20210339

FILED
IN THE OFFICE OF THE
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APRIL 4, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	
	)	
-vs-	)	
	)	
Ephrium Thomas,	)	Supreme Ct. No. 20210339
	)	
Defendant and Appellant.	)	Dist. Ct. No. 08-2021-CR-00557

BRIEF OF PLAINTIFF AND APPELLEE
STATE OF NORTH DAKOTA

Appeal from Corrected Criminal Judgment Entered December 7, 2021

South Central Judicial District, Burleigh County
The Honorable James Hill, Presiding

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STATEMENT OF THE ISSUES

(1) Whether the district court erred in admitting a portion of Thomas' recorded statement to law enforcement.

STATEMENT OF THE CASE

[¶ 1] A jury found defendant Ephrium Thomas ("Thomas") guilty of the offenses of robbery and terrorizing a child victim. (Index ##75, 76). The evidence at trial proved that Thomas robbed J.Z., a juvenile, of approximately 3.5 grams of cocaine and threatened to kill J.Z. and his family. (Transcript ("Tr.") at 86:12-14; 88:24-89:1; 89:9-14; 93:5-7; 104:3-6). After the jury convicted Thomas of robbery and terrorizing, and following a presentence investigation, the district court sentenced Thomas to a term of imprisonment followed by a period of supervised probation. (Index #86). Thomas timely filed a notice of appeal. (Index #87).

STATEMENT OF FACTS

[¶ 2] By Information dated February 22, 2021, the State charged Thomas with robbery in violation of N.D.C.C. § 12.1-22-01 and terrorizing a child victim in violation of N.D.C.C. § 12.1-17-04(1). (Index #4). At trial, J.Z. testified that, in the early morning hours of February 5, 2021, he gave Thomas a ride in J.Z.'s vehicle. (Tr. 85:3-5). At that time, Thomas knew that J.Z. was in possession of cocaine. (Tr. 98:16-21). While J.Z. was driving, Thomas placed a rope around J.Z.'s neck, told J.Z. that he was going to kill J.Z., struck J.Z., gouged J.Z.'s eyes, and demanded J.Z. give Thomas the cocaine. (Tr. 86: 9-18; 88:8-12). In response to the attack, J.Z. gave Thomas the cocaine, which weighed about 3.5 grams. (Tr. 88:13-14; 100:17-19). Thomas then told J.Z. that he would kill J.Z.'s family if J.Z. told anybody

about the robbery. (Tr. 89:10-14). At trial, J.Z. identified Thomas as the person who committed the robbery. (Tr. 91:10-25). The State introduced photographs of injuries to J.Z.'s neck at trial. (Index ##59-63). J.Z. testified that Thomas inflicted the injuries upon J.Z. when Thomas committed the robbery. (Tr. 91:5-25).

[¶ 3] J.Z. also testified that about twenty-four hours after the robbery, J.Z. received an electronic message from "Ephraim" on social media stating, "You probably mad, but I still got your back." (Tr. 90:4-21; Index #58). J.Z. testified that the "Ephraim" from whom J.Z. received the message was Ephrium Thomas. (Tr. 105:1-12). At trial, the State introduced a picture of the social media profile of "Ephraim Thomas," and the profile photograph matched the photograph of the individual who sent the message to J.Z. after the robbery. (Index ##58, 66). In a recorded interview, Thomas admitted to Bismarck Police Detective Guggenberger that Thomas sometimes spells his name "Ephraim." (Trial Exhibit 12). As such, the evidence at trial proved that Thomas sent the message "You probably mad, but I still got your back" to J.Z. about twenty-four hours after the robbery. (Tr. 90:4-21; Index #58).

[¶ 4] In the same interview in which Thomas discussed the spelling of his name, Thomas told Detective Guggenberger that he would commit a robbery for cocaine:

> Thomas: You talking about cocaine then, obviously, somebody got took for cocaine.

> Det. Guggenberger: Right.
>
> Thomas: I mean . . .
>
> Det. Guggenberger: So . . .
>
> Thomas: Nobody's out here moving enough for me to even consider taking it. I mean, I'll risk getting a charge if it was like a key or more.

(Trial Exhibit 12). Before the State presented its opening statement at trial, Thomas objected to that portion of the interview as "more prejudicial than probative" and as "highly prejudicial." (Tr. 16:3-6; 21:4). Thomas argued that "the prejudicial value [of the statement] far outweighs its probative value." (Tr. 21:4-5). Thomas also argued that the statement was "just going to end up confusing the jury" and that the statement was "way too prejudicial[.]" (Tr. 21:9-13). In addition to prejudice, Thomas argued that the statement raised "relevance issues." (Tr. 16:4).

