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JANUARY 10, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	
	)	
-vs-	)	
	)	
Mason Jordan Schuh,	)	Supreme Ct. No. 20210257
	)	
Defendant-Appellant	)	District Ct. No. 08-2020-CR-01198

BRIEF OF PLAINTIFF-APPELLEE

Appeal from Jury Verdict dated July 2, 2021 and Judgment of Conviction dated September 7, 2021

Burleigh County District Court
South Central Judicial District
The Honorable Bonnie Storbakken, Presiding

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶1] I. Whether the district court properly instructed the jury.

[¶2] II. Whether the district court properly admitted an audio recording into evidence.

STATEMENT OF THE FACTS

[¶3] On April 24, 2020, the Bismarck Police Department ("BPD") received multiple calls about shots fired in the intersection of Tyler Parkway and Burnt Boat Drive. (Trial Transcript ("Tr.") Day 1 ("Vol. 1") pp. 29:23 – 30:7). One of those 911 calls came from M.B., who reported that the vehicle he was driving was recently shot at multiple times while stopped at an intersection. (Tr. Vol. 1 p. 48:19-20; p. 40:3-7). M.B. told police that he observed a tan Chevrolet Blazer following his vehicle as he drove on River Road. (Tr. Vol. 1 p. 40:5-22; Tr. Vol. 2 p. 47:19-25). M.B. reported that while he was stopped at an intersection, he observed the same tan Chevrolet Blazer pull up to the right of his vehicle, flash a handgun, and begin shooting. (Tr. Vol. 1 pp. 42: 9 – 45:16). Two other individuals were inside M.B.'s vehicle at the time of the shooting, D.J. and D.M. (Tr. Vol. 1 pp. 37:21 – 38:13.

[¶4] During the investigation, BPD discovered that the parties involved in the altercation were members of rival gangs. (Tr. Vol. 1 pp. 50:18 – 52:9; Tr. Vol. 2 pp. 21:20 – 23:6). BPD began a full examination of M.B.'s vehicle and identified at least three separate bullet holes in the victim's vehicle. (Tr. Vol. 1 pp. 79:18 – 80:18).

[¶5] M.B. identified the driver of the tan Chevrolet Blazer as Albert Crews ("Crews") and the passenger who fired the handgun as Mason Schuh ("Schuh"). (Tr. Vol. 1 pp. 42:12 – 44:1; Tr. Vol. 2 pp. 43:3 – 47:17). Video surveillance was also obtained from near-by businesses put both vehicles in the area during the reported time frame. (Tr. Vol. 2 pp. 49:4 – 52:2).

[¶6] Police interviewed Crews on April 27, 2020, who admitted that while he was driving his vehicle on April 24, 2020 on River Road, his front seat passenger began firing on the vehicle to their left at an intersection. (Exhibit 53, Index # 243). Crews also confirmed to police that his front seat passenger was Schuh. Id. Crews explained to police how Schuh leaned over him to fire approximately two rounds into the victim's vehicle, occupied by M.B., D.J., and D.M. Id.

[¶7] While Schuh was in jail and awaiting trial, on a recorded jail phone call, Schuh rapped a song about his criminal charges and the events leading up to his actions. (Tr. Vol. 2 pp. 70:1 – 72:2). At trial, Schuh testified that he shot in self-defense because he believed the occupants of the other vehicle had a firearm. (Tr. Vol. 2 pp. 91:17 – 92:25).

ORAL ARGUMENT

[¶8] The State requests oral argument to emphasize and clarify it arguments contained within the brief and to rebut any additional arguments brought forward by the Appellant during oral argument.

ARGUMENT

[¶9] I. Whether the District Court properly instructed the jury.

[¶10] Jury instructions are fully reviewable on appeal. State v. Wilson, 2004 ND 51, ¶ 11, 676 N.W.2d 98. This Court reviews jury instructions as a whole and determines whether they correctly and adequately inform the jury of the applicable law, even though part of the instructions standing alone may be insufficient or erroneous. Id. Reversal is appropriate only if the instructions, as a whole, are erroneous, relate to a central subject in the case, and affect a substantial right of the accused. State v. Landrus, 2019 ND 162, ¶ 7, 930 N.W.2d 176.

[¶11] On appeal, Schuh argues the District Court erred because the jury instructions did not include the words "even though that belief is mistaken" to Pattern Criminal Jury Instruction K-3.34, Self-Defense (Reasonableness of Accused's Belief). The trial court gave the pattern jury instruction to the jury. (Index # 229, p. 9). Schuh requested this specific instruction with the language used in the pattern instructions. (Index # 119, p. 3). He also requested the Excuse instruction K-3.80. Id. The trial court did give the requested instruction

for K-3.34, with the pattern language requested but did not give the Excuse instruction K-3.80. (Index # 229).

