

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

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| State of North Dakota, |) | |
| |) | |
| v. |) | Supreme Court No.: 20180233 |
| Plaintiff and Appellee, |) | District Court No.: 36-2016-CR-555 |
| |) | |
| v. |) | |
| |) | |
| Austin Lee Thorsteinson, |) | |
| |) | |
| Defendant and Appellant. |) | |
| |) | |

**APPEAL FROM THE CRIMINAL JUDGMENT ENTERED MAY 31, 2018 IN
RAMSEY COUNTY DISTRICT COURT, NORTHEAST JUDICIAL DISTRICT,
NORTH DAKOTA, THE HONORABLE DONOVAN A. FOUGHTY, PRESIDING**

BRIEF OF THE APPELLEE

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JURISDICTIONAL STATEMENT

¶1 This is an appeal of a Criminal Judgment entered after a jury trial. The district court had jurisdiction under N.D. Const. Art. VI, § 8 and N.D.C.C. § 27-05-06. 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.

ISSUES PRESENTED

¶2 I. Whether the District Court properly admitted evidence under N.D.R.Ev. 404(b)(2).

II. Whether the district court properly instructed the jury.

STATEMENT OF THE CASE

¶3 Austin Thorsteinson (“Mr. Thorsteinson”) appeals a criminal judgment entered after a jury trial. (Appellant’s App. at 61). On December 9, 2016, charges were filed against Mr. Thorsteinson for Abuse of a Child, A felony. (Appellant’s App. at 9). On October 13th, 2017, the State provided notice of intent to offer evidence pursuant to N.D.R.Ev. 404. (Appellant’s App. at 11). A jury trial was held November 7-9, 2017 which resulted in a hung jury. (Appellant’s App. at 33). The State provided notice of intent to retry the matter. (Appellant’s App. at 34). Prior to the second jury trial, Mr. Thorsteinson renewed his objection to the State’s introduction of evidence under N.D.R.Ev. 404. (Appellant’s App. at 35). The State responded to Mr. Thorsteinson’s objection and noticed the intent to again offer evidence pursuant to N.D.R.Ev. 404. (Appellee’s App. at 1). The district court overruled Mr. Thorsteinson’s objection and evidence pursuant to N.D.R.Ev. 404 was introduced at the second jury trial which was

held March 6-8, 2018. On March 8, 2018, Mr. Thorsteinson was found guilty of abuse of a child and on May 31, 2018, was sentenced to twenty (20) years in the Department of Corrections with ten (10) years suspended. (Appellant's App. at 61).

STATEMENT OF THE FACTS

[¶4] On or about November 22, 2016, C.S., a two-year-old minor child, received a permanent impairment to his brain from the result of a subdural hematoma, (Tr. Transcript p. 236, line 21) as well as approximately twenty bruises on his body (Tr. Transcript p. 233, line 15) in multiple planes such as the side of chest, all four sides of the head, facial areas, neck areas, the upper back, the arm (Tr. Transcript, p. 232-233, lines 22-25). Mr. Thorsteinson was investigated for the areas of injury to C.S.; and was charged in December 2016 with Abuse of a Child. (Appellant's App. at 9).

[¶5] On October 13, 2017 the State filed notice of intent to submit evidence pursuant to N.D.R.Ev. 404. (Appellant's App at 12). The State noticed three separate events it intended to submit as evidence. (Appellant's App. at 13). The first incident involved an injury to C.S. that occurred in July 2016 while alone with Mr. Thorsteinson. (Tr. Transcript p. 44, lines 3-8). The second incident involved an audio recording of an incident involving C.S.'s mother, Mr. Thorsteinson and C.S. whereby Mr. Thorsteinson mentions C.S.'s mother cries just like C.S. when he gets after him. The final evidence was a photograph of an injury to C.S. buttocks in September of 2016 whereby Mr. Thorsteinson admitted to striking C.S. (Tr. Transcript p. 302, lines 1-21). The district court issued a memorandum opinion and order allowing the submission of the evidence. (Appellant's App. at 22).

[¶6] The first jury trial occurred on November 8, 2017. The jury was unable to come to a unanimous verdict and a hung jury was declared. (Appellant’s App. at 33). The State provided notice of intent to retry. (Appellant’s App. at 34).

[¶7] On January 8, 2018, Mr. Thorsteinson renewed his objection to the evidence of the three prior acts being submitted at the second trial. (Appellant’s App. at 35). The State responded. (Appellee’s App. at 1). On February 15, 2018, the district court entered an order allowing the submission of all three incidents. (Appellant’s App. at 40).

[¶8] The second Trial began March 6, 2018. The State offered all three prior act incidents. (Trial Transcript p. 44, 120, and 284).

