20210339
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 7, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellee, vs. Ephrium Thomas, Defendant-Appellant	Supreme Court No. 20210339 Case No. 08-2021-CR-00557

On appeal from the Criminal Judgment entered December 7, 2021
Burleigh County District Court
South Central Judicial District
State of North Dakota
The Honorable James S. Hill, Presiding

APPELLANT'S BRIEF

Scott O. Diamond
ND Bar # 05773
3523 45th Street South
Suite 100
Fargo, ND 58104
Telephone: (701) 639-6521
Fax: (701) 639-6501
Email: Scott@scottdiamondlaw.com
Attorneys for the Defendant-Appellant

Tables of Contents

Table of Authorities

[¶1] **Statement of the Issue**

I. Whether the district court erred in admitting evidence of a hypothetical statement made by the defendant to law enforcement.

Statement of the Case

[¶2] This is an appeal of a Criminal Judgment entered against Ephrium Thomas, (hereinafter referred to as "Mr. Thomas") after a jury trial. On February 23, 2021, Mr. Thomas was charged with Robbery and Terrorizing. (R4:1). As the case progressed, the charging document was amended four times. (R45:1). On September 24, 2021, the district court commenced a jury trial on the two charges. At the conclusion of the trial, Mr. Thomas was found guilty of both charges. (R75:1: R76:1). Mr. Thomas was sentenced to a term of imprisonment. (R84:1-3). Mr. Thomas now appeals the jury's verdicts and the resulting criminal judgment entered against him. (R87:1).

Statement of the Facts

[¶3] The criminal charges in this case stem from an individual who contacted law enforcement and claimed to have been robbed. Pursuant to N.D.R.App.P. 14(a)(5), that individual will be referred to as "John Doe." See id.

[¶4] In the early morning hours of February 5, 2021, John Doe returned home with injuries to the face and neck area. (Tr. at 115, ln. 25 - 116, ln. 10). In response, John Doe's father contacted the police. John Doe initially refused to speak to law enforcement about the injuries. (Tr. at 64, ln. 7 - 9).

[¶5] Later that day, Ryan Guggenberger, a Detective with the Bismarck, Police Department, interviewed John Doe a second time. (Tr. at 145, ln. 2 - 11). During the course of the conversation, John Doe informed law enforcement that he had purchased

approximately 3.5 grams of cocaine for $350. (Tr. at 83, ln. 19 - 84, ln. 2). John Doe purchased the cocaine to sell it for a profit. (Tr. at 161, ln. 17 - 19). According to John Doe, he had been hanging out with Mr. Thomas and others during the evening of February 4 and the early morning hours of February 5. (Tr. at 82, ln. 12 - 17). According to John Doe, Mr. Thomas attacked him, punched him, threatened him and demanded that John Doe give him the cocaine. (Tr. at 86, ln. 9 - 89, ln. 14). In response, John Doe claims to have given Mr. Thomas the 3.5 grams of cocaine. See id.

[¶6] Approximately 3 months later, Officer Guggenberger interviewed Mr. Thomas about the alleged robbery. (Tr. at 149, ln. 12 - 19). Mr. Thomas denied being involved in the robbery. An audio recording was made of the interview. (Tr. at 150, ln. 2 - 7). After the interview, Officer Guggenberger made a disc which contained the audio portions of three different parts of the interview with Mr. Thomas. (Tr. at 152, ln. 20 - 153, ln. 20).

[¶7] The first portion of the interview related to how Mr. Thomas spells his first name. (Tr. at 19, ln. 20 - 20, ln. 3). This related to some evidence that law enforcement had gathered from social media. See id.

[¶8] The second portion of the interview related to a hypothetical situation. (Tr. at 20, ln. 4 - 14: at 21, ln. 2 - 14). In this portion of the interview, Mr. Thomas makes a hypothetical statement to law enforcement. (Tr. at 20, ln. 4 - 14: at 21, ln. 2 - 14). Mr. Thomas states, "You are talking about cocaine and, obviously, someone got took for cocaine. I mean, nobody out here is moving enough for me to even consider taking it. I mean, I would risk getting a charge, if it was like a key or more, but …" (R:72:23:10-23:26). In this context, a "key" refers to a kilogram. (Tr. at 168, ln. 3 - 12).