[¶12] The trial court went through the instructions at the close of the State's case. (Tr. Vol. 2 84:6 – 88:11). The trial court indicated it would give instruction K-3.34 as requested by Schuh. (Id. pp. 86:25 – 87:6). The court read the instruction verbatim into the record, as requested by Schuh, neither Schuh nor the State objected to the language. Id. Neither party proposed additional or alternative language to the pattern jury instruction. Id. The State did object to the instruction on Excuse K-3.80 and Schuh did not object to the court removing that instruction. (Id. p. 87:16-24). Schuh, for the first time on appeal, argues the court erred in not including additional language to the pattern instruction. Schuh failed to request these specific instructions and specifically had no objection to the Excuse instruction being removed, therefore, he failed to preserve his argument for appeal.

[¶13] In determining whether the jury instructions correctly and adequately informed the jury of the applicable law, and did not mislead or confuse the jury, this Court must look at the instructions as a whole. State v. Romero, 2013 ND 77, ¶ 16, 830 N.W.2d 586. "Selecting only a part of the instructions without considering the jury instructions as a whole is not proper because it can result in erroneous and misleading inferences." Id. (quoting City of Minot v. Rubbelke, 456 N.W. 2d 511, 513 (N.D. 1990)). Furthermore, "[t]he district court is not required to instruct the jury in specific language requested by the defendant, even if it is a correct statement of the law." State v. Morales,

2004 ND 10, ¶ 8, 673 N.W.2d 250. In this case, the trial court did give the requested instruction using the language requested by Schuh.

[¶14] It is, for the first time on appeal, that Schuh objects to the language used in the instruction. When an issue was not raised before the trial court but, instead, raised for the first time on appeal, this Court will not address that issue unless the error rises to the level of obvious error under N.D.R.Crim.P.52(b). State v. Edwards, 2020 ND 200, ¶ 5, 948 N.W.2d 832. The defendant bears the burden to show obvious error that affected his substantial rights. Id. Schuh argues his allegation that improper instructions were not given is enough to allege obvious error. In this case, Schuh argues language from the statute defining Excuse should be used in statutes involving self-defense. N.D.C.C. §§ 12.1-05-03, 12.1-05-07, 12.1-05-07.1, and 12.1-05-08. Schuh does not cite to any statute or case law which allows the trial court to pick and choose language from one statute and apply it to another statute, nor can the State find any such precedent. Schuh does not cite to any statute or case law which requires the proposed language be included in the jury instruction on self-defense, nor can the State find any such precedent. There is no obvious error.

[¶15] Even if this Court were to find obvious error, the State contends Schuh invited the error - by proposing the language the trial court used, not objecting to the trial court's removal of Excuse from the instructions, and not requesting the unprecedented combination of two different statutes into one instruction. "This Court has recognized three categories of error that arise in

criminal cases when the alleged error has not been raised in the district court: forfeited error, waived error, and structural error. 'Forfeiture is the failure to timely assert a right, while waiver is the intentional relinquishment of a right, and [N.D.] R.Crim.P. 52(b) applies only to 'forfeited' and not to 'waived' errors'." State v. Watkins, 2017 ND 165, ¶ 12, 898 N.W.2d 442 (quoting State v. Olander, 1998 ND 50, ¶ 14, 575 N.W.2d 658), other internal citations omitted.

[¶16] In this case, the jury instructions were discussed in depth during the course of the trial. (Tr. Vol. 2 84:6 – 88:11). Schuh intentionally relinquished any right regarding his now requested instruction by proposing the language of the instruction that was used and specifically indicating he had no objection to removal of the Excuse instruction. (Id. pp. 86:25 – 87:24). "[I]f a defendant desires a more comprehensive instruction on any point of law than what the trial court has indicated it will give, the defendant must request specific written instructions, and if the defendant fails to do so he cannot predicate error upon omissions in the charge given." State v. Erickstad, 2000 ND 202, ¶ 18, 620 N.W.2d 136. In this case, Schuh received the instructions he requested.

[¶17] **II. Whether the district court properly admitted an audio recording into evidence.**

[¶18] Whether a district court properly admitted or excluded evidence is reviewed under an abuse of discretion standard. State v. Beltran, 2018 ND 166, ¶ 16, 914 N.W.2d 488. A district court "abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner or when it

misinterprets or misapplies the law." Id. The trial court did not abuse its discretion when admitting the audio recording exhibit of Schuh's rap song into evidence.

[¶19] Schuh argues the district court abused its discretion in admitting the exhibit into evidence for two reasons. First, because Schuh claims that N.D.R.Ev. 404(b) does not apply because the evidence should be construed as Defendant's "frame of mind," and not prior bad acts. Second, because it did not provide the proper three-step analysis required in Rule 404(b) objections. These arguments are contradictory, either N.D.R.Ev. 404(b) applies or it does not. Regardless, both of these arguments fail.