[¶9] The State elicited expert testimony from Dr. Arne Graff (“Dr. Graff”). Dr. Graff testified regarding all the information and material he had reviewed as he was forming his expert opinion as to the cause of C.S.’s injuries. This did include information he reviewed about the July 2016 injury to C.S., ultimately a historical piece of medical information provided by C.S.’s mother. (Tr. Transcript p. 234). Dr. Graff, on cross examination indicated the July incident was an independent situation, and not indicative of the trauma to C.S. on November 22, 2016. (Tr. Transcript p. 233-234, lines 22-5). Mr. Thorsteinson objected to this and was overruled. (Tr. Transcript p. 234, line 24-25). Dr. Graff did acknowledge that while one of Mr. Thorsteinson’s versions of what happened to C.S. on November 22, 2016 could explain the one area of injury to C.S.’s head, it would not explain the multiple planes of injuries to his body. (Tr. Transcript p. 232-233, lines 7-15).

[¶10] The evidence throughout the trial showed that Mr. Thorsteinson gave many explanations for the injuries that occurred to C.S. on November 22, 2016. Mr. Thorsteinson first questioned all the injuries to C.S. by indicating no knowledge of what happened to C.S. (Tr. Transcript p. 55-56, lines 22-2). Mr. Thorsteinson also indicated that another two-year old child had done the injuries to C.S. (Tr. Transcript p. 136-137, lines 6-1). Mr. Thorsteinson eventually admitted to investigators he made that explanation up. (Tr. Transcript p. 164, line 11-15). Mr. Thorsteinson then indicated he was playing with C.S. and as he was laying C.S. in a bean bag chair he hit his head on a speaker. (Tr. Transcript p. 67, line 2-6), (Tr. Transcript p. 139, lines 13-24). Mr. Thorsteinson then indicated he tripped with C.S. (Tr. Transcript p. 67, line 8-9); (Tr. Transcript p. 104, line 3-10). When questioned by investigators as to the large amount of injuries to C.S., Mr. Thorsteinson indicated there were perhaps other items C.S. could have additionally hurt himself on. (Tr. Transcript p. 145, lines 11-20). Mr. Thorsteinson then indicated he was mad on November 22, 2016, but he couldn't remember why and likened it to a toe-stubbing type of incident and when he got mad he had a hard time remembering or thinking (Tr. Transcript p. 145-146, lines 19-1). Mr. Thorsteinson then indicated he made up the toe-stubbing angry explanation. (Tr. Transcript p. 290, lines 3-19). Mr. Thorsteinson's explanations for the injuries, other than the first explanation offered were that this was a single accidental event. The State's theory of the case was this was not an accident, this was multiple impact injuries to C.S.

STANDARD OF REVIEW

[¶11] The district court has "broad discretion in determining whether to admit or exclude evidence, and its determination will be reversed on appeal only for an abuse of discretion."

State v. Chisholm, 2012 ND 147, ¶ 10, 818 N.W.2d 707. It is an abuse of discretion if the court “acts arbitrarily, capriciously, or unreasonably, or it misinterprets or misapplies the law.” Id. If a district court errs in admitting evidence under N.D.R.Ev. 404(b), the error is reviewed for harmless or obvious error. State v. Shaw, 2016 ND 171, ¶ 6, 883 N.W.2d 889. An obvious error is one that “affects a defendant’s substantial rights and is grounds for reversal, “whereas a harmless error “does not affect a defendant’s substantial rights and must be disregarded.” Id.

[¶12] Jury instructions are fully reviewable on appeal. State v. Wilson, 2004 ND 51, ¶ 11, 676 N.W.2d 98. The Court considers instructions as a whole and determines “whether they correctly and adequately inform the jury of the applicable law, even though part of the instructions when standing alone may be insufficient or erroneous.” Id. (quoting State v. Hammeren, 2003 ND 6, ¶ 13, 665 N.W.2d 707). This Court will reverse “only if the instructions are (1) erroneous, (2) relate to a central subject in the case, and (3) affect a substantial right of the accused.) Id.

LAW AND ARGUMENT

I. The district court properly complied with the requirements of N.D.R.Ev. 404.

[¶13] The admissibility of evidence of other acts to establish intent and absence of mistake or accident is well established in child abuse cases. See e.g. State v. Ohnstad, 359 N.W.2d 827, 838-839, (N.D. 1984).

