RECEIVED BY CLERK
SUPREME COURT AUG 19 2009

IN THE SUPREME COURT 20090147

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUG 19 2009
STATE OF NORTH DAKOTA

State of North Dakota,)
)
Plaintiff-Appellee,)
)
-vs-)
)
Joseph Henry Johnson,) Supreme Ct. No. 20090147
)
Defendant-Appellant,) District Ct. No. 08-08-K-1576
.....) SA File No. F518-08-07

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM THE CRIMINAL JUDGMENT

Burleigh County District Court
South Central Judicial District
The Honorable David E. Reich, Presiding

Lloyd C. Suhr
Burleigh County Assistant State's Attorney
Courthouse, 514 East Thayer Avenue
Bismarck, North Dakota 58501
Phone No: (701) 222-6672
BAR ID No: 05405
Attorney for Plaintiff-Appellee

TABLE OF CONTENTS

Page No.

Table of Authorities i

Statement of the Issues 1

Statement of the Case 2

Statement of the Facts 3

Argument 4

Conclusion 10

TABLE OF AUTHORITIES

Page No.

Cases

State v. Delaney
1999 ND 189; 601 N.W.2d 573 7

State v. Kautzman
2007 ND 133; 738 N.W.2d 1 7

State v. Maki
2009 ND 123; ____ N.W.2d ____ 7

State v. Sorenson
2009 ND 147; ____ N.W.2d____ 4

State v. Weaver
2002 ND 4; 638 N.W.2d 30 ..... 4, 7

Statutes

N.D.C.C. § 31-22-05(6) 5

Rules

N.D.R. Crim.P. 29(a) 6

N.D.R. Crim.P. 29(b) 6

N.D.R.Crim.P 30(c)(1)..... 4

N.D.R.Crim.P. 52(b)..... 5

BURLEIGH COUNTY
STATE'S ATTORNEY
BISMARCK, N. DAK.

STATEMENT OF THE ISSUES

1. Whether the trial court properly instructed the jury on the applicable law?

2. Whether the trial court properly denied Johnson's motion for judgment of acquittal?

BURLEIGH COUNTY
STATE'S ATTORNEY
BISMARCK, N. DAK.

STATEMENT OF THE CASE

The Statement of the Case as set out in the Appellant's brief is substantially accurate. The State joins in the same.

BURLEIGH COUNTY
STATE'S ATTORNEY
BISMARCK, N. DAK.

STATEMENT OF THE FACTS

The facts of this case are set out in their entirety in the trial transcript. While the Statement of the Facts as set out in the Appellant's brief is substantially accurate, the State will supplement additional relevant facts omitted therein by reference to the appropriate portions of the trial transcript in the Argument section.

ARGUMENT

1. The trial court properly instructed the jury as to the applicable law

When reviewing a trial court's jury instructions, the issue is whether as a whole they fairly and adequately advised the jury of the applicable law. *State v. Sorenson*, 2009 ND 147, ¶ 22, ____ N.W.2d ____. An error in a jury instruction is grounds for reversal if, when read as a whole, it is erroneous, relates to a subject central to the case, and affects the substantial rights of the defendant. *Id.*

The district court must instruct the jury on the law, however, both the prosecution and the defense must request and object to specific jury instructions. *State v. Weaver*, 2002 ND 4, ¶ 16, 638 N.W.2d 30. "[A] party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection." N.D.R.Crim.P 30(c)(1).

If the 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 he fails to do so he cannot predicate error upon omissions in the charge given. *Weaver*, at ¶ 16. When the defendant fails to properly object to a proposed instruction, or fails to specifically request an instruction or object to omission of an instruction, the issue is not adequately preserved for appellate review and our inquiry is

BURLEIGH COUNTY
STATE'S ATTORNEY
BISMARCK, N. DAK.

limited under N.D.R.Crim.P. 52(b) to whether the jury instructions constitute obvious error affecting substantial rights. *Id.*.

