

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF LYON

FIFTH JUDICIAL DISTRICT

CRIMINAL COURT DIVISION

Court File No. 42-CR-08-220

State of Minnesota,

Plaintiff,

vs.

**DEFENDANT'S NOTICE OF MOTION
AND MOTION IN LIMINE TO RAISE
AND ARGUE THAT FLIGHT IS
ADMISSIBLE AS EVIDENCE OF
CONSCIOUSNESS OF GUILT**

Olga Marina Franco del Cid

aka

Alianiss Nunez Morales,

Defendant.

To: Lyon County District Court, Criminal Division, Lyon County Government Center, 607 West Main Street, Marshall, MN 56258;

and: Lyon County Attorney's Office, Attention: Rick Maes, Lyon County Attorney, 607 West Main Street, MN 56258.

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE that the Defendant, by and through her attorney, Manuel P. Guerrero, will move this honorable court for an order to allow the defense to introduce evidence and to argue that flight is evidence of consciousness of guilt without trial objection by the State.

The hearing is now scheduled for **Tuesday, July 8, 2008** at 9:00 a.m. or as soon thereafter as counsel may be heard, at the Lyon County Government Center, located at 607 West Main Street, Marshall, MN 56258.

FILED IN THIS OFFICE
7/8/08
Karen J. Bierman
COURT ADMINISTRATOR
Marshall Lyon County, Minnesota

MOTION

COMES NOW the Defendant, by and through her attorney, Manuel P. Guerrero, and hereby requests an Order from this honorable court to allow the defense to introduce evidence and to argue that flight is evidence of consciousness of guilt without trial objection by the State.

This Motion is made pursuant to:

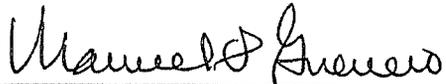
1. Rule 10.01; 10.04; and 11.04 of the Minnesota Rules of Criminal Procedure;
2. Due Process under the United States Constitution and the Minnesota State Constitution;
3. Minnesota cases including but not limited to *State v. Meany*, 115 N.W.2d 247, 255 (Minn. 1962); *State v. Bias*, 419 N.W.2d 480, 485 (Minn. 1986); *State v. Mosby*, 450 N.W.2d 629, 633 (Minn.App. 1990).

This Motion is based upon all the court files and records in the above entitled matter.

You are informed that responsive pleadings shall be served and mailed to or filed with the Court Administrator no later than three days prior to the scheduled hearing. The court may, in its discretion disregard any responsive pleadings served or filed less than three days prior to the hearing.

Dated: 2 July, 2008

RESPECTFULLY SUBMITTED,


Manuel P. Guerrero (38520)
Attorney for Defendant
148 Farrington Street
St. Paul, MN 55102
(651) 587-2158

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7 N.W.2d 660,
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v. Oates, 611
.2000); State v.
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76 (Minn.1997);
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N.W.2d 276, 285
; above; State v.
59 (Minn.1988).

A difference in this type of evidence is that the advance notice generally required need not be given.⁴⁵ This is reasonable, because a party will ordinarily be aware of such evidence and reasonably expect it to be offered.

Relationship evidence is otherwise treated in the same way as other evidence in this general category. It must be shown to be clear and convincing, and more probative than prejudicial.⁴⁶

This type of evidence is a species of "context" or "background" evidence, referred to elsewhere in this section; a specific application of that broader category. This evidence may be relevant to context or background, but have no bearing on the relationship.

Note that in certain cases these relationships may be in effect an element of the offense itself, and then it is not evidence of "other" acts at all.⁴⁷ And in some cases, the relationship itself may be a benign one, which is exploited in the crime.⁴⁸

K. Consciousness of Guilt. The courts in some cases have allowed evidence of certain acts to prove "consciousness of guilt."⁴⁹ The opinions on this point do not contain any extended analysis or consistent theory, generally assuming that the purpose is proper.⁵⁰

Thus, evidence of flight and the like may be admissible.⁵¹ Similarly, improper attempts to influence witnesses or evidence may show consciousness of guilt.⁵²

It is true that acts suggesting consciousness of guilt do not necessarily or exclusively do so; flight, for example, may be caused by an innocent person's fear.⁵³ The jury should be carefully instructed on the proper use of the evidence.⁵⁴

45. State v. Boyce, above; State v. Oates, above.

46. State v. Buggs, 581 N.W.2d 329, 336 (Minn.1998); State v. Bauer, above; State v. Oates, above.

47. E.g., State v. Cross, 577 N.W.2d 721 (Minn.1998) (domestic abuse homicide involving a "past pattern of domestic abuse" under M.S.A. § 609.185).

