

IN THE SUPREME COURT OF THE STATE OF NEBRASKA
NEBRASKA SUPREME COURT
COURT OF APPEALS

STATE OF NEBRASKA,

NO. A-19-000643

Appellee,

) PETITION FOR FURTHER REVIEW

) AND

) MEMORANDUM BRIEF IN SUPPORT

AUGUSTINE L. CAVITTE,

Appellant.

COMES NOW, Appellant Augustine Cavitte ("Ms. Cavitte") and pursuant to Nebraska Supreme Court Rule §2-102(F) hereby petitions the Supreme Court for an Order granting further review of the Court of Appeals opinion entered on July 7, 2020.

ASSIGNMENT OF ERRORS

The Court of Appeals erred as follows:

- I. The Court of Appeals erred in misstating the law by upholding the receipt of Ms. Cavitte's pre-*Miranda* statements which therefore affects her statements regarding *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601 (2004).
- II. The Court of Appeals erred in mischaracterizing the record regarding the prosecutor's unlawful statements during closing argument when upholding the district court's decision denying Appellant's motion for mistrial and new trial.
- III. The Court of Appeals erred in misapplying the inextricably intertwined rule when upholding the district court's admission of Appellant's prior bad acts.

STATEMENT OF FACTS

Appellant, Augustine Cavitte, incorporates the Statement of Facts contained in Appellant's brief to the Court of Appeals, herein by reference.

MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR FURTHER REVIEW

Appendix K

I. THE COURT OF APPEALS ERRED IN MISSTATING THE LAW BY UPHOLDING THE RECEIPT OF MS. CAVITTE'S PRE-MIRANDA STATEMENTS THEREFORE AFFECTING HER STATEMENTS REGARDING *MISSOURI V. SIEBERT*, 542 U.S. 600, 124 S. CT. 2301 (2001).

The appeals court should have reversed the district court's denial of Ms. Cavitte's Motion to Suppress and ruled that her statements were inadmissible at trial because the court applied the wrong law regarding what constitutes an interrogation which therefore affects her argument pursuant to *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601 (2004).

Appellant incorporates the argument in appellant brief herein. See appellant's brief 23.

The Court of Appeals misstated the law when they determined that Ms. Cavitte's pre-Miranda statements were admissible because they were not incriminating. *Cavitte*, at 608 (neither [the statement that 'we hurt each other'] nor Cavitte's assertion that a disagreement occurred is incriminating...). Such analysis is irrelevant. The Supreme Court of the United States has made clear that "'incriminating response' refers to any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial." *Rhode Island v. Innis*, 446 U.S. at 301, n. 5, 100 S.Ct. at 1694. Furthermore, The Court has explained:

"No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory'. If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to

be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.” *Id.* (citing *Miranda v. Arizona*, 384 U.S.436, 476–477, 86 S.Ct. 1602, 1629 (1966)).

Not to mention, the Court of Appeals invaded the province of the jury when determining Ms. Cavitte’s responses were not incriminating. Additionally, the district court previously found that the questions by Omaha Police Officer Baines’ (“Baines”) were interrogational. (T33).

Furthermore, the Court of Appeals misapplied the law when reviewing what constitutes an interrogation for *Miranda* purposes. In its analysis, the court incorrectly reviewed Baines’ express questions subjectively. *State v. Cavitte*, 28 Neb. App. 601, 609 (2020)(“Therefore, because Baines’ question...was not intended to elicit an incriminating response...”). In *State v. Juranek*, this Court reiterated that “we apply an objective standard in determining whether a defendant’s response was the result of interrogation. For this reason, whether a defendant was being interrogated does not depend on the officer’s intent in asking the question that elicited an incriminating response.” 287 Neb. 846, 855, 844 N.W.2d 791, 800-01(2014) (emphasis supplied) citing *State v. Bormann*, 279 Neb. 320, 327, 777 N.W.2d 829, 836 (2010) interpreting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1694 (1980). Current law holds that an interrogation can be “express questioning” or “any words or actions on the part of the police... that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Id.* citing *State v. Bauldwin*, 283 Neb. 678, 700, 811 N.W.2d. 267, 286 (2012)(ellipsis in original)(quoting *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35(2009)). Therefore, when the Court of Appeals

reviewed Baines' express questions to Ms. Cavitte purely subjectively, they misapplied the law. Because Baines' expressly asked Ms. Cavitte questions regarding the nature of what happened while Ms. Cavitte was in custody, the Court of appeals erred and this court should grant this petition for further review.