Rule 52(b), N.D.R.Crim.P., allows this Court to correct obvious errors or defects affecting substantial rights even if they were not brought to the attention of the trial court. *Id.* at ¶ 17. This power is exercised cautiously and only in exceptional circumstances where the defendant has suffered serious injustice, and this Court will very rarely find obvious error under N.D.R.Crim.P. 52(b). *Id.* In determining whether there has been obvious error, the entire record is to be examined to determine the probable effect of the alleged error in light of all the evidence, and the burden is upon the defendant to show the alleged error was prejudicial *Id.* An alleged error does not constitute obvious error unless there is a clear deviation from an applicable legal rule under current law. *Id.*

Here, Johnson argues that the trial court failed to properly instruct the jury by not including an instruction on the maxim of jurisprudence set out at N.D.C.C. § 31-22-05(6), which provides that one who consents to an act is not wronged by it. He correctly notes that, at trial, Johnson neither requested this instruction nor objected to its absence. Accordingly, his argument only prevails if the trial court's failure to include the instruction constituted obvious error. His argument should fail.

The essential elements of the jury instructions, unchallenged by Johnson at both the trial and appellate stages of this case, instructed that the State had to prove that Johnson entered S.T.'s residence "knowing he was not

BURLEIGH COUNTY
STATE'S ATTORNEY
BISMARCK, N. DAK.

licensed or privileged to do so". (Reg. of Actions, docket entry no. 21). The term "licensed" was defined as "consensual entry". *Id.* In deciding whether Johnson was licensed or privileged to be in S.T.'s residence, the jury implicitly had to consider any evidence that he was there with her consent. Accordingly, the instructions given in the case provide the very guidance to the jury that Johnson claims was lacking. Further, Johnson cites no authority requiring that the identified maxim of jurisprudence be included as an instruction in order to properly guide the jury. Thus, he has failed to demonstrate how the absence of such an instruction affected his substantial rights and his argument should be rejected.

2. The trial court properly denied Johnson's motion for judgment of acquittal.

Rule 29(a) of the North Dakota Rules of Criminal Procedure states:

> **(a) Before Submission to the Jury.** After the prosecution closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the prosecution's evidence, the defendant may offer evidence without having reserved the right to do so.

Rule 29(b) of the North Dakota Rules of Criminal Procedure states:

> **(b) Reserving Decision.** The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged

> without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

In *State v. Maki*, 2009 ND 123, ¶ 7, ____ N.W.2d ____ this Court very recently summarized its precedent outlining the standard of review applicable when a trial court denies a motion to acquit under Rule 29:

> "To grant a judgment of acquittal, 'a trial court must find the evidence is insufficient to sustain a conviction of the offenses charged.' " *State v. Kautzman*, 2007 ND 133, ¶ 10, 738 N.W.2d 1 (quoting *State v. Delaney*, 1999 ND 189, ¶ 4, 601 N.W.2d 573). "When considering the sufficiency of the evidence on appeal, this Court views the evidence and all reasonable inferences in the light most favorable to the prosecution and then determines whether a rational fact finder could have found guilt beyond a reasonable doubt." *State v. Kautzman*, 2007 ND 133, ¶ 10, 738 N.W.2d 1. "In reviewing a question of sufficiency of the evidence under N.D.R.Crim.P. 29(a), we do not resolve conflicts in the evidence or reweigh the credibility of witnesses." *State v. Weaver*, 2002 ND 4, ¶ 10, 638 N.W.2d 30. "On appeal, we determine only whether there is evidence which could have allowed the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction." *Id.*

Here, the trial court reserved ruling on Johnson's motion under Rule 29 until the time of sentencing where, as noted in his brief, it denied the same. Johnson argues that the trial court erroneously denied his motion for judgment of acquittal because of evidence that she had given him permission to be in her residence at the time of the offense. However, there was also a significant amount of evidence that she had not consented to his entry into the residence.

The trial testimony reflects that Johnson was in S.T.'s apartment twice at the time of the offense. As to the first time, S.T. testified that she called the police and asked for him to be removed from her apartment. (Trans., p. 113,

BURLEIGH COUNTY
STATE'S ATTORNEY
BISMARCK, N. DAK.

lines 1-1; p. 114, lines 14-17). After the police arrived and told him to leave, he then called her so he could come and get his belongings and returned to her apartment a second time about 45 minutes later. (Trans. p. 116, lines 1-25; p. 117, lines 15-19). Indeed, S.T. testified at trial that this second time Johnson was at her apartment he was there with her permission. (Trans. p. 117, lines 20-25; p. 118, lines 1-4; p. 132, lines 17-19).