48. See M.S.A. § 609.342, subd. 1(g), § 609.34B, subd. 1(g), § 609.344 subd. 1(f), (criminal sexual conduct, "significant relationship"); § 609.345, subd. 1(b) ("position of authority").

49. See State v. Harris, 521 N.W.2d 348, 353 (Minn.1994) (threats to witness).

50. See State v. Mosby, 450 N.W.2d 629, 633 (Minn.App.1990) (evidence of flight; "The righteous standeth firm while the

guilty fleeth" is the extent of the court's analysis); State v. Meany, 262 Minn. 491, 502, 115 N.W.2d 247, 255 (1962) (flight, citing Wigmore).

51. State v. Mosby, above; State v. Meany, above; State v. French, 400 N.W.2d 111 (Minn.App.1987); State v. Bias, 419 N.W.2d 480, 485 (Minn.1988); State v. Merrill, 428 N.W.2d 361, 368 (Minn.1988).

52. State v. Redding, 422 N.W.2d 260 (Minn.1988); State v. Witucki, 420 N.W.2d 217 (Minn.App.1988).

53. Compare State v. Mosby, above.

54. State v. Harris, above, 521 N.W.2d at 353 (The trial court erred by failing to give the jury cautionary instructions).

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proper lookout; and (3) that he drove his automobile to the north of and off the road-way.

[9, 10] 5. Defendant challenges the sufficiency of the indictment, contending that none of the three acts upon which the state relies to establish the crime constitutes more than ordinary negligence. With this we cannot agree. It is conceivable that any of the three acts alleged could constitute criminal negligence if proved to have been done in a reckless or grossly negligent manner, as those terms have been defined herein. All of the cases we have passed upon under our criminal negligence statute involve either intoxication or excessive speed.⁶ That does not mean that there are not other acts that can be done in such a reckless or grossly negligent manner as to constitute commission of the crime of criminal negligence.

6. The case was tried before a trial judge who did not pass on the demurrer. A great deal of the evidence in a voluminous record pertains to investigations made by police officers in an effort to locate the hit-run driver who killed Patricia Sands. Prior to the trial, defendant admitted that it was he who struck and killed the girl. He also admitted that he left the scene of the accident. He has since entered a plea of guilty to that charge and served a sentence in jail.

[11-13] While flight is admissible to establish a consciousness of guilt,⁷ we think that the prosecution here was permitted entirely too much liberty in showing the facts respecting the investigation and apprehension of defendant. Obviously, this evidence was intended only for the purpose of creating prejudice by establishing an entirely

separate crime, that of leaving the scene of an accident after it had occurred.

7. There are, however, more serious errors in the trial. Intoxication was not specified in the indictment, nor was there any evidence of it. It was shown that during the noon hour and late afternoon defendant and some others did have a few drinks of intoxicating liquor. There was absolutely no evidence, opinion or otherwise, that he was intoxicated, either during the afternoon or immediately prior to this accident. In spite of this lack of evidence, the prosecuting attorney was permitted to argue to the jury that they could draw an inference that defendant was intoxicated and for that reason ran away from the accident.

[14] An inference is a permissible deduction the factfinder is entitled to draw from the proven or admitted facts. It cannot be based on a mere suspicion that unproved facts may exist. The facts may be established by circumstantial evidence, but where there is no evidence, direct or circumstantial, to support an inference any conclusion based thereon becomes merely a conjecture.⁸

In *Albert Lea Ice & Fuel Co. v. United States Fire Ins. Co.*, 239 Minn. 198, 204, 58 N.W.2d 614, 618, we quote with approval from *Hiber v. City of St. Paul*, 219 Minn. 87, 91, 16 N.W.2d 878, 880, the following:

"* * * The rule against conjectural and speculative opinions is aimed at those not based upon a factual foundation, and not at those which are. The distinction is between inference and conjecture. As Lord Shaw said in *Kerr or Lendrum (Pauper) v. Ayr. Steam Shipping Co. Ltd.* [1915] A.C.

