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NOVEMBER 2, 2018
STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

No. 20180292

City of Fargo,

Plaintiff-Appellee

v.

Jared James Nikle,

Defendant-Appellant

Appeal from Judgment dated July 10, 2018,
Cass County District Court, East Central Judicial District,
No. 09-2018-CR-00657,
The Honorable Susan Bailey

BRIEF OF APPELLEE

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I. STATEMENT OF ISSUES

[¶1] Whether the district court erred in denying Defendant Jared Nikle's ("Nikle") request to provide jury instructions which were contrary to stated North Dakota law.

II. STATEMENT OF THE CASE

[¶2] This appeal is from a criminal judgment after the district court found Nikle guilty of actual physical control while under the influence in violation of Fargo Municipal Code § 08-0310 (Tr. at 13:9-19). Nikle requested jury instructions on the defense of necessity/choice of evils which the district court denied. (Tr. at 2:21-3:4). As a result, Nikle chose to forgo a jury trial, stipulate to facts, and the district court found Nikle guilty based on the stipulated facts. (Tr. at 2:21-3:4; 13:9-19).

III. STATEMENT OF THE FACTS

[¶3] The stipulated facts establish that on December 30, 2017, Nikle came to Fargo to celebrate a friend's birthday (Tr. at 10:3-5). Throughout the day, he drank alcohol at the Empire Lounge, Speck's Bar, Rick's Bar, and a birthday party at a private residence (Tr. at 10:9-21). At the party, Nikle's phone died. As a result, Nikle went outside to his car to charge his phone (Tr. at 10:22-11:3). Nikle started his car, plugged in his phone, and then fell asleep in the driver's seat (Tr. at 10:24-11:6). He was woken up by a Fargo Police Officer a few hours later (Tr. at 11:6-7).

[¶4] Fargo police officer Tyler Seehusen ("Officer Seehusen") found Nikle asleep in his car at 11:21 p.m. (Tr. at 8:11; 20-21). Nikle was in the driver's seat, the car was running, the head lights were on, and the driver's seat was in the upright position (Tr. at 8:22-23, 11:16-23). While Officer Seehusen spoke with Nikle, he noted Nikle didn't know where he was, appeared confused, smelled like alcohol, and had slurred speech (Tr.

at 9:5-6). Nikle admitted to Officer Seehusen that he had been drinking cocktails (Tr. at 9:2-3).

[¶5] Fargo police officer Justin Valenti ("Officer Valenti") arrived on scene, was briefed by Officer Seehusen, and noted Nikle smelled like alcohol, had slurred speech, and had red, bloodshot, watery eyes (Tr. at 9:7-10). Nikle took or attempted to take standard field sobriety tests. (Tr. 9:11-17). Nikle failed both the horizontal gaze nystagmus and walk-and-turn test. (Tr. 9:11-17). Nikle refused the one leg stand (Tr. 9:11-17). Officer Valenti determined Nikle was under the influence of alcohol and read Nikle his Miranda rights and the Implied Consent Warning (Tr. 9:17-21).

[¶6] At the jail, Fargo Police Officer Toby Carlsson, who is certified to administer the intoxilyzer, used a certified machine to obtain a breath sample from Nikle (Tr. 9:22-25). All proper procedures were followed (Tr. 9:25; 10:1-2). The intoxilyzer registered .158% (Tr. 10:2 and Doc. #19 – Exhibit 1: Intoxilyzer Test).

