IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, vs. Gregorio Montano, Defendant/Appellant.	)	Supreme Court No. 20110281 District Court No. 51-10-K-1913

BRIEF OF APPELLEE

APPEAL FROM THE CRIMINAL JUDGMENT AND SENTENCE
DATED SEPTEMBER 8, 2011
IN AND FOR THE COUNTY OF WARD, STATE OF NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT
HONORABLE WILLIAM MCLEES
JUDGE OF THE DISTRICT COURT, PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Rules, or Other Authorities:

STATEMENT OF THE ISSUES

I. Whether the trial court committed reversible error by not imposing sanctions that were not requested by the defendant following an objection.

II. Whether there was a sufficient amount of evidence to sustain the convictions of the defendant.

LAW AND ARGUMENT

Pursuant to the North Dakota Rules of Appellate Procedure, Rule 28(c), having no serious dissatisfaction with the Appellant's statements, the jurisdictional statement, statement of the issues, statement of the case, statement of the facts and the statement of standard of review are not repeated herein.

I. Whether the trial court committed reversible error by not imposing sanctions that were not requested by the defendant following an objection.

Both issues presented by the defendant in his brief address the alleged inappropriate racial comments, made by the prosecutor during rebuttal closing argument in this case. This writer concedes that he did in fact state "The defense wants you to believe that there is something wrong with the system, that they use people like that. What's that mean? Black people?" (Transcript on Appeal, (Tr.) p. 379, ll. 2–4). What the defendant's brief does not mention is that I was responding to an earlier statement by the defendant's attorney in his closing statement. Counsel for the defense stated during his closing argument, "Mr. Monroe exemplifies what is exactly wrong with the system of using people like that to conduct controlled buys." (Tr. p. 362, ll. 21–23). This statement stands alone without any further explanation at the time it was made.

During rebuttal closing I did in fact ask the jury if perhaps it sounded to them that counsel for the defendant was referring to the fact that the state's witness, Eddie Monroe was a black man. Again, this was in response to the statement made by the defendant's attorney during closing argument without any explanation as to why it was made. It is the State's position that the defendant, through his attorney, opened the door to this statement and additionally, that it was a reasonable reference to the evidence in the case. Leann Whitebull was in fact at one time a co-defendant in this case. She entered guilty pleas in

exchange for consideration at sentencing and then testified against this defendant. During her direct examination she described Eddie Monroe as a black guy. (Tr. p. 99, l. 20, l. 22). Eddie Monroe, the informant used by law enforcement in this case also testified against the defendant during the trial. He took the stand, was sworn under oath and testified and was subject to cross-examination by counsel for the defense. Mr. Monroe is in fact an African American male. The fact that he is a black male was testified too by Leann Whitebull and was therefore in evidence. Additionally, when Mr. Monroe testified and was on the stand the jury could plainly see that he was a black man or an African American male. Accordingly, when the statement was made by myself during rebuttal closing argument in response to the defense comments I was not telling the jury anything they did not already know, it was in fact in evidence.

When the statement was made during rebuttal argument counsel for the defendant did in fact object and the objection was sustained by the Court. (Tr. p. 379, ll. 5 – 8). The defendant after making the objection never requested that it be stricken, that a curative instruction be given, that the Court grant a mistrial, or that the Court impose any other sanctions. To preserve the issue for appeal, the defendant must object to the State's improper closing argument and request a curative instruction. State v. Smith, 1999 ND 109, ¶8, 59 N.W.2d 565, citing State v. Azure, 525 N.W.2d 654, 656 (N.D. 1994).

In the present case, as stated earlier, the defendant did not ask for any curative instruction following his objection or for any other sanctions. Accordingly, it is the State's position that the defendant did not properly preserve the issue for this appeal. Had the defendant requested an instruction from the Court, he may well have received one. Based on the fact that none was asked for, it would appear that the Court, in the context

of the entire trial did not believe that anything other than a sustained objection was required. As in Azure, the defendant in this case received all that he requested from the Court.

Although it appears that the defendant did not properly preserve the issue for appeal, this Court does have the power to review the case under the obvious error standard. In other words, whether the rhetorical question asked during rebuttal closing argument constituted obvious error which affected the substantial rights of the defendant. State v. Jones, 557 N.W.2d 375, 378 (N.D. 1996). This Court exercises the power to consider obvious error cautiously and only in exceptional situations where the defendant has suffered serious injustice. State v. Smuda, 419 N.W.2d 166, 168 (N.D. 1988).