6. *State v. Cook*, 212 Minn. 495, 4 N.W.2d 323; *State v. Clow*, 215 Minn. 380, 10 N.W.2d 359; *State v. Bolsinger*, 221 Minn. 154, 21 N.W.2d 430; *State v. Homme*, 226 Minn. 83, 32 N.W.2d 151; *State v. Brady*, 244 Minn. 455, 70 N.W.2d 449; *State v. Anderson*, 247 Minn. 469, 78 N.W.2d 320; *State v. Ewing*, 250 Minn. 436, 84 N.W.2d 904.

7. See, 2 *Wigmore, Evidence* (3 ed.) § 276.

8. 21 *Words & Phrases "Inference"* p. 572; *Puget Sound Elec. Ry. v. Benson* (9 Cir.) 253 F. 710; *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 106 P.2d 886; see, 1 *Wigmore, Evidence* (3 ed.) § 41; *New York Life Ins. Co. v. McNeely*, 52 Ariz. 181, 79 P.2d 948.

Cite as 419 N.W.2d 480 (Minn. 1988)

tion to assess Bender's credibility, and could reasonably have believed her account, which was generally corroborated by other witnesses (e.g., Wittner's testimony that Bias treated the gun "like a little kid after a bag of candy"). The jury likewise could have believed Bender's testimony that guests were in the living room and heard the door click as Bias apparently left the apartment. This evidence, and evidence of no forced entry, is consistent with the state's theory that Bias swung the door shut from the inside, then proceeded down a short hallway to the bathroom where he hid until the others left. Though Bias testified Bender accompanied him to the door, his vested interest in having a witness to his departure provides substantial grounds to doubt his story. See *State v. Langley*, 354 N.W.2d 389, 394 (Minn.1984).

Bias also dismisses his encounter with Officer Peterson in the MacPhail Music Center parking lot as an unfortunate coincidence with no probative value, considering Peterson's inability to describe the person he saw carrying the gun case. However, the location of the gun in relation to Bias and the timing of events that night allowed the jury to infer that Bias saw the squad car following him, cut through the alley, and dropped the gun shortly before Peterson entered the parking lot. More importantly, inconsistencies in the evidence cast doubt on any alternative hypothesis. Bias testified he walked from Loring Park down Yale Place to arrive in the MacPhail lot at the same time as Peterson. Peterson, however, was parked just off Yale Place several minutes earlier and would almost certainly have seen Bias somewhere along that street. Peterson apparently saw no one else that night other than a crowd leaving a bus at the nearby Luxford Hotel, and Bias himself saw no one in the alley or parking lot near where the gun was found. Peterson spotted appellant just moments after he last saw the gun-carrier, who must have been near the parking lot at roughly the same time.

Bias' credibility is further undermined by the conflicting story he gave Sgt. Miles in Baton Rouge, at a time when he was not aware that Officer Peterson had confirmed

Bias' presence in the MacPhail lot. When Miles asked Bias to show him on a map how he walked home, Bias described a path that avoided the MacPhail Music Center and denied talking to a police officer. Bias attributes those "omissions" to fright and confusion, but such "[s]ignificant inconsistencies in appellant's statements to authorities substantially diminished the credibility" of his story. *State v. Race*, 383 N.W.2d 656, 662 (Minn.1986). Assessment of credibility is left to the jury, which was fully apprised of discrepancies in the evidence. See *State v. Daniels*, 361 N.W.2d 819, 827 (Minn.1985).

