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OCTOBER 3, 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

BRIEF FOR APPELLANT

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ISSUE PRESENTED FOR REVIEW

Whether the defendant, under the stipulated facts is entitled to a jury instruction allowing him to raise the defense of necessity/choice of evils?

STATEMENT OF THE CASE-
PROCEDURAL HISTORY

[1] This case comes to this Court as an appeal of the conviction entered by the District Court of the Defendant for the crime of Driving Under the Influence of Alcohol (Actual Physical Control) after the District Court (The Honorable Susan L. Bailey) decided that she would not give the jury the Defendant's requested jury instruction on the necessity (Choice of Evils) defense, as requested by the defendant prior to trial.

[2] The parties agreed, and the Court approved an agreement whereby the parties agreed to stipulate to the facts in this case, and the Court would render a verdict based upon those facts so that the parties would not have to go through a jury trial, just to raise the question of whether or not the District Court should have allowed the defense of necessity to go to the Jury.

[3] The parties and the Court agreed, that should the Supreme Court determine that the defendant was entitled to a jury instruction allowing the defendant to raise the defense or necessity/Choice of Evils, that this matter would then be remanded to the District Court where it would be tried by a jury.

[4] Therefore, this appeal is intended to raise the issue of whether a defendant, under the stipulated facts, is entitled to a jury instruction allowing him to raise the defense of necessity/choice of evils?

STATEMENT OF FACTS

[5] On December 30th, 2017, at 11:21 p.m., Officers Seehusen and Valenti indicate that Mr. Nikle's car was parked on the west side of 18th Street South, east of the building, on the street blocking part of the driveway into the parking lot. Mr. Nikle believes, he was parked in the parking lot. That's the only dispute the parties had as to the facts in this case.

[6] On that day, it was minus 18 degrees Fahrenheit with a west, northwest wind three miles per hour, and there was no accumulation of precipitation. Officer Seehusen found Mr. Nikle asleep in his car in the driver's seat. The driver's seat was in the normal upright position. The car was a Volvo S60. The engine was running, and the headlights were on. Mr. Nikle's car has automatic headlights, so that when the car is running the lights come on automatically when it is dark outside.

[7] Officer Seehusen woke Mr. Nikle by knocking on the window. Mr. Nikle believes that he opened the door and unlocked the car. Officer Seehusen doesn't remember the unlocking, but he does remember the opening. According to Officer Seehusen, Mr. Nikle admitted he had been drinking cocktails. Mr. Nikle appeared not to know where he was. He appeared confused, had slurred speech, and smelled of alcohol.

[8] Officer Valenti would testify that he came to the scene. He was briefed by Officer Seehusen and that he observed Mr. Nikle, who smelled of alcohol, had red, bloodshot watery eyes, slurred speech. Mr. Nikle was polite and cooperative.

[9] Officer Valenti performed the HGN test in the backseat of the police car and Mr. Nikle failed six of six clues. The officer then transported Mr. Nikle to the M & H Store, which was two tenths of a mile away where he had Mr. Nikle perform the walk-and-turn test in the store, which

Mr. Nikle failed. Mr. Nikle refused the one-leg stand test. Mr. Nikle was then read the implied consent advisory, given his Miranda warnings, and Officer Valenti formed the opinion that Mr. Nikle was under the influence of alcohol.

[10] Mr. Nikel was then taken to the Cass County Jail where Officer Toby Carlsson, a certified Intoxilyzer operator, performed a test on a certified Intoxilyzer machine, following standard operating procedure, including observing Mr. Nikle so he didn't put anything in his mouth for 20 minutes before the testing. The test results were .158.

[11] Mr. Nikle's testimony wasy that he came to Fargo from Minneapolis on the afternoon of December 30th to celebrate Cheri Ringdahl's 50th birthday. He and Ms. Ringdahl have known each other since they were 15 years old. Mr. Nikle was to spend that night at the home of his daughter, Shay, who lives at 1801 13th Avenue South.

[12] Mr. Nikle had met Ms. Ringdahl at the Empire Lounge where they had one rum and coke, each. They sat and chatted for about an hour. Mr. Nikle had been a groomsman at Ms. Ringdahl's wedding. Ms. Ringdahl's late husband, Steve Nicklay, was one of Mr. Nikle's best friends, when he was alive. Mr. Nikle and Ms. Ringdahl went to Speck's and Rick's Bar, which are located next to each other on Main Avenue where they had a rum and coke together and spent three to three and a half hours talking and catching up with each other.

[13] Jared and Cheri then drove separately to the 50th birthday party for Cheri, at Cheri's friend's house, which is located in the 100 block of 18th Street South. Mr. Nikle didn't know anyone at the party except for Cheri.

[14] At around 8 p.m., Mr. Nikle left the party and went to his car to charge his cell phone, as he only had a car charger for his phone and the phone was dead. Mr. Nikle started the car to enable the charger to work, turned on the heater so he didn't freeze, and plugged in the phone and

waited for it to charge so that he could call his daughter to come pick him up. He knew he was too intoxicated to drive and did not move the car.