[¶9] The third portion of the interview involved Mr. Thomas asking whether law enforcement had found any cocaine or blood on him when they arrested him. (Tr. at 20, ln. 14 - 17: at 21, ln. 15 - 25). Law enforcement had not and there was no other forensic evidence that linked Mr. Thomas to the robbery.

[¶10] Mr. Thomas was charged with Robbery and Terrorizing. On September 24, 2021, the district court commenced a jury trial on the charges of Robbery and Terrorizing. (Tr. at 4, ln. 1 - 12). Prior to the trial, Mr. Thomas objected to the introduction of the second and third portions of the interview. (Tr. at 15, ln. 23 - 16, ln. 7). The State asked the Court to make a preliminary ruling on the admissibility of the interview, so that it could be discussed during opening statements. (Tr. at 19, ln. 8 - 14). The State explained that the three different portions of the interview had been put onto a single audio disc. (Tr. at 19, ln. 16 - 20, ln. 21). The defense indicated that it did not have an objection to the first portion of the recording, which related to the spelling of Mr. Thomas' first name. (Tr. at 20, ln. 23 - 21, ln 1). The defense objected to the second portion of the interview, which included the hypothetical statement, arguing that it was "highly prejudicial" and that the "prejudicial value far outweighs its probative value." (Tr. at 21, ln. 2 - 14). The defense also objected to the third portion of the interview, in which Mr. Thomas discussed the lack of physical evidence against him. (Tr. at 21, ln. 15 - 25). The trial court ruled that the statements were admissible and that the State could reference those statements during its opening. (Tr. at 22, ln. 1 - 24, ln. 9).

[¶11] As the trial progressed, the State called a number of witnesses. In between some of the witnesses, while the jury was excused, the State played the audio recording of the

interview for the trial court. (Tr. at 71, ln. 22 - 72, ln. 24). The defense renewed the objection to the second portion of the interview, which included Mr. Thomas' hypothetical statement. (Tr. at 73, ln. 14 - 74, ln. 1). The trial court again indicated that the interview disc would be received into evidence. (Tr. at 76, ln. 1 - 16).

[¶12] The final witness was Officer Guggenberger. (Tr. at 141, ln. 16 - 17). During Officer Guggenberger's testimony, the State offered the audio disc which contained the three portions of Mr. Thomas' interview. (Tr. at 154, ln. 1 - 2). At the time that it was offered, the defense once again renewed the previously made objections. (Tr. at 154, ln.7 - 8). The trial court overruled the defense' objections and admitted the recording, which was played for the jury. (Tr. at 154, ln. 9 - 24). Officer Guggenberger also testified about Mr. Thomas' hypothetical statement. (Tr. at 156, ln. 3 - 13).

[¶13] During the course of the trial, the defense theory was that, even if John Doe was robbed, Mr. Thomas was not the person who committed the robbery.

[¶14] Mr. Thomas was found guilty of both charges. (Tr. at 207, ln. 20 - 208, ln. 14). Mr. Thomas was sentenced to a term of imprisonment and now appeals. (R84:1-3: R87:1).

Law and Argument

[¶15] This is an appeal of a criminal judgment entered after a jury trial. (R87:1). 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.

Standard of Review

[¶16] Mr. Thomas challenges the admission of his hypothetical statement that he would commit a robbery for one kilogram of cocaine. A district court's decision on an evidentiary matter is reviewed under the abuse of discretion standard. State v. Chicano, 2013 ND 8, ¶ 7, 826 N.W.2d 294. A district court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law. See id.

I. The district court erred by permitting the jury to hear Mr. Thomas' irrelevant, unfairly prejudicial, hypothetical statement to law enforcement.