[¶ 5] The State argued the statement was relevant and admissible because Thomas admitted he would risk a charge for cocaine and this case involved a robbery for cocaine. (Tr. 20:5-7). In overruling Thomas' objections and allowing the State to reference that portion of Thomas' interview in its opening statement, the district court noted that "any prejudice is overwhelmed by the relevance of those statements made and it goes to weight." (Tr. 23:24-25).

[¶ 6] Later in the trial, before Detective Guggenberger testified, Thomas again objected to introduction of the interview. (Tr. 73:17-18). In

considering the objection, and based on Thomas' arguments, the district court described the objection as "a 402, 403 argument." (Tr. 73:10). In response, Thomas' attorney noted that "my objections are to the substance and to it being more prejudicial than probative." (Tr. 73:17-18). Thomas did not argue that Thomas' statements were inadmissible under Rule 404, nor did Thomas argue that the statements were improper character evidence.

[¶ 7] In overruling the objection, the district court found Thomas' statement relevant because the trial concerned a "robbery that relate[d] to apparently some aspects of cocaine; so the relevance is there." (Tr. 75:1-4). The district court found the portions of Thomas' interview that the State intended to introduce were "highly relevant statements, isolated in context obviously, but certainly relevant and certainly the relevance outweighs the prejudice that would flow." (Tr. 75:19-21). After Detective Guggenberger testified regarding the foundation for his interview of Thomas, the State offered the interview as an exhibit. (Tr. 154:1-2). Thomas objected and "raise[d] the same objections that [Thomas] already raised[.]" (Tr. 154:7-8). Thomas did not make a Rule 404 objection or otherwise argue that Thomas' statement was improper character evidence. The district court overruled the objection and received the exhibit. (Tr. 154:13).

[¶ 8] The jury convicted Thomas of robbery and terrorizing a child victim. (Index ##75, 76). Following a presentence investigation, the district court

sentenced Thomas to a period of incarceration followed by supervised probation. (Index #86). Thomas filed a notice of appeal. (Index #87).

ARGUMENT

I. The district court did not abuse its discretion in admitting Thomas' statement that he would commit a robbery to obtain cocaine.

[¶ 9] Thomas argues that the district court abused its discretion in admitting Thomas' statement that he would commit a robbery to obtain cocaine. Thomas first argues that the district court should have excluded his statement because it was not relevant. Under N.D.R.Evid. 401 ("Rule 401"), evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." N.D.R.Evid. 401. The trial court has "wide discretion in deciding whether proffered evidence is relevant," and this Court will not reverse a trial court ruling that evidence is relevant unless the trial court abuses its discretion. *Williston Farm Equip. v. Steiger* Tractor, Inc. 504 N.W.2d 545, 548-49 (N.D. 1993). "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. Polk*, 2020 ND 248, ¶ 10, 950 N.W.2d 764.

[¶ 10] Thomas' admission that he would commit the type of robbery involved in this case—a robbery to obtain cocaine—was relevant evidence. At trial, the State argued Thomas' statement was a relevant admission

because this case involves a robbery for cocaine and Thomas admitted he would commit a robbery for cocaine. (Tr. 20:4-7). The district court agreed and concluded that Thomas' statement "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. 75:1-4) (emphasis added). That ruling was not an abuse of the district court's wide discretion because, in the context of the other evidence admitted at trial, Thomas' statement that he would commit a robbery to obtain cocaine was a partial confession. At trial, J.Z. testified that Thomas robbed J.Z. of cocaine, and the State introduced at trial a message from Thomas to J.Z. sent a day after the robbery that the jury could reasonably construe as an apology. (Tr. 86:12-88:14; Index #58). Viewed with the other evidence at trial, Thomas' admission that he would commit a robbery of cocaine was relevant evidence that the jury was properly allowed to consider.

[¶ 11] Thomas' partial confession—an admission that he would commit a robbery to get cocaine—made the fact that Thomas robbed J.Z. of cocaine more probable than without the admission. It was therefore relevant evidence. N.D.R.Evid. 401. As such, the district court properly concluded that Thomas' statement was relevant evidence and did not abuse its discretion in overruling Thomas' objection under Rule 401.