[¶7] The City of Fargo charged Nikle for being in actual physical control while under the influence in violation of Fargo Municipal Code § 08-0310. (Doc. #1). Nikle then transferred the matter to district court for a jury trial. (Doc. #8). On June 28, 2018, Nikle served and filed his requested jury instructions (Nikle's App. 5-6). Nikle's requested instructions asked the court to instruct the jury on necessity/lesser of evils case law from the Ninth Circuit, Colorado, and Hawaii. (Nikle's App. 5-6). On July 6, 2018, the City of Fargo filed a response/objection (Doc. #17 – Response and Objection to Nikle's Requested Jury Instruction). At the pretrial conference, Judge Bailey determined Nikle's proposed jury instructions were not supported by North Dakota law and were inapplicable. (Tr. 2:21-3:4, 4:23-5:3). As Nikle's defense to the charge centered on his

requested jury instructions, after the district court refused to provide the instructions to the jury, Nikle stipulated to the facts with the understanding the issue would be appealed. (Tr.4:2-15). Judge Bailey found Nikle guilty of being actual physical control while under the influence and entered Judgment on July 10, 2018. (Tr. 13:9-19 and Nikle App. 7-8). Nikle filed his Notice of Appeal on July 30, 2018. (COF App. 1-3) and served his brief on October 3, 2018.

IV. STANDARD OF REVIEW

[¶8] "Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury." State v. Keller, 2016 ND 63, ¶ 4, 876 N.W.2d 724 (quoting Rittenour v. Gibson, 2003 ND 14, ¶ 15, 656 N.W.2d 691). This Court reviews jury instructions "to determine whether, as a whole, they fairly and adequately advised the jury of the applicable law." State v. Haugen, 2007 ND 195, ¶ 6, 742 N.W.2d 796. (citing Strand v. Cass County, 2006 ND 190, ¶ 7, 721 N.W.2d 374). "When the jury instruction, read as a whole, is erroneous, relates to a subject central to the case, and affects the substantial rights of the defendant, it is grounds for reversal." Id. (citing State v. Smith, 1999 ND 109, ¶ 22, 595 N.W.2d 565). A court errs if it refuses to instruct the jury on an issue that has been adequately raised, but the court may refuse to give an irrelevant or inapplicable instruction. State v. Ness, 2009 ND 182, ¶ 13, 774 N.W.2d 254.

V. LAW AND ARGUEMENT

A. The District Court's Jury Instructions Were Proper Because They Correctly Informed the Jury of North Dakota law.

1. The District Court's Jury Instructions Correctly Informed the Jury of North Dakota law on Actual Physical Control.

[¶9] The district court's jury instructions were proper because they correctly informed the jury of the essential elements of the offense – actual physical control. "Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury." Rittenour v. Gibson, 2003 ND 14, ¶ 15, 656 N.W.2d 691. This Court has explained:

> Jury instructions are an explanation and application of the law as it relates to the evidence presented. Their purpose is to inform the jury of the applicable law. To determine whether a trial court commits error in its instructions to a jury, this court considers whether, as a whole, the instructions correctly and adequately advise the jury of the applicable law.

City of Fargo v. Novotny, 1997 ND 73, ¶ 10, 562 N.W2d 95 (quotations and citations omitted)(emphasis added).

[¶10] The essential elements of actual physical control ("APC") are: (1) the defendant is in actual physical control of a motor vehicle on a highway or upon public or private areas to which the public has a right of access; and (2) the defendant was under the influence of intoxicating liquor, drugs or other substances. State v. Haverluk, 2000 ND 178, ¶ 15, 617 N.W.2d 652; see also Fargo Municipal Code § 08-0310; N.D.C.C. § 39-08-01.

[¶11] Intent to drive or otherwise operate the motor vehicle is not an element of APC. Hawes v. North Dakota Department of Transportation, 2007 ND 177, ¶ 5, 741 N.W.2d 202. In Hawes, this Court stated: "Intent to operate a motor vehicle is not an

element of the actual physical control offense." Id. (citing City of Fargo v. Novotny, 1997 ND 73, ¶ 6, 562 N.W.2d 95).

[¶12] The ruling in Hawes is in line with the Supreme Court's broad prohibition of any exercise of dominion or control over a vehicle by an intoxicated person. Id. at ¶ 6 (citing City of Fargo v. Theusch, 462 N.W.2d 162, 163-64 (N.D. 1990)). The purpose of APC law is to "prevent an intoxicated person from getting behind the steering wheel of a motor vehicle because that person may set out on an inebriated journey at any moment and is a threat to the safety and welfare of the public." State v. Saul, 434 N.W.2d 572, 576 (N.D. 1989).