[3, 4] Bias further claims "there is absolutely nothing suspicious" about his departure from Minneapolis the day after the party, as he was a drifter with no permanent home and had been planning to leave for warmer weather. Nevertheless, evidence of flight suggests consciousness of guilt. *State v. Meany*, 262 Minn. 491, 502, 115 N.W.2d 247, 255 (1962); *State v. French*, 400 N.W.2d 111, 116 (Minn.App. 1987). The jury could and apparently did find the circumstances surrounding his abrupt departure to be incriminating. Bias had only three days earlier rented an apartment and exhausted his money on rent and furnishings. He explained his actions partly through dissatisfaction with mail facilities at the apartment, but admitted he hadn't received mail in a long time, then equivocated about whether or not he was expecting mail. Transients who sublet appellant's apartment claimed he told them he was "hot"; appellant disputes their testimony, but the jury apparently believed them and could reasonably have done so. See *State v. Daniels*, 332 N.W.2d 172, 180 (Minn.1983). The jury could also reasonably dismiss the relatively minor PCI tire-slashing incident as the explanation for appellant's evasive telephone calls to his sister. Moreover, appellant's behavior after the offense cannot be isolated from the rest of the evidence, the cumulative effect of which negates any rational hypothesis other than guilty flight.

Similarly, lack of physical evidence connecting appellant to the crime does not

During direct examination, N.D. testified Mosby "took his hand and stuck it in my private." She defined her "private" as her "middle," the part she uses "to go to the bathroom" or to urinate. She first stated Mosby stuck his hand, then changed it to his finger, in "just a little." On cross-examination, N.D. demonstrated for the jury how much she claimed Mosby's finger was inside her. This demonstration indicated 1/8th of an inch and was consistent with what she had told a police officer.

N.D.'s trial testimony was consistent in all significant details with her prior statements to the first police officer on the scene, the next door neighbor, the investigating officer and her mother. In particular, N.D. consistently said Mosby had penetrated her vagina with his finger.

Mosby testified he left the caretaker's apartment to go get dressed, and, while in his apartment, he guzzled a big drink and then things began to fade. Mosby also testified he went out of the building without his keys and was locked out. According to Mosby, he went for a walk and did not remember what happened until he was arrested.

After police officers spoke to witnesses, one of the officers parked his car two blocks away to write his report. Twenty minutes later, he heard a call over the radio of an attempted car theft in the same area. Another 20 minutes later after an intervening priority call, the officer was checking the area when information came over the air about the suspect. Near Mosby's apartment building, the officer saw a man fitting the description of the car theft suspect, which description also matched Mosby's. The officer arrested the man, who turned out to be Mosby.

ISSUES

1. Was evidence that tended to show Mosby attempted to steal a car in which to flee improperly admitted as an inseparable part of the crimes for which Mosby was being tried and not as *Spreigl* evidence?

2. Was there error in how the ten-year-old complainant was sworn before her testimony?

3. Did the trial court's curative instruction remedy any error made when the trial court said to the ten-year-old complainant at the start of the second day of her testimony, in the presence of the jury, "We want you to tell the truth again today?"

4. Was the evidence insufficient to establish beyond a reasonable doubt Mosby was guilty of criminal sexual conduct in either the first degree or the second degree?

ANALYSIS

1. Mosby challenges the admission of evidence tending to show he attempted to steal a car in which to flee. Mosby alleges it was error to admit the evidence as an integral part of the crimes charged and not as *Spreigl* evidence. We find no error.

[1] As a general rule, evidence of other crimes is not admissible to prove the character of a defendant or his guilt of the offense charged. Minn.R.Evid. 404(b); *State v. Titworth*, 255 N.W.2d 241, 244 (Minn.1977). However, this rule

does not necessarily deprive the state of the right to make out its whole case against the accused on any evidence which is otherwise relevant upon the issue of the defendant's guilt of the crime with which he was charged.

State v. Wofford, 262 Minn. 112, 118, 114 N.W.2d 267, 271 (1962). Here, the trial court found the evidence of the attempted auto theft was properly admissible as an integral part of the charged offense. This was not an abuse of the trial court's discretion. See *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn.1988).