[15] While waiting for the phone to charge, Mr. Nikle fell asleep and slept for about 3 hours. The next thing he knew, he was awakened by the police officer.

ARGUMENT

[16] "A defendant is entitled to have the jury instructed on all defenses for which there is any support in the evidence." ***State v. Ronne,*** 458 N.W. 2d 294, 296 (N.D. 1990); ***State v. Mathre,*** 2004 ND 149 ¶10. In this case, the defendant requested an instruction raising the "choice of evils" defense. Mr. Nikle maintains that he did present sufficient facts to support the giving of the instruction in this case, and that the denial of the instruction constitutes an error of law, that requires a reversal of this conviction and a remand for a new trial before a jury.

[17] While North Dakota has never expressly recognized the "choice of evils" defense, it did consider that defense, as it was raised in several cases where people protesting the legality of abortion were convicted of criminal trespass for trespassing at abortion clinics in Jamestown and Fargo in ***State v. Sahr,*** 470 N.W. 2d 185 (ND 1991). In those cases, the defendant's asked to present a choice of evils/necessity defense, and the District Courts denied their requests. While the North Dakota Supreme Court upheld the decisions of the District Courts not to give those instructions, the basis for that decision was not that the choice of evils/necessity defense was unavailable in North Dakota, but that the defendants were not acting in support of a legally cognizable evil which they were trying to prevent, and therefore, their actions precluded the use of the necessity defense to justify criminal conduct in interfering with legal abortions.\

[18] Although the Court indicated that it was not recognizing the necessity defense in this case, it did note that although the Century Code did not explicitly recognize "choice of evils/necessity as a justification or excuse that since Chapter 12.1-05 was an almost complete adoption of Chapter 6 of the Proposed Federal Criminal Code, which included defenses involving justification and excuse, there was good reason to believe that it was not foreclosed as

a defense in North Dakota. Justice Meschke's opinion makes clear that while the North Dakota Legislature had not specifically adopted the necessity defense as a part of Chapter 12.1-05 N.D.C.C., the defense of necessity has a long history in the English and American Common Law, and that some kinds of necessity, like self-defense, for conduct that would otherwise be criminal has become well-established, their remains less agreement on what other necessity defenses apply.

[19] Citing the Model Penal Code, and the New York Penal Law, as well as Professor Robinson's treatise on criminal defense, the Court concluded that to be applicable in the Sahr case, the defense applied only in regard to threats to legally recognized interests, which it held did not include the protestors interests in stopping legal abortions.

[20] The Court noted that the history of the legislative development of justification defenses in North Dakota shows that NDCC Chapter 12.1-05 is not intended to preclude the judicial development of other justifications. In addition, it noted that the Study Draft of the Federal Criminal Code, § 608 provided that "Conduct is justified if it is necessary and appropriate to avoid harm clearly greater than the harm which might result from such conduct and the situation developed through no fault of the actor." The comment to that section noted that "a man is not to be punished as a criminal if his prohibited conduct averted more harm than it caused."

[21] Speaking separately on several issues, Justice (Now Chief Justice) Vandewalle, in his concurrence in ***State v. Sahr,*** disagreed with the majority, which had concluded that the evil, harm or injury sought to be avoided had to be a legally cognizable claim to be justified as necessity. Rather, he maintained that a citizen's right to protest and to object to the "community's view" on an issue had in the past served either directly or as a catalyst to reform the "community view," and that therefore, limiting the necessity defense to those cases that the

majority had limited it to was too restrictive.

[22] The Chief Justice noted that the defendants' were entitled to explain why they violated the law prohibiting trespass in these cases. They were able to explain why they had done what they had done. However, because their defense was predicated on the premise that abortion is evil, and that the act of trespassing causes less severe harm than does abortion, and because the United States Supreme Court had already determined ***Roe v. Wade,*** , 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) it prevented the North Dakota Supreme Court from recognizing their defense in that case. It is important to note, for this case, that recognition of the necessity defense is not precluded by any Constitutional ruling of either the North Dakota or United States' Supreme Court.

[23] The question of whether or not this defendant is entitled to use of the necessity defense in this case appears not to be precluded by any earlier opinion of this Court. Given that situation and given the generally favorable decision in ***Sahr*** in regard to the use of the necessity defense, it is merely up to this Court to determine whether there is "any support in the evidence for the defendant's request for said instruction. Mr. Nikle maintains that he has met the threshold for presenting such a defense, and that the District Court's denial of said instruction warrants a reversal of this conviction and a trial before a jury, with the proper law being instructed.