[¶13] The district court's jury instructions properly advised the jury of the applicable law on actual physical control. Specifically, the jury instructions provided:

> **CHARGE TO THE JURY**
>
> This is a criminal action brought to this Court by a citation charging the Defendant, Jared James Nikle, with having committed the offense of Driving Under the Influence of Intoxicating Liquor (Actual Physical Control) on or about December 30, 2017, in the City of Fargo, Cass County, North Dakota.
>
> **ACTUAL PHYSICAL CONTROL**
>
> No personal shall be in actual physical control of a vehicle upon a highway street or on public or private areas to which the public has a right to access for vehicular use in this State if:
>
> 1. The person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after being in actual physical control of the vehicle.
>
> 2. The person is under the influence of intoxicating liquor.
>
> 3. The person is under the influence of any drug or substance or combination of drugs or substances to a degree which renders that person incapable of safely driving.

4. The person is under the combined influence of alcohol and any other drugs or substances to a degree which renders that person incapable of safely driving. A person is "in actual physical control" of a vehicle when the vehicle is operable and a person is in a position to manipulate one or more of the controls of the vehicle that cause it to move or affect the movement in some manner or direction. Whether the Defendant was in actual physical control is a question of fact for you to decide.

ESSENTIAL ELEMENTS

The City's burden of proof is satisfied if the evidence shows, beyond a reasonable doubt, the following essential elements:

1. On or about December 30, 2017, in the City of Fargo, Cass County, North Dakota, the Defendant, Jared James Nikle, was in actual physical control of a vehicle on a highway street or on public or private areas to which the public has a right of access for vehicular use; and

2. Any of the following:

    a. The Defendant had an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after being in actual physical control of the vehicle.

    b. The Defendant was under the influence of intoxicating liquor.

UNDER THE INFLUENCE OF INTOXICATING LIQUOR

The phrase "under the influence of intoxicating liquor" is a flexible term. The mere fact that the driver of a motor vehicle may have confused intoxicating liquor does not necessarily render the driver "under the influence of intoxicating liquor." The circumstances and effect must be considered.

On the other hand, the driver need to be intoxicated or in the state of drunkenness to be "under the influence of intoxicating liquor." The expression covers not only all the well-known and easily recognized conditions and degrees of intoxication, but also any abnormal mental or physical condition which is the result of drinking intoxicating liquor and which tends to deprive the driver of that clearness of intellect or control which the driver would otherwise possess. Whether the Defendant was "under the

> influence of intoxicating liquor: is a question of fact for you to determine.

(COF. App. 4-8). Accordingly, because the instructions fairly and adequately advised the jury of the applicable law, the instructions were proper and the district court did not err.

2. The District Court did not err in Refusing to Include an Instruction that is Inapplicable to the Offense of Actual Physical Control.

[¶14] A district court must not only inform the jury of the applicable law, but also "must refuse a requested instruction that misstates the applicable law." State v. Anderson, 480 N.W.2d 727, 730 (N.D. 1992) (citation omitted). Nikle argues the district court erred in excluding his requested instruction on the defense of "necessity" or "choice of evils." However, such defense is not recognized for APC offenses in North Dakota by any statute or case law.

[¶15] The necessity/choice of evils instruction Nikle requested provided that (1) he was faced with a choice of evils, and chose the lesser evil; (2) he acted to prevent imminent harm; (3) he reasonably anticipated that his conduct would prevent such harm; and (4) there was no legal alternative to his violating the law in this situation. The rationale behind the defense of necessity "is that for reasons of social policy it is better to allow the defendant to violate the criminal law (a lesser evil) to avoid death or great bodily harm (a greater evil)." State v. Rasmussen, 524 N.W.2d 843, 845 (N.D. 1994). "The evil, harm, or injury sought to be avoided . . . by the commission of a crime must be legally cognizable to be justified as necessity." State v. Sahr, 470 N.W.2d 185, 191 (N.D. 1991) (emphasis added). However, "in most cases of civil disobedience a lesser evils defense will be barred . . . because as long as the laws or policies being protested

have been lawfully adopted, they are conclusive evidence of the community's view on the issue." Id.