The Court of Appeals cited to other jurisdictions to justify Baines' conduct creating an exception to allow officers to question about a suspect's apparent injuries. *Cavitte* at 608. ("other jurisdictions have found that a law enforcement officer's pre-Miranda questions regarding a suspect's apparent injuries are valid"). When applying the correct binding law to the case at hand, this Court should find that when Ms. Cavitte was immediately cuffed, completely bypassing the paramedics, and placed in the back of cruiser, Baines should have known his express questions were reasonably likely to elicit an incriminating response from Ms. Cavitte. (E1, 10: 10, located between page 482-483).

Appellant incorporates the argument in appellant brief herein. See appellant's brief 24-26. Because the Court of Appeals misstated the law regarding what constitutes an "interrogation" for *Miranda* purposes, this Court should grant Ms. Cavitte's petition for further review.

II. THE COURT OF APPEALS ERRED IN MISCHARACTERIZING THE RECORD REGARDING THE PROSECUTOR'S STATEMENTS DURING CLOSING ARGUMENT.

The Court of Appeals mischaracterized the record when it found the prosecutor's comments during closing were not misconduct and instead made in reference to Ms. Cavitte's credibility. *Cavitte* at 617. For reference, the prosecutor argued, "...nowhere in the ten and a half months leading up to this trial was there any evidence that [Ms. Cavitte] tried to reach out to law enforcement to change her story." (437: 22-24)(emphasis supplied). In coming to this conclusion,

the Court of Appeals examined the comments “in the context of the full trial” and in doing so, the court blatantly ignored the prosecutor’s stated purpose for the comment. *Id.* After Ms. Cavitte moved for mistrial, the prosecutor was given the opportunity to respond to the questionable comments and explained by stating:

“[I]t’s the State’s position that we’re just now hearing of the self-defense claim, and that [Ms. Cavitte] had ample opportunity to provide law enforcement—when she’s speaking with them, to provide them information about this. The State’s just referencing the lack of information provided by the defendant during the case.” (466:2-11)(emphasis supplied).

There is a difference between attacking the credibility of the defendant’s testimony and shifting the burden. There is a difference between “nowhere in the ten and a half months leading up to this trial was there any evidence that Ms. Cavitte tried to reach out to law enforcement to change her story” and commenting on the time Ms. Cavitte had to develop her testimony. (437: 22-24)(emphasis supplied). The clear words of distinction here are that the prosecutor specifically said “evidence that she tried to reach out to law enforcement” which makes it clear that the prosecutor was illegally commenting on the defendant’s failure to produce evidence.

Appellant incorporates the argument in appellant brief herein. See appellant’s brief 9-18.

Because the Court of Appeals mischaracterized the record regarding the prosecutor’s actual explanation for his unlawful comments during closing, this Court should grant Ms. Cavitte’s petition for further review.

III. THE COURT OF APPEALS ERRED IN MISSAPPLYING THE INEXTRICABLY INTERTWINED RULE WHEN UPHOLDING THE DISTRICT COURT’S ADMISSION OF APPELLANT’S PRIOR BAD ACTS.

The Court of Appeals erred in upholding the admission of propensity evidence governed by Neb. Rev. Stat. §27-404(2) under the guise that the evidence falls under the inextricably intertwined rule. For reference, the questionable evidence included:

2:06:05 Detetective Kreikemeier (“Kreikemeier”): “So these past 3 days you’ve been staying there trying to work on the marriage because in the past there’s been abuse, mental physical like that...”