[2] We find no merit in Mosby's allegation it was error to admit evidence of the attempted car theft without adhering to *Spreigl* requirements. See *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965); see also *State v. Billstrom*, 276 Minn. 174, 178-79, 149 N.W.2d 281, 284-85 (1967). Evidence incidentally necessary as an element of substantive proof of the charged offense is not *Spreigl* evidence even though it relates to another crime of

the defendant's c N.W.2d 168, 171 for rev. denied (A *State v. Salas*, (Minn.1981); *Sta.* 116, 128-29, 19 (1972)).

Flight is a fact the sufficiency of *Merrill*, 428 N.W. Consciousness of evidence of flight N.W.2d 480, 485 said, "The righteo guilty fleeth."

Here, evidence had probative val dence that showe and the attempted nected with the N.W.2d at 172. T Mosby's testimon; had inadvertently building and expl; when the police w was apprehended.

[3] 2. Mosby N.D. was sworn N.D. gave these the prosecutor:

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Cite as 450 N.W.2d 629 (Minn.App. 1990)

the defendant's doing. *State v. Roy*, 408 N.W.2d 168, 171 (Minn.Ct.App.1987), *pet. for rev. denied* (Minn. Jul. 22, 1987) (citing *State v. Salas*, 306 N.W.2d 832, 836-37 (Minn.1981); *State v. Martin*, 293 Minn. 116, 128-29, 197 N.W.2d 219, 226-27 (1972)).

Flight is a factor that can contribute to the sufficiency of the evidence. *State v. Merrill*, 428 N.W.2d 361, 368 (Minn.1988). Consciousness of guilt is also suggested by evidence of flight. *State v. Bias*, 419 N.W.2d 480, 485 (Minn.1988). It has been said, "The righteous standth firm while the guilty fleeth."

Here, evidence of the attempted car theft had probative value as circumstantial evidence that showed consciousness of guilt, and the attempted theft was intimately connected with the crime. *See Roy*, 408 N.W.2d at 172. This evidence contradicted Mosby's testimony he was not fleeing but had inadvertently locked himself out of the building and explained a gap in time from when the police were called to when Mosby was apprehended.

[3] 2. Mosby also assigns error in how N.D. was sworn before her testimony. N.D. gave these answers to questions of the prosecutor:

Q Okay. Now, one of the things we talked about, [N.D.], was the difference between the truth and a lie, didn't we?

A Yes.

Q Do you know what the difference is?

A Yes.

Q What is the difference, [N.D.]?

A The difference between a lie and the truth is *when you lie* you're not telling the truth, *you're not saying what really happened, and the truth is when you're saying what really happened.*

Q *What happens if you don't tell the truth, [N.D.]?*

A *You can get in big trouble for it.*

Q *Okay. And you know that here you're supposed to tell the truth?*

A Yes.

Q All right.

(Emphasis added).

Witnesses must be sworn by oath or affirmation. *See* Minn.Stat. § 595.01 (1988); Minn.R.Civ.P. 43.04. Prior to giving testimony,

every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Minn.R.Evid. 603. Furthermore, Rule 603 is designed to afford the flexibility required in dealing with * * * children.

Affirmation is simply a solemn undertaking to tell the truth; *no special verbal formula is required.*

Minn.R.Evid. 603 committee comment (quoting Fed.R.Evid. 603 advisory committee note) (emphasis added).

Mosby does not challenge N.D.'s competency as a witness, but, rather, the verbal formula by which N.D. was sworn. In the context of this case, it is clear N.D. understood she was obliged to tell the truth. *See State v. Whelan*, 291 Minn. 83, 86, 189 N.W.2d 170, 173 (1971).

[4] 3. Mosby also assigns error to the trial court's saying, on the second day of N.D.'s testimony:

Q You know, [the prosecutor] asked you yesterday about the difference between telling the truth and a lie. Do you remember that?

A Yes.

Q Okay. And we want you to tell the truth again today. Do you understand?

A Yes.

Mosby called the double meaning of what the trial court had said to the trial court's attention and requested a mistrial. Upon request by Mosby's counsel, the trial court immediately gave the following curative instruction:

Counsel have called my attention * * * to an unintentional misstatement * * * with respect to asking [N.D.] as to whether or not she remembers that she must tell the truth. It is not my job to

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