[¶16] North Dakota does not recognize "necessity" as a defense: "broad notion of necessity …is not one of the particular justifications authorized in NDCC 12.1-05 and has not yet been recognized by this court." State v. Sahr, 470 N.W.2d 185, 188 (N.D. 1991). The necessity/choice of evils defense Nikle requested is inapplicable to the offense of APC because of the public policy considerations that necessitate its enforcement.

[¶17] As this Court has recognized repeatedly: "The purpose of the actual physical control offense is to prevent an intoxicated person from getting behind the steering wheel of a vehicle because that person is a threat to the safety and welfare of the public." City of Fargo v. Novotny, 1997 ND 73, ¶ 5, 562 N.W.2d 95, 97 (emphasis added); see also State v. Saul, 434 N.W.2d 572, 576 (N.D.1989); State v. Schwalk, 430 N.W.2d 317, 319 (N.D.1988); Buck v. North Dakota State Highway Commissioner, 425 N.W.2d 370, 372 (N.D.1988); State v. Schuler, 243 N.W.2d 367, 370 (N.D.1976).

[¶18] Nikle alleges State v. Sahr opens the door to possible necessity defense claims. 470 N.W.2d 185 (ND 1991). In State v. Sahr, the North Dakota Supreme Court addressed the issue of necessity in a criminal trespass case, and declined to extend the defense to list of justifications authorized in N.D.C.C. Ch. 12.1-05. This Court went on to say "[t]he broad notion of necessity . . . is not one of the particular justifications authorized in NDCC 12.1-05 and has not yet been recognized by this court." Sahr, 470 N.W.2d 185, 188 (N.D. 1991).

[¶19] Because no pattern jury instruction exist for necessity in North Dakota, Nikle asked the district court to adopt jury instructions from the foreign jurisdictions of Colorado, Hawaii, and the Ninth Circuit (Nikle's Appendix 5-6). The district court correctly refused to give the foreign jury instructions because it misstated North Dakota law. As this Court stated in Sahr: "it is clear that our criminal code does not license the judicial extension of justification to any individualized conception of "necessity." Id. at 191. Moreover, if the legislature wanted "necessity" to be a valid defense for offenses including APC, it would have done so long ago.

3. The Defense of Necessity/Choice of Evils Does not Apply to General Intent Crimes.

[¶20] In addition to denying instructions which misstate the law, a judge is allowed discretion to decide whether a jury instruction should be given. For example, in State v. Keller, Keller's attorney wanted instructions that were "incomplete" and "inaccurate." 2016 ND 63, ¶5-6, 876 N.W.2d 724. This Court affirmed the district court's decision to disregard the proposed instructions. Id. at ¶9. This Court went on to say "[j]ury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury." Id. at ¶8 (citing State v. Mounts, 484 N.W.2d 843 (N.D. 1992)). This Court summarized the discretion given to a district court judge by stating "A trial court can refuse to give an inapplicable or irrelevant instruction. . . ." Id.

[¶21] Here, the Court found Nikle's proposed jury instruction to be not only unsupported by law, but also inapplicable. The requested jury instructions are inapplicable because APC is not an "intent" crime. City of Fargo v. Novotny, 1997 ND 73, ¶ 6, 562 N.W.2d 95. The transcript and Nikle's brief is littered with statements like "Nikle didn't intend to drive." It is inapplicable to give a jury instruction focused on

intent for a non-intent crime. The only issue was whether Nikle was in actual physical control of a motor vehicle. Because APC is not a specific-intent crime, the necessity defense does not apply and the district court properly refused to include it.