Ms. Cavitte: “and drinking”

Kreikemeier: “by both or just him or...”

Ms. Cavitte: “hmmmm....”

Kreikemeier: “You can be honest with me.”

Ms. Cavitte: “50/50”

Kreikemeier: “so you both have beat up on each other, has any of it been reported to police?”

Ms. Cavitte: “yes”

Kreikemeier: “has anybody ever been arrested?”

Ms. Cavitte: “Yes, I went to jail for 4 days, I’ve never been there in all of my life...”

Kreikemeier: “uhh huh”

As well as at 2:23:11:

Ms. Cavitte: “and I love him so much, I do, but...”

Kreikemeier: “You know I’m not gonna tell you how not to feel but if you’ve told me that you both like to drink, you obviously have some relationship issues for lack of a better word, *you both have been arrested for beating on each other*, you have a protection order out on him, ok, I think this has to be the last time, and that’s just my opinion. But

we've come to the point now where we've definitely gone too far. One time is too many. This is a cycle, this is repeating this isn't good for you this isn't good for him, ok? I'm thinking this is the last time you guys are together. And I know that's not easy and I'm sitting here telling you that I think you should probably end it because I don't wanna see anybody else get hurt. Ok? You know nobody was seriously hurt here. Let's not continue down this path and cycle were someone does get seriously hurt. Ummm did he stay in the room when you wrapped his head or were you..."

(E3, 24: 24, located between page 483-484). The regular text of the conversation is to provide context. The italicized was redacted. The bolded portions were admitted over defense objection.

The court explained that the above statements were admissible because, "the nature of the relationship between [Ms.] Cavitte and her husband, including the fact that each abused the other, was necessary to present a coherent picture of the assault." *Cavitte* at 622. This holding is inconsistent with itself because part of the bad acts evidence was redacted while the admitted evidence was not. The Court of Appeal therefore erred in upholding the district court's decision to redact some of the bad acts evidence and not all of it as the evidence is indistinguishable. More importantly, this holding deliberately allows the admission of propensity evidence.

"Evidence of prior [bad acts] introduced for no purpose other than to show criminal disposition ... violate[s] the Due Process Clause. *Spencer v. Texas*, 385 U.S. 554, 575, 87 S.Ct. 648, 659 (1996). Evidence of prior [bad acts] has been forbidden because it jeopardizes the presumption of innocence of the same crime currently charged." *Id.* Character evidence is not excluded because it is irrelevant, rather because the jury may find it too relevant. *Michelson v. US*, 335 US 469, 475-476, 69 S.Ct. 213, 219 (2005). The broad interpretation of the inextricably intertwined rule adopted by the Court of Appeals eviscerates the procedural protections provided

by Neb. Rev. Stat. §27-404(2) and allows propensity evidence in most domestic violence cases. The Court of Appeals relied on *State v. Burries* to justify the introduction of the propensity evidence in the case at hand, such reliance is misplaced.

In *Burries*, this Court admitted evidence of previous threats made to the victim by Burries and Burries' 2012 assault conviction under the inextricably intertwined rule. 297 Neb. 367, 900 N.W. 2d 483 (2017). This Court expanded its own holding in *Ash* to now include "evidence of a murder defendant's previous threat to the victim or statement to others showing a desire to harm or kill the victim... if the defendant made the threat or statement fairly close in time to the murder." *Id.* at Neb. 407, N.W. 2d 514. This court included the 2012 assault conviction based on this expansion and because, "Burries himself repeatedly interjected the 2012 assault of Hoult into the 2014 murder of Hoult." *Id.* at 405, N.W. 2d. 513. Although the holding in *Ash* was expanded, it was not abandoned. The expansion of the inextricably intertwined rule provided in *Burries* does not apply to instant case.