[¶ 12] Thomas next argues that, even if relevant, his statement should have been excluded as unfairly prejudicial under N.D.R.Evid. 403 ("Rule 403"). Under Rule 403, relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice[.]" N.D.R.Evid. 403(a). Because nearly all evidence in a criminal trial is prejudicial, the issue is whether evidence is *unfairly* prejudicial. "After all, 'the admission of evidence is generally calculated to benefit one side to the prejudice of the other.'" *State v. Anderson*, 2003 ND 30, ¶ 16, 657 N.W.2d 245 (*quoting Bell v. City of Milwaukee*, 746 F.2d 1205, 1277 (7th Cir. 1984) (overruled on other grounds)).

[¶ 13] In *State v. Zimmerman*, this Court held that "[p]rejudice is unfair if it is the result of something other than the relevance of the evidence." 524 N.W.2d 111, 116 (N.D. 1994). That is because Rule 403 "is directed to unfairly prejudicial evidence, not simply prejudicial evidence." *Id*. at 116. Thus, "any prejudice due to the probative force of evidence is not unfair prejudice." *Id*.

[¶ 14] Here, the district court considered the nature of the statement—an admission that Thomas would commit a robbery to obtain cocaine—and the nature of the allegations against Thomas. (Tr. 75:1-21). The district court noted that "virtually everything in a criminal case" is prejudicial, but the court found that the relevance of Thomas' statement outweighed its prejudicial impact. (Tr. 75:9-25). Given the wide discretion afforded to the

district court to make evidentiary rulings, the district court did not abuse its discretion in admitting the statement.

[¶ 15] This Court has affirmed a criminal judgment in case involving a similar partial confession. In *State v. Schuh*, this Court held that a district court did not abuse its discretion in admitting at an attempted murder trial a defendant's recorded statement—in the form of a jail telephone call—in which the defendant stated he would commit a shooting, albeit with a different caliber firearm than that used in the attempted murder. 2022 ND 55, ¶ 3, __ N.W.2d __. The defendant argued under Rule 403 that the prejudicial effect of his statement, which was made in the form of rap lyrics involving reference to violence and gang activity, outweighed its probative value. This Court concluded that the district court did not abuse its discretion in admitting the statement. *Id*.

[¶ 16] Like the defendant's rap lyrics in *Schuh*, Thomas' statement contained relevant admissions to some part of the State's allegations. Those admissions were relevant and appropriate for the jury to consider. In *Schuh*, the defendant admitted he would commit a shooting, but with a different caliber firearm than that used in the attempted murder with which he was charged. Here, Thomas admitted he would commit a robbery for cocaine, but for a different amount of cocaine than that taken from J.Z. (Trial Exhibit 12). Because admission of Thomas' statement was not unfairly prejudicial, the district court did not abuse its discretion in admitting the statement.

II. Thomas waived his N.D.R.Evid. 404 argument by not objecting under N.D.R.Evid. 404 in the district court.

[¶ 17] To preserve a claim of error in a ruling that admits evidence, a party must state the specific ground for the objection, unless the ground was apparent from the context of the objection. N.D.R.Evid. 103(a)(1). Although Thomas objected to admission of the portion of his interview in which he stated he would "risk getting a charge" for a cocaine robbery, Thomas did not object under N.D.R.Evid. 404 ("Rule 404"). On appeal, Thomas argues for the first time that his statement is inadmissible character evidence under Rule 404. (App. Br. at 14). But at trial, Thomas' objections were that the statement was "more prejudicial than probative" and was "highly prejudicial[.]" (Tr. 16:3-6; 21:4). In making the objections, Thomas argued that "the prejudicial value [of Thomas' statement] far outweighs its probative value." (Tr. 21:4-5). Those are Rule 403 objections. *See* N.D.R.Evid. 403(a) ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice[.]").

[¶ 18] Thomas' other objections were that the statement raised "relevance issues" and was "just going to end up confusing the jury[.]" (Tr. 16:4; 21:9). The relevance objection falls within Rule 401, and the objection that the statement would confuse the jury is a Rule 403(b) objection. Thomas did not reference Rule 404, by title or otherwise, in any of his several objections to

the admission of his statement that he would risk getting a charge for a cocaine robbery. Rather, Thomas' objections were related to relevance under Rule 401 and prejudice under Rule 403.