4. The District Court did not err in Refusing to Include a Jury Instruction that is Inapplicable to the Facts of this Case.

[¶22] The district court did not err in excluding Nikle's proposed instruction because it was irrelevant and inapplicable to the undisputed facts of the case. Even if a necessity defense was recognized in North Dakota for APC, Nikle's specific proposed jury instructions were inapplicable and inappropriate based on the facts of this case. Nikle's proposed jury instruction listed four elements that had to be proven:

> 1. *He was faced with a choice of evils and chose the lesser evil:* Nikle was not an innocent bystander who "faced" a choice between evils. Nikle created the "evil" when he made the affirmative decision to drink alcohol and leave a party he was attending to charge his telephone in his car. A defendant is not allowed to choose between evils when he sets in motion the perilous event.
>
> 2. *He acted to prevent imminent harm* - The "harm" was not imminent. By Nikle's account, he was in his car for three hours before the police arrived (Tr. 10:22-24). Nikle had plenty of time to decide on an alternative action which would have prevented any "imminent harm."
>
> 3. *He reasonably anticipated his conduct would prevent such harm* - Passing out in a car appears accidental compared to intentional. Nikle did not intend to pass out in his car but rather claims he only went to his car to charge his telephone.
>
> 4. *There were no other legal alternatives to violating the law* - Numerous alternatives existed. Nikle could have borrowed a phone or phone charger from his friend or any of the other persons at the party. He could've charged his phone in the car and came back inside. Nikle could have decided not to charge his phone. Nikle could have asked someone at the party to call him a taxi or an Uber. Nikle could have stayed at his friend's house if he believed it was unsafe to drive or walk home. Nikle could have asked someone at the party to provide him with a

> ride. Nike could have walked to the M and H, which was 2/10 of a mile away (Tr. 9:13-14). There were several unexhausted legal alternatives for Nikle that did not involve violating the law in this situation. Accordingly, the district court properly refused to include the necessity/choice of laws instruction.

[¶23] In short, even if necessity was a recognized defense to an APC charge, the district court properly refused to provide the instruction in this case as there was not a factual basis to support the requested instruction.

VI. CONCLUSION

[¶24] The district court properly refused Nikle's proposed jury instruction necessity/choice of evils because it is not a recognized defense to APC under North Dakota law. In addition, the district court is allowed to refuse to use Nikle's proposed jury instructions because they focused on intent for a non-intent crime. Moreover, even if necessity/choice of evils was a recognized defense, it would be inapplicable to the facts of this case because Nikle had several legal alternatives. The City requests the Court affirm the district court's order and judgment.

Dated: November 2, 2018.

/s/ William B. Wischer
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CERTIFICATE OF COMPLIANCE

[¶25] The undersigned, as attorney for the Appellee, City of Fargo, in the above-entitled matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and (7)(a) of the North Dakota Rules of Appellate Procedure, that the above Brief of Appellee was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, certificate of service and this certificate of compliance, totals 3,289.

Dated: November 2, 2018.

/s/ William B. Wischer

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AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA
COUNTY OF CASS

[¶ 1] Karen Davis, being first duly sworn, deposes and says that she is a resident of the City of Casselton, State of North Dakota, is of legal age; and that she served the foregoing:

BRIEF OF PLAINTIFF-APPELLEE
APPENDIX OF PLAINTIFF-APPELLEE

on November 2, 2018, by sending a true and correct copy thereof by electronic means only to the following e-mail address:

William Kirschner
Kirschner Law Office
kirschnerlaw@kirschnerlawfargo.com

[¶ 2] To the best of affiant's knowledge, the email address above given is the actual email address of the parties intended to be so served. The above document was emailed in accordance with the provisions of the Rules of Civil Procedure.

/s/ Karen Davis
Karen Davis

Subscribed and sworn to before me this 2nd day of November, 2018.

/s/ Theresa A. Luehring
Theresa A. Luehring, Notary Public
Cass County, North Dakota
Commission Expires: 2-5-21