[¶17] The district court erred when it admitted into evidence a statement by Mr. Thomas about how he would act in a hypothetical situation. Prior to trial, Mr. Thomas objected to the admission of this statement. (Tr. at 15, ln. 23 - 16, ln. 7: at 21, ln. 2 - 14). As the trial progressed, Mr. Thomas renewed the objection. (Tr. at 73, ln. 14 - 74, ln. 1). At the time the audio recording was offered, Mr. Thomas once again renewed the objection. (Tr. at 154, ln.7 - 8). By objecting before trial, and renewing the objection at the time the evidence was offered, the issue of whether the evidence was admissible has been properly preserved for appeal.

A. The hypothetical situation evidence should have been excluded under Rule 401, because it had no probative value and was not relevant.

[¶18] The first question related to the district court's admission of the hypothetical situation evidence is whether the evidence was relevant. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b)

the fact is of consequence in determining the action." N.D.R.Ev. 401. Mr. Thomas' statement was that nobody in the area had enough cocaine for him to consider committing a robbery and that he would commit a robbery, but only if it was for a kilogram of cocaine or more. Simply put, such a statement has zero relevance. The statement is purely a hypothetical statement. It is not related to the robbery of John Doe. In fact, it is not related to any robbery that has ever actually occurred. It is a purely hypothetical statement about a manufactured set of facts that he is saying do not currently exist. The hypothetical statement was not based on the actual facts that John Doe described. John Doe described being robbed for 3.5 grams of cocaine. John Doe never said anything to law enforcement about a kilogram of cocaine. Mr. Thomas did not say that robbed anyone or that he would rob anyone for 3.5 grams of cocaine. Mr. Thomas' statement was not admission or even related to the actual facts of the case. It does not make any fact of consequence more or less likely.

[¶19] The irrelevance of the statement becomes clear when it is logically analyzed. Putting aside the very real possibility that this statement was intended as pure hyperbole, even if Mr. Thomas' statement were true, it would be irrelevant. Mr. Thomas' statement was that he would only risk a charge of robbery, if the individual to be robbed had 1,000 grams of cocaine. Logically speaking, the statement that he would only commit a robbery for 1,000 grams of cocaine means that he would not rob someone for less than 1,000 grams of cocaine. The allegation in this case was that the robbery was committed for 3.5 grams of cocaine. Unless Mr. Thomas stated that 3.5 grams were enough for him to rob someone, the statement is purely a hypothetical statement of how he might act when faced with a different set of facts. It has no bearing on any fact of consequence and is therefore irrelevant.

[¶20] The district court's analysis in this regard was limited and flawed. (Tr. at 22, ln. 1 - 24, ln. 9: at 73, ln, 23 - 74, ln. 4). When ruling on the admissibility of this statement, the relevant portions of the trial court's analysis are as follows:

> If in fact there were an interview taking place some days later, it is in the course of an interview, so it would be relevant. It is of this defendant, that would be relevant, it is posing questions regarding a specific event, that would be relevant. So if one's going to balance based on what I know right now of the 403 or 404 argument, I see the relevance in the suggestion.
> (Tr. at 22, ln. 16 - 22)

> On the other two segments, there is no doubt as presented by the State, that this is an interview between an investigating officer and the defendant; so clearly it has relevance. It relates to the subject matter that obviously this case takes on, that is possession of cocaine or the cocaine usage and the robbery that relates to apparently some aspects of cocaine; so the relevance is there.
> (Tr. at 73, ln, 23 - 74, ln. 4).

The trial court essentially determined that because it was an interview between law enforcement and Mr. Thomas, it was automatically relevant. Such analysis is flawed. Simply because it was an interview with Mr. Thomas does not make anything that was said in the interview relevant. It must still relate to a fact of consequence. This particular portion of the interview did not relate to the subject matter of the case. This case was about whether Mr. Thomas robbed John Doe for 3.5 grams of cocaine. It was not about whether Mr. Thomas was hypothetically willing to commit such a crime for 285 times more cocaine than John Doe had. This was a flippant, hyperbolic statement regarding a hypothetical situation that did not exist at the time. It was irrelevant and should have been excluded. Just because a statement relates to cocaine does not make it automatically relevant. Despite the trial

court's statement, this was not a case about "possession of cocaine or the cocaine usage." Further, just because John Doe stated that he was robbed over cocaine does not make any and all statements related to robberies or cocaine automatically relevant. It is only relevant if it makes a fact of consequence more or less likely. Mr. Thomas' hypothetical statement does not do that. As a result, it should have been considered irrelevant and excluded from the jury's consideration.

