. Thorsteinson had a propensity to abuse children. This was error in the district court's analysis and the evidence should have never been admitted at trial.

[¶28] Assuming for the sake of argument that the motive argument can somehow be inferred from the case presented at trial, this Court has already rejected similar arguments such as State v.

Osier, 1997 ND 170, ¶8, 569 NW.2d 441, where this Court rejected a similar argument for a sexual assault of a minor child.

[¶29] The district court similarly failed in conducting the second prong of the analysis which required the proffered evidence to be substantially reliable or clear and convincing. Taking each incident one by one, the State did not properly demonstrate that this evidence was clear or convincing. For example, in the July, 2016 bath tub incident, the district court summarily determined that the evidence was clear and convincing and failed to conduct really any analysis on this particular prong. (App. 31). There was no such clear and convincing evidence, and it was hotly debated what actually occurred without any substantial proof as to whether or not this was an intentional injury or simply an accident. The district court erred in allowing such baseless evidence to be admitted.

[¶30] A similar error was made regarding the September 2016 recording, as not only does it serve no permissible purpose, but it does not provide clear and convincing evidence of anything related to the issues in this particular case, such as how the injury was actually inflicted on CS.

[¶31] The photograph of a bruised buttocks from spanking also fails the clear and convincing prong in that, again it is not a crime to use physical discipline that does not severely injure or disfigure a

child, but there is also substantial dispute as to the context in which that bruise was made.

[¶32] Finally, the district court failed in concluding that there was an abundance of independent evidence that tends to prove Mr. Thorsteinson's guilt. The State did not once ever present any theory whatsoever for how CS's injuries were specifically caused. They did have an expert witness, Arne Graff, who opined that the injuries may not be consistent with an accident, but that same witness further testified that an adult falling over with a child in that adult's arms could cause the accident that CS had inflicted on him. Furthermore, this was also a case that originally resulted in a hung jury. Taking this evidence out of the equation, it is difficult to ascertain what precisely the State could have relied on to demonstrate their case, aside from the fact that Mr. Thorsteinson was alone with the child.

[¶33] Finally, although not specifically included in North Dakota Rule of Evidence 404(b), this Court has nevertheless held that a trial court must further conduct an analysis under N.D.R.Ev. 403 to determine whether the proffered evidence is unduly prejudicial, even assuming it is offered for acceptable purposes, is corroborated by sufficient evidence, and is substantial, and clear and convincing. State v. Aabrekke, 2011 N.D. 131, ¶15, 800 NW 2d., 284. Rule 403 allows a trial court to exclude evidence when it's

probative value substantially weighed by the unfairly prejudicial effect the evidence may have on a jury. N.D.R.Ev. 403.

[¶34] This Court has specifically rejected the type of arguments raised by both the State and the district court for admissibility of the three separate incidences of 404(b)(2) evidence in cases such as State v. Stevens, 238 NW 2d. 251 and State v. Osier, 1997 ND 170, ¶8, 569 NW.2d 441. Both the State and the district court reference in the State's arguments and the district court's opinion that the July, 2016 bath tub incident and the September spanking incident demonstrate a motive or lack of accident because they are accidental injuries that have occurred while the child was in the custody of Mr. Thorsteinson. In Stevens, this Court rejected such an argument, finding that such arguments tend to unfairly stir the passions of a jury and have insufficient probative value to outweigh their prejudicial effect, and ultimately required reversal. Stevens at 258.

[¶35] The argument in the 2016 recording is prejudicial in a different regard in the sense that it portrays Mr. Thorsteinson as being violent and/or abusive to CS's mother. Once again, it has no direct relation to CS and CS is not harmed in the recording, but it nevertheless portrays Mr. Thorsteinson as having a propensity for violence, which ultimately would be the only thing that a jury could reasonably infer from that evidence.

## II. The District Court Erred in Providing Mr. Thorsteinson's Offered Instruction on Reckless Conduct.

[¶36] On appeal, jury instructions are fully reviewable. State v. Wilson, 2004, N.D. 51, ¶11, 676 NW 2d. 98. Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. State v. Jahner, 2003, NW 2d., ¶13, 657, NW 2d., 266. This Court reviews jury instructions in whole to determine whether they adequately and correctly inform the jury of the applicable law, even though part of the instructions standing alone may be insufficient or erroneous. State v. Barr, 2001, N.D. 201, ¶12, 637 NW 2d. 369. This Court will reverse a criminal conviction only if the instructions, as a whole, are erroneous, relate to a central subject in the case, and effect a substantial right of the Defendant. Wilson, at ¶11.

[¶37] In previous cases, this Court has held that it was not error for a trial court to refuse to define a word that is commonly understood by a lay person. State v. Motsko, 261 NW 2d., 860, 866 (N.D. 1977). In this case however, it is clear that lay people on the jury did not have sufficient understanding of the word recklessly.

[¶38] The jury presented a question for a trial court of "definition of intent" and "does this mean that this action taken is not a normal action." In response to that question, counsel for Mr. Thorsteinson proposed an additional instruction of "that the definition of

‘recklessly’ suggests a high degree of risk of which the actor is aware and consciously disregards,” which further elaborated on the issue of reckless conduct. (Tr. at the page of 362). The District Court rejected the proposed instruction from Mr. Thorsteinson, and instead directed the jury to consider the instructions that they had previously been given.

[¶39] To do so in this case was error as the instruction of reckless conduct related to a central subject in the case, the intent behind Mr. Thorsteinson’s actions. The jury’s questions to the district court strongly suggest that the jury did not properly understand what reckless conduct was and strongly insinuates that they could view negligent conduct as fitting under the offered instruction of reckless conduct. The crux of Mr. Thorsteinson’s entire case is that this was an unfortunate accident where Mr. Thorsteinson may have acted negligently, but did not willfully harm CS. Additionally, the State failed to articulate any version of an intentional or knowing injury to CS It therefore appears that the jury could have simply taken Mr. Thorsteinson at his word, that this was an unfortunate and negligent accident and nevertheless convicted him on that basis. Mr. Thorsteinson’s instruction would have corrected that issue and failing to give that instruction allowed a jury to convict him for conduct that was not a crime.

[¶40] This error requires reversal of the conviction.

## CONCLUSION:

[¶41] Based on the foregoing, Mr. Thorsteinson respectfully requests that the Court reverse the judgment of conviction in this matter.

[¶42] Dated this 24th day of September, 2018.

**/s/ Kyle R. Craig**

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Defendant/Appellant

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CERTIFICATE OF SERVICE

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[¶1] I hereby certify that on September 24, 2018, the following documents:

BRIEF OF APPELLANT AND APPELLANT'S APPENDIX

Were emailed to the Clerk of the North Dakota Supreme Court @ supclerkofcourt@ndcourts.gov and courtesy copies were emailed to the following:

Kari Agotness @ ramseysa@nd.gov
Ramsey County State's Attorney

Wendy Stittsworth @ WStittsworth@ndcourts.gov
Court Reporter

**/s/ Kyle R. Craig**

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