[¶14] In October of 2017, the State filed notice and motion to allow the introduction of evidence of prior acts. The State’s position was the injury that occurred to C.S. on

November 22, 2016 was not an accident. (Motion Tr. p. 4). Mr. Thorsteinson objected, and the district court subsequently granted the State's motion. Prior to the second trial in this matter, Mr. Thorsteinson renewed his objections to the introduction of evidence under N.D.R.Ev. 404; the State responded renewing the motion to admit the evidence of the July 2016 injury to C.S., the early September 2016 audio recording as well as the late September 2016 injury to C.S. buttocks. The district court granted the State's motion.

[¶15] Under Rule 404(b) of the North Dakota Rules of Evidence, evidence of other crimes, wrongs, or acts is “not admissible to show a person acted in conformity therewith.” State v. Aabrekke, 2011 ND 131, ¶8-9, 800 N.W.2d 284. Prior act evidence is excluded unless “the evidence is substantially relevant for some purpose other than to show a person's criminal character and that person acted in conformity with that character. Id. The evidence is admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” N.D.R.Ev. 404(b)(2).

[¶16] To decide whether evidence of other crimes is admissible, a district court must apply a three-step analysis: (1) the court must look to the purpose for which 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 on the evidence presented, without consideration of the evidence of the prior acts. Id. Generally, the third step is satisfied with a cautionary jury instruction about the admissibility of the evidence and its use for a limited purpose. Id. At ¶10. Whether the evidence is admissible because it falls outside of the scope of 404 or whether

it is admissible under 404(b)(2), a court still may exclude evidence if its probative value is substantially outweighed by a danger of unfair prejudice. N.D.R.Ev. 403(a).

[¶17] The district court complied with Rules 404 and 403. In its Memorandum Opinion and Order the district court went through each of the three steps as well as a balancing test under Rule 403 for each prior act incident. As it related to the early September 2016 audio recording; the court noted it was probative for showing motive, intent, absence of mistake or accident. The court further noted this evidence of Mr. Thorsteinson's prior conduct provided a "more complete story of the crime by putting it in context of happenings near in time and place." State v. Alvarado, 2008 ND 203, ¶ 13-19, 757 N.W.2d 570 (quoting State v. Gefroh, 495 N.W.2d 651, 654 (N.D. 1993)). "This Court has determined such evidence is an exception to N.D.R.Ev. 404(b) and is therefore admissible." Id. The court found the recording to be substantial and reliable proof of the prior act. It noted the recording was contemporaneous and not created after or considering the charged November 2016 injury. The court looked at the third prong of the test and rightfully noted there was ample other evidence on which the jury could establish Mr. Thorsteinson's guilt or innocence, including testimony, medical records, photographs.

[¶18] The late September 2016 photograph regarding bruised buttocks on C.S. The district court went through the three-prong analysis. The court noted a proper purpose of the use of this evidence would be to show motive, or intent and absence of mistake or accident. The proof of this incident was an unedited photograph, taken contemporaneously and not for the purposes of trial preparation for the charged November 2016 injuries to C.S. The court also noted there was ample evidence the jury

could use to establish proof of Mr. Thorsteinson's guilt or innocence in the form of testimony, medical records, photographs.

[¶19] The July 2016 injury to C.S., the district court did the three-prong test for this act and found that if an additional offer of proof was provided it would be allowable as to the purpose of lack of mistake or accident. The State provided two affidavits as an offer of proof and the district court issued a Supplemental Order Regarding Admission of Prior Act Evidence. (Appellant's App. at 31). The district court noted the testimony as indicated by the State's offer of proof was sufficient and reliable evidence; allowable for the purpose of showing absence of mistake or accident. The court further noted there would be ample other evidence in which the jury could find Mr. Thorsteinson's guilt or innocence. The court noted a cautionary instruction would be and indeed was given to the jury. (Appellant's App. at 57).

[¶20] Following an analysis of the three-prong step test for each item of prior acts, the district court did a balancing test under N.D.R.Ev. 403. The district court then determined the evidence of the defendant's prior acts satisfied the admissibility requirements of N.D.R.Ev. 403. Thus it was not an abuse of discretion to allow the prior acts of July 2016 and September 2016 into evidence at trial.

[¶21] Error under Rule 404(b) is subject to the harmless error analysis. State v. Stewart, 2006 ND 39, ¶17, 710 N.W.2d 403. Reversal of a conviction is warranted only if the admitted testimony is "so prejudicial that substantial injury occurred" and absent the error "a different decision would have resulted." Id. (quoting State v. Eugene, 536 N.W.2d 696 (N.D. 1995)). If this Court were to hold that the district court did not sufficiently analyze the 404(b) evidentiary issues in its Orders, then it was harmless error and the

record and evidence presented at the district court level are sufficient to support a finding of Mr. Thorsteinson's guilty in this case.