When an issue is not properly preserved for review on appeal, this Court's inquiry is limited to determining whether the trial court committed obvious error affecting the substantial rights of the defendant under N.D.R.Crim.P. 52(b). State v. Thill, 473 N.W.2d 451, 453 (N.D. 1991). The State contends the statement complained of by the defendant in this case did not constitute obvious error. It is argued that the statement was a fair comment based on the evidence presented at trial through the testimony of Leann Whitebull and the fact that Eddie Monroe testified in person and the jury was able to see and notice his race. There was nothing inflammatory about the statement and even assuming for argument that the comment may have been ill-advised, it was not a remark about the defendant, it was not an appeal to the jury to treat Hispanics differently than Native Americans or African Americans and therefore could not have affected the substantial rights of the defendant by affecting the outcome of the trial.

In addition, the trial court did instruct the jury that the argument or other remarks of an attorney must not be considered by them as evidence and that if the attorneys made any comments concerning the evidence that the jury found was not supported by the evidence should be disregarded by the jury. (Tr. p. 389, ll. 9–19).

II. Whether there was a sufficient amount of evidence to sustain the convictions of the defendant.

The defendant in this matter claims that because he repeatedly attacked or impeached the credibility of two of the State's witnesses, Leann Whitebull and Eddie Monroe, and additionally, argued the issue of impeachment during closing that there is no evidence with which the jury could have convicted the defendant. The defendant also throws in his assertion that because of the improper racial statement made by the prosecutor that this Court should find there is even less evidence. The State of course disagrees with the defendant's theory. The trial court instructed the jury as to credibility and part of the instruction given indicated that even if the jury finds a witness has been impeached that they should give that testimony the weight that it deserves. After hearing the testimony in this case and after being given the Court's instructions, the twelve person jury in this case obviously did as the Court instructed, weighed the evidence, considered any impeachment evidence and still found the defendant guilty on both counts. It would therefore appear that there was more than sufficient evidence to find this defendant guilty.

To successfully challenge the sufficiency of the evidence on appeal, a defendant must convince the Supreme Court that the evidence, when viewed in the light most favorable to the verdict, permits no reasonable inference of guilt. State v. McKinney, 518 N.W.2d 696, 698 (N.D. 1994), citing State v. Heintze, 482 N.W.2d 590, 592 (N.D. 1992).

The Supreme Court, on appeal, does not resolve conflicts in the evidence or determine the credibility of witnesses and reconcile their testimony. State v. Nelson, 488 N.W.2d 600, 602 (N.D. 1992).

Assuming the jury followed the Court's instructions with regard to impeachment, the jury chose not to ignore the testimony it had heard regarding the defendant's guilt but instead, chose to accept it and found the defendant guilty. The fact that the credibility of Whitebull and Monroe may have been impeached in the defendant's eyes is of no consequence if the jury chose to believe their testimony and there was sufficient credible evidence to sustain the verdicts. Likewise, the fact that the prosecutor may or may not have said something about his own witness that the defendant felt was an improper racial attack on himself should be of no avail to the defendant inasmuch as he did not properly preserve that issue for appeal. Therefore, anything the prosecutor said in this regard should not be grounds for reversal unless this Court finds that it resulted in prejudicial error that the trial court did not address.

CONCLUSION

Based on the foregoing and the record in this trial, the State of North Dakota respectively requests that the North Dakota Supreme Court affirm the judgment of the jury and the sentence of the Court.

Dated this 13th day of February, 2012.

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AFFIDAVIT OF SERVICE BY MAIL

Lynnae Rudland, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 13 day of February, 2012 this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

BRIEF OF APPELLEE

That said envelope was addressed to the following person at his address as follows:

RUSSELL J. MYHRE
ATTORNEY AT LAW
PO BOX 475
VALLEY CITY ND 58072 0475

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Lynnae Rudland

Subscribed and sworn to before me this 13 day of February, 2012, by Lynnae Rudland

Notary Public

LEANN WESTERENG
Notary Public
State of North Dakota
My Commission Expires April 14, 2016