In *Cavitte*, the district court admitted bad acts evidence that cannot be categorized as "evidence of a previous threat" to Mr. Cavitte nor a "statement to others showing a desire to harm or kill" Mr. Cavitte. Since the admitted bad acts did not include threats to harm Mr. Cavitte, *Burries* does not apply. Moreover, the admitted bad acts in this case cannot be "part of the factual setting of the assault" because the evidence fails to explain to what and/or when Ms. Cavitte is even referring. The fact that Ms. Cavitte is "not referring to a specific past assault" does not provide clarity in a lawful manner. Quoting *Cavitte* at 622. Instead, the admitted bad acts evidence is clearly propensity evidence used for the purpose to show Ms. Cavitte's bad character and that she acted in conformity with the alleged crime. When this court made its holding in *Burries*, surely it did not intend that evidence of prior bad acts would be expanded to propensity evidence without

requiring proof of the veracity of the evidence. Therefore, the comparison drawn by the Court of Appeals equating the bad acts evidence in *Cavitte* to the prior conviction and threats in *Burries* is a mischaracterization of this Court's precedent.

As this Court has previously held, the inextricably intertwined rule is applied when proof of the other bad acts are necessary. *State v. Ash*, 286 Neb. 681, 695, 838 N.W. 2d. 273, 283 (2013). Here, the Court of Appeals specifically ignores this Court's holding in *Ash* and instead finds that the admitted bad acts evidence "offered insight into the nature of [Ms.]Cavitte's relationship with her husband." *Cavitte* at 623. The Court of Appeals cannot simply ignore this Court's precedent because it does not fit within the present analysis. Here, the evidence was not necessary because it certainly was possible for the State to give a complete and intelligent account of the altercation between the Cavittes without delving into the details of prior domestic violence allegations. The State would have been permitted to properly impeach Ms. Cavitte had the appropriate scenario played out. However, admission of Ms. Cavitte's previous bad acts in her relationship with Mr. Cavitte in this manner blatantly allows propensity evidence which is clearly impermissible and goes to the heart of the protections that Neb. Rev. Stat. §27-404(2) provides. Not only does the evidence admitted in the instant case fail to meet the standards set out in *Ash* and *Burries*, the evidence admitted does not meet the minimal requirements for foundational purposes and is therefore far more prejudicial than probative.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." Neb. Rev. Stat. §27-403. As stated above, the evidence admitted fails to provide any context to when or even what Ms. Cavitte is referring. The evidence admitted does not explain when Ms. Cavitte allegedly contributed to the "abuse", it does not explain what Ms. Cavitte meant by

“50/50”, nor does it explain how she allegedly contributed to the “abuse”. The evidence admitted does not provide a clearer picture of what happened on April 30, 2018, instead the admitted bad acts evidence led to unfair prejudice, confusion, and misled the jury.

Additionally, the danger in upholding the Court of Appeals’ admission of bad acts evidence effectively allows the State to introduce prejudicial unsubstantiated evidence to prove Ms. Cavitte acted in conformity with her alleged past. In the instant case, the court upheld the admission of Ms. Cavitte’s bad character without being required to prove any veracity of the statement. The State did not provide a valid prior, they did not provide threatening phone calls made by Ms. Cavitte, nor did the State provide witnesses testifying to the legitimacy of the admitted evidence. Because of the lack of authenticity, the lack of context, the lack of foundational support, the admitted bad acts evidence is far more prejudicial than probative and its admittance was an abuse of discretion.

The inextricably intertwined rule is not an excuse to ignore the constitution and state statutes. This is why in *Ash*, this court found that if the evidence could be admitted through Neb. Rev. Stat. §27-404(2), it must go through Neb. Rev. Stat. §27-404(2) protections. Failing to grant this petition for further review will eviscerate the procedural protections provided by Neb. Rev. Stat. §27-404(2) and allows propensity evidence in most domestic violence cases.

Respectfully Submitted,

THOMAS C. RILEY, #13523

Douglas County Public Defender

BETHANY STENSRUD, #24679

Assistant Public Defender

Attorneys for Appellant