B. The hypothetical situation evidence should have been excluded under Rule 403 because it was unfairly prejudicial and would be confusing to the jury.

[¶21] While relevance is the first inquiry, the next inquiry becomes weighing the probative value of such evidence against the dangers that the evidence presents to the jury. Rule 403 states:

> **RULE 403. Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons.**
>
> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following:
>
> (a) unfair prejudice;
> (b) confusing the issues;
> (c) misleading the jury;
> (d) undue delay;
> (e) wasting time; or
> (f) needlessly presenting cumulative evidence.

N.D.R.Ev. 403. Weighing the evidence in this case is quite easy because the evidence has no probative value. Under Rule 403, the lack of probative value must be compared to the very real dangers that the evidence presented to the jury. Specifically, this evidence had the

danger of unfairly prejudicing Mr. Thomas, confusing the issues and misleading the jury.

[¶22] The statement would be very confusing and misleading to the jury. Mr. Thomas' statement was not an admission to a crime. There was no other information to put this statement in context to know whether it was intended as truth, or whether it was a flippant, hyperbole made to a police officer. When there is a question as to whether the statement is even true, the danger of unfair prejudice and confusion of the jury is heightened. Even if the statement were true, such a statement would be confusing to the jury. It was not an admission to robbing John Doe. However, the jury may have interpreted it that way. To the extent that the jury interpreted this as an admission to this robbery, the statement was misleading to the jury and unfairly prejudicial to Mr. Thomas. To the extent that the jury did not interpret the statement as an admission to this robbery, the jury would naturally have struggled to understand what logical relevance this statement had to this crime. This statement would only confuse the issues in the minds of the jury.

[¶23] This statement was unfairly prejudicial to Mr. Thomas. The term unfair prejudice, as to a criminal defendant, relates to the capacity of some piece of evidence "to lure the factfinder into declaring guilt on guilt on a ground different from proof specific to the offense charged." Old Chief v. U.S., 519 U.S. 172, 180 (1997). In this context, unfair prejudice means an undue tendency to suggest decision on an improper basis, typically, an emotional one. See id. In this case, the danger in admitting Mr. Thomas' hypothetical statement that he would be willing to commit a robbery for one kilogram of cocaine is that it casts Mr. Thomas in an extremely negative light. Upon hearing such a statement, the jury is going to have an emotional response and start to view Mr. Thomas differently. Hearing such a

statement removes the presumption of innocence that Mr. Thomas should have had and instead covers him in a cloud of mistrust and suspicion. This is unfairly prejudicial. When weighed against the absence of any probative value, such a statement should have been excluded.

C. The hypothetical situation evidence should have been excluded under Rule 404 because it was impermissible character evidence.

[¶24] When considering the unfair prejudice that attaches to the jury hearing Mr. Thomas' hypothetical statement, it becomes clear that such a statement is character evidence. When hearing Mr. Thomas' hypothetical statement that he would be willing to commit a robbery for one kilogram of cocaine, the jury must have begun to view Mr. Thomas' differently. Upon hearing this statement, the jury's natural response would be to view Mr. Thomas as a person who has an inherent willingness and propensity to commit a robbery. The risk of such propensity evidence is that it can cloud the jury's judgment and that the jury will convict, "because a bad person deserves punishment," rather than on the facts presented to it. Old Chief v. U.S., 519 U.S. 172, 181 (1997). As a result, propensity or character evidence is generally excluded in criminal cases.

[¶25] Generally, propensity or character evidence may not be introduced to show that a person acted in conformity to character. City of Fargo v. Habiger, 2004 ND 127, ¶ 32, 682 N.W.2d 300. In recognition of the inherent risks of propensity or character evidence, the admission of such evidence is closely controlled by N.D.R.Ev. 404. See id. Rule 404 provides, in relevant part:

> **RULE 404. CHARACTER EVIDENCE; CRIMES OR OTHER ACTS**
>
> (a) Character Evidence.
>
> (1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

N.D.R.Ev. 404.

