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NOVEMBER 7, 2018
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

City of Fargo,	)	
Plaintiff and Appellee,	)	
vs.	)	
Jared James Nikle,	)	District Court File No.: 09-2018-CR-00657
Defendant and Appellant.	)	Supreme Court File No. 20180292

APPEAL FROM DISTRICT COURT CONVICTION OF July 10, 2018

CASS COUNTY, NORTH DAKOTA

EAST CENTRAL JUDICIAL DISTRICT

THE HONORABLE SUSAN L. BAILEY

REPLY BRIEF FOR APPELLANT

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[1] ARGUMENT

[2] The Defendant was entitled to a Necessity/Choice of Evils Instruction

[3] In its brief the City of Fargo makes several claims that Mr. Nikle disputes and others which he believes are irrelevant to the actual issue in this case. It matters not whether the crime of being in actual physical control of a motor vehicle requires a "mens rea" element, as this Court has previously held that defenses of justification and/or excuse are available to defendants even in strict liability offense. ***State v. Rasmussen,*** 524 N.W. 2d 843 (N.D. 1994). While it is true, that the law does not require the defendant to have the intent to drive a vehicle, it does not mean, that a defendant cannot raise a choice of evils/necessity defense to this crime as either a justification or excuse under North Dakota law.

[4] The City claims that ***State v. Keller,*** 2016 ND 63, 876 N.W. 2nd 724 stands for the proposition that the defense of "choice of evils/necessity" does not apply to a general intent crime. However, in ***Keller,*** the defendant was not requesting instructions that had anything to do with the "choice of evils" defense. In ***Keller,*** the defendant was requesting instructions that this Court held were not correct statements of the law. ***Id.*** at ¶¶ 5-7. In this case, the City cites no cases that indicate that this Court has rejected the Necessity/Choice of Evils defense in any general intent or lack of "mens rea" offense.

[5] Instead of drawing this Court's attention to the ***Keller*** case, the City should have noted that the Supreme Court of North Dakota recognized the defense in ***State v. Rasmussen,*** 524 N.W. 2d 843 (N.D. 1994), when it reversed the defendant's conviction on a strict liability offense because the District Court refused to consider the defenses of justification or excuse that the defendant wished to raise in his defense of a driving under suspension charge.

[6] This case stands for exactly the opposite of what the City argues here, as it notes that justification or excuse is available as a defense, when it involves a life-threatening situation. The defendant in this case, argued that in order for him to be able to avoid a life-threatening situation, which would have required him to walk about a mile in sub 30 below wind chills, that he had gotten in his car, to be able to charge his phone to call for a ride.

[7] At least as far as this defendant is concerned, he believed that he was in a life-threatening situation, and it is up to the finder of fact, which was to be the jury, and not the judge, to determine whether this constituted a justification or excuse in this case. In refusing to give the aforesaid instruction, the Judge denied Mr. Nikle's right to have his defense heard. It was not the District Court's job to determine whether such a situation existed, but the juries, and the denial of the instruction in these circumstances, is what Mr. Nikle is appealing.

[8] The City's factual arguments about whether or not a choice of evils/necessity existed is for the Jury, not the Court to determine.

[8] In its brief the City attempts to argue the factual dispute that Mr. Nikle intended to present to the Jurors. While correctly citing the elements of the defense, the City introduces its own value judgments as to whether the defendant would have been successful in arguing that defense to the jury.

[9] For instance, it claims that Mr. Nikle "created" the evil, when he made the affirmative decision to drink alcohol. However, there is nothing illegal under North Dakota law that prohibits a person from drinking alcohol. The evil which Mr. Nikle was seeking to avoid, was the evil of freezing to death because he was unable to call the person he wanted to have pick him up. Whether or not he had imbibed alcohol, he certainly was not responsible for creating that evil.

[10] The City then claims that the harm that Mr. Nikle sought to avoid was not imminent because Mr. Nikle was in the car for three hours before the police arrived. However, it was precisely his actions in being in the car and having the heat in the car working that prevented his freezing to death. Again, this is a question for the jury to decide, under the facts of this case. Considering the number of people who freeze to death in a North Dakota winter, it can hardly be claimed that under the weather conditions then existing that Mr. Nikle did not face imminent harm if he had not turned on the ignition to both heat his car and charge his telephone.

[11] The City then claims that because Mr. Nikle fell asleep in his car, that he could not have reasonably anticipated that his conduct would prevent such harm. However, because Mr. Nikle knew that his car had a working heater, and because he had driven that car earlier in the day, it is clear that he anticipated that being in the car would both keep him from freezing and charge his telephone, so he could get assistance.

[12] Finally, the City claims that Mr. Nikle had legal alternatives to violating the law. This again, is an element that is in dispute. Mr. Nikle knew only one person at the party, and did not know if any of them happened to have a phone charger with them that would charge his phone. The argument that he could've charged his phone in the car, and come back inside, appears to be an admission by the City that he would have been justified in what he was doing, if he had not fallen asleep while waiting for the phone to charge. Mr. Nikle explained that he needed to charge his phone so that he could call his daughter to come and get him. Today, with our modern cell phones, no one memorizes telephone numbers, and Mr. Nikle's phone contained both her telephone number and probably her address. What good would it have done to call a taxi or an Uber, if you don't know where exactly you are going? And it is very presumptuous of the City to claim that Mr. Nikle could have stayed at the house of the person making the party,

when the only person he knew was the guest of honor.

[13] However, all of these issues could and would be resolved by the jury had they been allowed to hear the testimony of the witnesses and heard the arguments in regard to the defense.

[14] CONCLUSION

[15] Mr. Nikle cannot and would not guarantee that his defense would have been successful in this case, but that is not the issue for this Court. The issue is whether or not Mr. Nikle was entitled to raise the defense of choice of evils/necessity at his jury trial, or whether the Court under the circumstances was right to foreclose that defense before any witnesses had testified and before determining whether to give the requested jury instruction.

[16] Given the Court's action in denying the instruction before any testimony was presented, was an error by the Court, and therefore, Mr. Nikle's conviction should be reversed and this matter remanded to the District Court for a jury trial. This Court should instruct the District Court that so long as the defendant presents evidence that a jury could view as supporting the defendant's theory of the case, the instruction on choice of evils/necessity should be given.

[17] Respectfully submitted this 7th day of November 2018.

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

City of Fargo,	)	
Plaintiff and Appellee,	)	
vs.	)	CERTIFICATE OF SERVICE BY ELECTRONIC MAIL
Jared James Nikle,	)	District Court File No.: 09-2018-CR-00657
Defendant and Appellant.	)	Supreme Court File No. 20180292

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[1] I hereby certify that on November 7, 2018, the following documents:

1. Appellant's Reply Brief
2. Certificate of Service by Electronic Mail

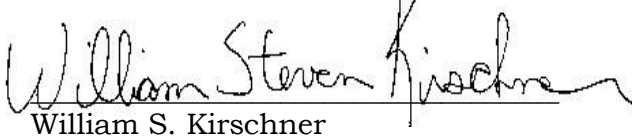
was filed and served electronically on the Fargo City Prosecutor through Email and that the electronic email was sent to the following:

City of Fargo Prosecutor
Email: prosecutor@cityoffargo.com

[2] I further certify that to the best of my knowledge, the Email address given above was the designated email address by the City of Fargo Prosecutor's Office intended to receive Notices of Electronic Service

[3] Dated November 7, 2018.

KIRSCHNER LAW



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