[¶20] Schuh asserts that the trial court improperly admitted an exhibit consisting of a rap song from a jail recording which Schuh admits included statements related to the criminal charges against him. The recording was highly relevant to the proceeding and the probative value outweighed any prejudice to Schuh. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.D.R.Ev. 401. Relevant evidence is generally admissible. N.D.R.Ev. 402. While relevant evidence may be excluded if its probative value is substantially outweighed by the prejudice, Schuh has not demonstrated substantial prejudice. See N.D.R.Ev. 403. All evidence is prejudicial. "The rule is directed to unfairly prejudicial evidence, not simply prejudicial evidence." State v. Zimmerman, 524 N.W.2d 111, 116 (N.D. 1994).

[¶21] At trial, Schuh objected to the audio being admitted claiming the evidence was not relevant and was overly prejudicial. (Tr. Vol. 2 p. 72:5-22; p. 75:6-21). However, in the rap, as Schuh admits, he is talking directly about the charges he is currently facing, which makes it highly relevant. (Tr. Vol. 2 p. 101:5-24). The State was also allowed to present argument as to why the evidence was relevant and should be admitted. (Tr. Vol. 2 p. 74:7 – 75:2). Moreover, Schuh has presented no evidence that admitting the exhibit substantially prejudiced him. The trial court properly considered if the audio recording was overly prejudicial as both the State and Schuh were permitted to make arguments.

[¶22] While the trial court didn't use any specific verbiage to say the probative value outweighed the prejudicial effect of the evidence, by overruling that specific objection, the intent is implied. (Tr. Vol. 2 p. 76:10-12). The trial court did not act in an arbitrary, unreasonable, or unconscionable manner nor did it misinterpret or misapply the law, especially in light of the fact that when weighing probative value and prejudice, "the usual approach … is … to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." State v. Ash, 526 N.W.2d 473, 479 (N.D.1995) (quoting 1 Jack B. Weinstein and Margaret A. Berger, *Weinstein's Evidence*, ¶ 403[03], pp. 403–49, 403–51 (construing FREv 403)). Therefore, the exhibit is relevant, the probative value outweighs any unfair prejudice, and trial court properly admitted the exhibit into evidence.

[¶23] The exhibit does not require a 404(b) analysis to be admitted because the audio recording was not admitted as character evidence. Under N.D.R.Ev. 404(b) evidence of a defendant's prior criminal acts or other bad acts may be admissible as character evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Evidence admitted under Rule 404(b) are acts which have occurred prior to the current conduct for which the defendant is being charged. N.D.R.Ev. 404(b). The district court is only required to do a Rule 404(b) analysis when determining to admit or exclude prior-act evidence. State v. Parisien, 2005 ND 152, ¶ 26, 703 N.W.2d 306.

[¶24] Here, a 404(b) analysis is irrelevant. The audio recording references the crimes for which Schuh was on trial. It does not reference any past crimes or bad acts, but instead is a direct commentary on his current criminal charges. In the audio recording, Schuh talks about how he is charged with three attempted murders and his actions in relation to those charges. There is nothing in the record to suggest that the State sought to admit the audio recording to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." N.D.R.Ev. 404(b). Moreover, there is no mention in the audio recording to Schuh's past crimes or other bad acts. Schuh has failed to demonstrate the trial court's ruling was arbitrary, capricious, or unreasonable or a misinterpretation or misapplication of the law. Therefore, because the audio recording makes no mention Schuh's prior

criminal acts or other bad acts, a 404(b) analysis is not necessary for the audio to be admitted into evidence.

CONCLUSION

[¶25] Based upon the foregoing, the State respectfully requests that the jury verdict and criminal judgment be affirmed.

Dated this 10th day of January, 2022.

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State of North Dakota,	)	
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Mason Jordan Schuh,	)	Supreme Ct. No. 20210257
	)	
Defendant-Appellant	)	District Ct. No. 08-2020-CR-01198

CERTIFICATE OF COMPLIANCE

I hereby certify that this documents complies with the page limitations allowed by N.D.R.App.P. 32(8). The brief of Respondent-Appellee contains 15 pages.

Dated this 10th day of January, 2022.

/s *Julie Lawyer*
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STATE OF NORTH DAKOTA

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Petitioner-Appellee,	)	
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-vs-	)	
	)	
Mason Jordan Schuh,	)	Supreme Ct. No. 20210257
	)	
Respondent-Appellant.	)	Dist. Ct. No. 08-2020-CR-01198

[¶1] I hereby certify that on January 10, 2022, the following documents:

Brief of Plaintiff-Appellee; and
Certificate of Compliance

were filed electronically with the Clerk of Court through the North Dakota E-Filing Portal and service will be made via electronic service through the portal to the following:

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the above being the last known address of the addressee.

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Respondent-Appellant.	)	Dist. Ct. No. 08-2020-CR-01198

[¶1] I hereby certify that on January 11, 2022, the following documents:

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