[¶26] In this case, the district court permitted Mr. Thomas' statement about how he might act in a hypothetical situation. Mr. Thomas' statement was that he would not risk a robbery charge for less than a kilogram of cocaine. Other than this statement, there was nothing in this case about a kilogram of cocaine. The kilogram of cocaine was purely hypothetical. In offering such a statement, the State was hoping the jury would consider that if Mr. Thomas admitted that he would be willing to commit a robbery for one kilogram of cocaine, than it is more likely that he robbed John Doe for 3.5 grams of cocaine. This is character evidence. This is evidence of a person's particular character trait. The particular propensity or trait in question is someone who is willing to commit a robbery for enough cocaine. The State hoped that by showing that Mr. Thomas had such a character trait, it was more likely that he was the person who robbed John Doe. This statement was offered to prove that on a particular occasion, Mr. Thomas acted in accordance with the character trait. This is exactly what is prohibited by Rule 404(a)(1).

[¶27] The hypothetical statement must have been considered to be character evidence by the prosecutor and by the district court. It is only by finding that Mr. Thomas' statement reveals a certain character trait that such a statement would be relevant to the instant case.

There would be no other reason that such evidence could be considered relevant. However, as character evidence, its admission is prohibited by Rule 404.

[¶28] If the Court was going to allow character evidence, this method was impermissible. When character evidence is admissible, Rule 405 provides that the appropriate method is to provide the character evidence in the form of testimony about the person's reputation or testimony in the form of an opinion. N.D.R.Ev. 405. Rule 405 does not allow for character evidence in the form of a hypothetical statement about a hypothetical situation that did not exist and that was different from the crime that was alleged to have occurred. Under the circumstances, the trial court abused its discretion in allowing the evidence.

[¶29] Without this statement, there was little more than John Doe's statement to convict Mr. Thomas. Mr. Thomas was significantly prejudiced as a result of the admission of the hypothetical statement. This case should be remanded for a new trial as a result.

Conclusion

[¶30] For the foregoing reasons, Mr. Thomas' conviction should be reversed and remanded for a new trial.

Dated this 7th day of March, 2022.

/s/ Scott O. Diamond

Scott O. Diamond
ND Bar # 05773
3523 45th Street South
Suite 100
Fargo, ND 58104
Telephone: (701) 639-6521
Fax: (701) 639-6501
Email: Scott@scottdiamondlaw.com
Attorney for the Defendant-Appellant

Certificate of Compliance

[¶31] Pursuant to N.D.R.App.P. 32(e), the undersigned attorney certifies that this Brief consists of 17 pages and complies with 38 page limitation.

Dated this 7th day of March, 2022.

/s/ Scott O. Diamond

Scott O. Diamond
ND Bar # 05773
3523 45th Street South
Suite 100
Fargo, ND 58104
Telephone: (701) 639-6521
Fax: (701) 639-6501
Email: Scott@scottdiamondlaw.com
Attorney for the Defendant-Appellant

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellee, vs. Ephrium Thomas, Defendant-Appellant,	Supreme Court No. 20210339 Case No. 08-2021-CR-00557 **Certificate of Service**

[¶1] I hereby certify that on the 7th day of March, 2022, the following documents:

1. Appellant's Brief; and
2. Certificate of Service

were served, via email, upon the following individual:

Email: bc08@nd.gov
Dennis H. Ingold

and were served, via first class mail, upon the Defendant-Appellant, as follows:

Ephrium Thomas, # 52005
c/o North Dakota State Penitentiary
3100 E Railroad Ave
Bismarck, ND 58506

Dated this 7th day of March, 2022.

/s/ Scott O. Diamond

Scott O. Diamond
ND Bar # 05773
3523 45th Street South
Suite 100
Fargo, ND 58104
Telephone: (701) 639-6521
Fax: (701) 639-6501
Email: Scott@scottdiamondlaw.com
Attorney for the Defendant-Appellant