In addition to her testimony at trial, S.T. also wrote two letters, one to the undersigned dated August 1, 2008 and one to the assigned judge dated August 6, 2008 contending that Johnson was in her apartment the second time with her permission. (App. pp. 6-7). Both letters were written after the filing of criminal charges. She admitted at the time of trial that she was still in a dating relationship with him. (Trans. p. 118, lines 18-19).

However, she also acknowledged during her testimony that when law enforcement told Johnson to leave, they did so at her instruction and that she had never told law enforcement on either occasion he was in the residence that he had permission to be there. (Trans. p. 122, lines 19-25; p. 123, lines 1-12). Further, she admitted that when she saw Johnson re-enter her residence she hid from him behind a chair and was still hiding there when the police arrived the second time. (Trans. p. 124, lines 13-24; p. 125, lines 7-10). She admitted telling officers that when she ran and hid behind the chair it was because she was trying to get to the deck of her apartment. (Trans. p. 125, lines 21-24). When law enforcement arrived she ran out from behind the chair and told law enforcement where they could find him inside her residence. (Trans. p. 125,

lines 11-20). When asked at the time of trial if she was afraid of Johnson, she did not want to answer. (Trans. p. 127, line 25; p. 128 lines 1-2).

Officer Jeremy Curtis (Curtis) testified that when he arrived at S.T.'s apartment the second time, she ran out from behind a chair in the living room in a frantic and shaking state and pointed out Jonson's location in a back bedroom. (Trans. p. 162, lines 1-25; p. 163, lines 1-19). Johnson was found in one of the bedrooms. (Trans. p. 165, lines 2-12). Officer Grensteiner also testified that as they entered the apartment for the second time that night a female emerged from behind a chair and ran towards them. (Trans. p. 200, lines 8-17; p. 201, lines 8-15). He testified that she appeared to be frightened and it looked as if she had been crying. (Transp. P. 201, lines 24-25; p. 202, lines 1-2. She pointed to one of the back bedrooms and advised that "he was back there". (Trans. p. 202, lines 3-5).

This collective evidence certainly gave facts to the jury from which they conclude that Johnson was in S.T.'s residence on the second occasion with her permission. However, the evidence also gave the jury facts from which they could reasonably conclude that she she did not give him permission and that her testimony to the contrary was motivated by fear of or loyalty to him. Where the evidence could go either direction, it is proper that the jury make the final decision as to the correct facts.

The jury apparently believed that S.T. did not actually give him permission to be in her residence the second time as they convicted. Johnson's argument invites this Court to re-evaluate the evidence and make its

own assessment of credibility and superimpose itself as the finder of fact. This is a step that this Court has made clear it will not take. It should decline to do so now and reject his argument.

CONCLUSION

Based upon the foregoing, the State requests that the Criminal Judgment be affirmed in its entirety.

Dated this 13th day of August, 2009.

Lloyd C. Suhr
Burleigh County Assistant State's Attorney
Courthouse, 514 East Thayer Avenue
Bismarck, North Dakota 58501
Phone No: (701) 222-6672
BAR ID No: 05405
Attorney for Plaintiff-Appellee

BURLEIGH COUNTY
STATE'S ATTORNEY
BISMARCK, N. DAK.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	
	)	
-vs-	)	
	)	
Joseph Henry Johnson,	)	Supreme Ct. No. 20090147
	)	
Defendant-Appellant,	)	District Ct. No. 08-08-K-1576
.....	)	SA File No. F518-08-07
STATE OF NORTH DAKOTA	)	
	) ss	
COUNTY OF BURLEIGH	)	

Michelle Dresser-Ternes, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 18th day of August, 2009, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

BENJAMIN C. PULKRABEK
ATTORNEY AT LAW
402 FIRST STREET NW
MANDAN, ND 58554

which address is the last known address of the addressee.

Michelle Dresser-Ternes

Subscribed and sworn to before me this 18th day of August, 2009.

Kimberly S. Bless
Notary Public
Burleigh County, North Dakota

KIMBERLY S BLESS
Notary Public
State of North Dakota
My Commission Expires February 24, 2010

BURLEIGH COUNTY
STATE'S ATTORNEY
BISMARCK, N. DAK.