[¶ 19] Thomas' relevance and prejudice objections were not sufficient to preserve a claim of error under Rule 404. *See United States v. Sandini*, 803 F.2d 123, 126-27 (3rd Cir. 1986) (holding that objection to evidence as "irrelevant" did not properly preserve Rule 404 issue for appellate review); *Williams v. State*, 373 S.W.3d 237, 242 (Ark. 2009) (holding that objection to admission of evidence on the ground that it is more prejudicial than probative does not preserve a Rule 404 objection on appeal); *United States v. Laughlin*, 772 F.2d 1382, 1392 (7th Cir. 1985) (objection to admission of evidence as irrelevant and prejudicial did not preserve a Rule 404 issue for appeal). Because Thomas did not raise a Rule 404 objection in the district court, that argument is waived. *State v. Smith*, 2019 ND 239, ¶ 14, 934 N.W.2d 1.

[¶ 20] As such, with respect to whether the statement should have been excluded under Rule 404, the issue can be reviewed only for obvious error. *Id*. Thomas did not argue that admission of his statement constituted obvious error, and this Court therefore has discretion whether to consider the issue. *State v. Aune*, 2021 ND 7, ¶ 14, 953 N.W.2d 601. This Court "notices obvious error 'only in exceptional circumstances in which a party has suffered a serious injustice.'" *Id*. (*citing State v. Henes*, 2009 ND 42, ¶ 8,

763 N.W.2d 502). Because this is not such an exceptional circumstance, and because Thomas did not argue obvious error on appeal, this Court should decline to address the alleged error under obvious error review. *State v. Hart*, 1997 ND 188, ¶ 22, 569 N.W.2d 451 (declining to consider Rule 404 issue on appeal under obvious error review where defendant did not make Rule 404 objection in the district court); *State v. Sah*, 2020 ND 38, ¶ 9, 938 N.W.2d 912 (declining to consider Rule 403 and 404 issues on appeal under obvious error review where appellant did not argue obvious error).

[¶ 21] If this Court exercises its discretion to consider the issue under the obvious error standard, the burden is on the appellant to show (1) error; (2) that is plain; and (3) that affects substantial rights. *State v. Doppler*, 2013 ND 54, ¶ 14, 828 N.W.2d 502. "The first inquiry under the framework for obvious error is whether an error occurred." *Aune*, 2021 ND 7, ¶ 14, 953 N.W.2d 601. Thomas cannot demonstrate obvious error because he cannot establish that an error occurred. Thomas' statement that he would commit the type of robbery at issue in this case is not a statement regarding a character trait; it is a partial admission to the offense charged.

[¶ 22] Nor can Thomas establish that the alleged error affected substantial rights because he cannot demonstrate that the claimed error affected the outcome of the proceeding. *State v. Strutz*, 2000 ND 22, ¶ 20, 606 N.W.2d 886. At trial, the State presented the testimony of J.Z. that Thomas robbed him, presented evidence of J.Z.'s injuries from the robbery, and presented a

message from Thomas to J.Z. a day after the robbery that could reasonably be construed as an apology. As such, the district court's admission of a seconds-long statement that Thomas would commit this type of offense—in Thomas' own words—did not affect the outcome of the trial. Thus, the district court's admission of the statement was not obvious error.

CONCLUSION

[¶ 23] For the foregoing reasons, the criminal judgment should be affirmed.

Dated this 4th day of April, 2022.

/s/ Dennis H. Ingold
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Ephrium Thomas,	)	Supreme Ct. No. 20210339
	)	
Defendant and Appellant.	)	Dist. Ct. No. 08-2021-CR-00557

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee in the above matter, and as the author of this brief, hereby certifies that this brief complies with the page limitation in N.D.R.App.P. 32(a)(8). This brief is seventeen pages in length.

Dated this 4th day of April, 2022.

/s/ Dennis H. Ingold

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STATE OF NORTH DAKOTA	)	
	) ss	
COUNTY OF BURLEIGH	)	

[¶1] I, Stacey Baskerville, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 4th day of April, 2022, I served the following:

1. Brief of Plaintiff and Appellee
2. Certificate of Compliance
3. Certificate of Service

by electronic transmission to the following email address below:

Scott O. Diamond
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3523 45th St. S., Ste. 100
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Email: scott@scottdiamondlaw.com

which is the last known reasonable ascertainable email address of the addressee.

Stacey Baskerville

Subscribed and sworn to before me this 4th day of April, 2022.

MARIANN C. KRICK
NOTARY PUBLIC
STATE OF NORTH DAKOTA
MY COMMISSION EXPIRES OCT. 24, 2023

Marianne Krick, Notary Public,
Burleigh County, North Dakota.

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MARIANN C. KRICK
NOTARY PUBLIC
STATE OF NORTH DAKOTA
MY COMMISSION EXPIRES OCT. 24, 2023

Marianne Krick, Notary Public,
Burleigh County, North Dakota.

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/s/ Dennis H. Ingold

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