[¶22] There was ample evidence at trial of Mr. Thorsteinson's causing the injuries to C.S. On the morning of November 22, 2016, C.S. had no visible bruises. (Tr. Transcript p. 53, lines 23-25) C.S.'s grandmother gave C.S. a haircut around noon; no bruises were noted on C.S. (Tr. Transcript p. 89, lines 14-21). C.S. was picked up by Mr. Thorsteinson around 3:30 p.m.; Mr. Thorsteinson's initial photo to C.S.'s mother showing no injuries to C.S, sent around 4:30 pm. (Tr. Transcript p. 58-61) Shortly after that first photo, Mr. Thorsteinson sent a variety of photograph's to C.S.'s mother showing various bruises and injuries exclaiming what had happened to C.S. (Tr. Transcript p. 58-61). Mr. Thorsteinson's own admissions in testimony that he had lied and had fabricated the initial story. Mr. Thorsteinson's unwillingness to take C.S. to the hospital. (Tr. Transcript p. 62, lines 6-7). Mr. Thorsteinson gave between four and five variations of what happened to C.S. (Tr. Transcript p. 136, 139, 141, 145). The testimony of Dr. Graff that the multiple planes of injuries to C.S. did not result from a single accidental impact of Mr. Thorsteinson and C.S. to a speaker. (Tr. Transcript p. 232). The photographic exhibits depicted around twenty areas of impact to C.S. (Tr. Transcript p. 233). Therefore, if it was error to admit the July and September incidents, the error was harmless. See e.g. Stewart, 2006 ND 39, ¶17, 710 N.W.2d 403 (concluding that it was harmless error to admit testimony of the defendant's prior dealings with stolen property, noting that "[a]mple evidence and testimony existed to support the conclusion that Stewart knew he was dealing with stolen property").

II. The district court properly instructed the jury.

[¶23] Mr. Thorsteinson claims the district court failed to provide the jury with the appropriate instructions on the elements of Abuse of a Child. Specifically, Mr. Thorsteinson argues the jury instructions failed to make clear to the people on the jury the meaning of recklessly. This argument fails. First, and as rightly noted by Mr. Thorsteinson, this Court has held it was not error for a trial court to refuse to define a word that is commonly understood. State v. Motsko, 261 N.W.2d, 860, 866 (N.D. 1977). Second, when viewed as a whole, the instructions correctly and adequately informed the jury of the applicable law. The court's instructions for the most part mirrored the statutory language of N.D.C.C. §12.1-02-02. The court's instructions also specifically referenced the word willfully to ensure that nobody would be convicted for an act done because of mistake, accident, or other innocent reason. (Appellant's App. at 53). In this case, the jury presented a question to the trial court, from the Definition Regarding Intent Section of the instructions that pointed specifically to the phrase "such disregard must involve a gross deviation from acceptable standards of conduct". The question was "Does this mean the action taken is not a normal action?" (Tr. Transcript p. 363). The trial court properly advised the jurors to use the words within the definitions and to give them their plain and ordinary and commonly understood meaning.

[¶24] The second question from the jurors was in reference to the Weight and Credibility section of the instructions, specifically, "you should consider the evidence in this case in the light of your common sense and your ordinary experience and observations of human affairs." (Appellant's App. at 55). The question here was "We may use our own common sense on determining and interpreting 'reckless'. The court's

instruction back to the jurors was to “You should use the legal definitions provided to you, and the words within those definitions should be given their plain, ordinary, and commonly understood meaning.” (Tr. Transcript, p. 362-364). The trial court’s instructions and communication to the jury communicated an accurate description of the law.

[¶25] “Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury.” State v. Pavlicek, 2012 ND 154, ¶14, 819 N.W.2d 521. Jury instructions are to be viewed as a whole to determine if they correctly and adequately inform the jury. Id. at ¶14. In order to convict Mr. Thorsteinson, the jury was required by these instructions to find that Thorsteinson had acted consciously and with a clearly unjustifiable disregard for the risk of harm to C.S.

CONCLUSION

[¶26] For all the foregoing reasons, the State requests this Court affirm the criminal judgment.

Respectively submitted on October 23, 2018.

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| |) | Certificate of Service |
| Austin Lee Thorsteinson, |) | |
| |) | |
| Defendant and Appellant. |) | |
| |) | |

[¶1] I certify that on the 23rd day of October 2018, the following documents:

1. Brief of Appellee
2. Appellee's Appendix;
3. Certificate of Service

were served, via email, upon the following individual:

Email: Kyle Craig, Attorney for the Appellant
kcraig@acrelaw.com

Dated this 23rd day of October 2018.

/s/ Kari M. Agotness
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