[24] The instruction provided to the District Court in this case was based upon jury instructions used in the Ninth Circuit, Colorado and Hawaii. It presented the defense as an affirmative defense, which the defendant had to prove by a preponderance of the evidence. It instructed the jurors that they had to find 4 elements in order to find Mr. Nikel not guilty. First, that he was faced with a choice of evils, and chose the lesser evil. Second that he acted to prevent imminent harm. Three that he reasonably anticipated that his conduct would prevent such harm,

and finally, that there was no legal alternative to his violating the law in this situation.

[25] As presented in the defendant's anticipated testimony and in the stipulated facts, the choice that the defendant faced was to sit in his car, turn on the car to charge his phone so he could call his daughter to come and pick him up, or go sit out in the freezing cold, or to go back to a house where he knew only one person and try to get one of them to actually drive him to his daughter's home, as his inability to access her telephone number, because his phone was dead, made it impossible for him to call her. He knew it was unsafe for him to drive, and he certainly should not be doing that. But, he didn't know the people in the house and he knew his daughter's house was less than a mile away, and he believed what he was doing was reasonable. He knew people at the party had been drinking and he didn't believe that any of them would be able to drive him and he was not about to ask someone else to drive intoxicated to get him to his destination. He knew he was unsafe to drive, and he made the decision to call his daughter for a ride, because she had picked him up before, and would do so again.

[26] Because of the situation, he believed that he could not go back to the party but would ultimately have to decide either to try walking about 13 blocks in this sub-freezing weather, or to stay warm and get his phone charged and call for help. It is clear from the time that he was in the car until the police arrived at that location, that he had no intention of driving, but had fallen asleep while waiting for the phone to charge. It should have been up to jury to determine whether he was choosing the lesser evil in this situation.

[27] Under the second element of the test, it appears clear that had Mr. Nikle not turned on the car, to keep it warm, it is more than likely that the police would not have noticed it was running, and would probably not have noticed him at all, and he would have been discovered severely frost bitten or even frozen to death the next day. In this state, under these conditions, people

have died, and will continue to die, if they do not have a source of heat to keep them alive in our treacherous winter weather.

[28] There is also no question, that the reason Mr. Nikle turned on the car, and turned on the heat, was that he reasonably anticipated that with the heat on, he would not freeze to death prior to calling his daughter to come pick him up.

[29] The final issue here is whether he had a legal alternative to violating the law, considering his state of intoxication. Given that Mr. Nikle was intoxicated and given that it is still legal in North Dakota to drink to intoxication, provided one is not driving, the question is whether a jury would believe that a person in Mr. Nikle's condition had a reasonable legal alternative to what he actually did. It was Mr. Nikle's burden to prove that was not so, but without the instruction being given to the jurors about his defense, any testimony directed to this issue would have been meaningless.

[30] In this case, Mr. Nikle chose to use his vehicle to charge his telephone so that he could call for help to get somewhere safe. He had no intention of driving and did no driving after he got in his car to charge his telephone. Given the severe weather conditions that a North Dakota winter brings, certainly there are situations where a person who is legally intoxicated is going to need to remain in his/her vehicle rather than suffer serious injuries from remaining in an unheated vehicle and the issue of whether or not such a situation exists is a question of fact that should be decided by a jury in this case.

[31] Unless, we believe that the North Dakota Legislature decided that no matter what the situation a person should not remain in a running and heated car in the winter, but should be required to go out and brave the possibly fatal conditions, the question of whether there is a valid "choice of evils" defense in this case is a question for the jury, which should be instructed on

that. Since the burden of proving this defense applies in this case, falls on the defendant, it was the District Court's job, to give the necessity instruction, similar to or the same as the defendant requested, and allow the jury to determine that question of fact.

CONCLUSION

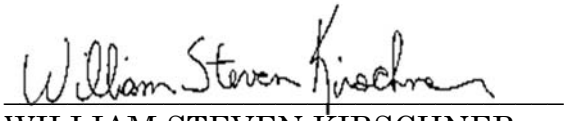
[32] Jared Nikle went out to his car to charge his cell phone so that he could call his daughter to come pick him up and drive him to her home where he intended to spend the night. Mr. Nikle acknowledged that he was intoxicated and knew it was not safe for him to drive. Before the phone could be charged, he fell asleep in his car, and was eventually woken by Fargo police officers and charged with Driving Under the Influence of Alcohol/Actual Physical Control.

[33] Mr. Nikle offered testimony that indicated that his actions were motivated by a desire not to drive and that he believed that this was the only reasonable thing for him to do under the conditions. He asked the Court to instruct the jury regarding the Choice of Evils (Necessity) defense and the Court refused to give such an instruction. Mr. Nikle maintains that he presented sufficient evidence to warrant such an instruction and has appealed the Court's failure to give the instruction.

[34] This Court should overturn the defendant's conviction and remand this case for a jury trial with instructions that the District Court give Mr. Nikle's requested instruction, so long as he presents evidence at the trial that supports use of the instruction.

[35] Respectfully submitted this 3rd day of October 2018.

KIRSCHNER LAW OFFICE



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