

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota,)	
)	Supreme Court No. 20190303
Plaintiff and Appellee,)	
)	
v.)	District Court No. 18-2018-CR-02783
)	
Saha Bahadur Darji,)	
)	
Defendant and Appellant.)	

BRIEF OF APPELLEE

ON APPEAL FROM CRIMINAL JUDGMENT DATED SEPTEMBER 9, 2019,
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE LOLITA HARTL-ROMANICK, PRESIDING.

Sarah Gereszek
Assistant State's Attorney
ND Bar ID #07017
124 South 4th Street
P.O Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
sasupportstaff@gfcounty.org
Email: sarah.gereszek@gfcounty.org
Attorney for Appellee

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STATEMENT OF THE CASE

[¶1] Saha Darji, Defendant, appeals from a criminal conviction in District Court No. 18-2018-CR-02783. On December 26, 2018, Defendant was charged with Fleeing a Peace Office – in a Vehicle, a Class C Felony, Reckless Endangerment – Extreme Indifference, a Class C Felony, Driving Under the Influence with a Minor – 3rd Offense in 7 Years, a Class A Misdemeanor, and Refusal to Submit to a Chemical Test – 3rd Offense in 7 Years, a Class A Misdemeanor from an incident occurring on December 22, 2018.

[¶2] The Defendant made an initial appearance on December 26, 2018. Defendant was given court appointed counsel and Ms. Rhiannon Gorham was assigned to represent the Defendant. A preliminary hearing was scheduled for February 11, 2019. At the preliminary hearing, the Defendant waived the preliminary hearing and was arraigned entering a not guilty plea on all four counts. On April 11, 2019, a final dispositional conference was held and the Defendant set the matter on for jury trial. A jury trial was held on August 6, 7, and 8, 2019. The jury returned a guilty verdict on all four counts. The Defendant requested to have the sentencing set out and it was scheduled for September 9, 2019. At the sentencing hearing, Defendant was sentenced on counts one and two to 24 months with 18 months suspended and 2 years of supervised probation. Defendant was sentenced on counts three and four to 360 days with 150 days suspended, 360 days of supervised probation, a chemical dependency evaluation, and participation in the 24/7 program for 360 days. On October 1, 2019, the Defendant filed a notice of appeal.

STATEMENT OF FACTS

[¶3] On December 22, 2018, Michael Morrow was driving home near 40th and Walnut Street in Grand Forks, North Dakota. Tr. p. 253. Mr. Morrow observed a vehicle in front of him that was behaving pretty erratically by swerving to the left and right and making intermittent stops for no reason at all. Tr. p. 254. Mr. Morrow testified the vehicle was in the direct center of the road. Tr. p. 254. Mr. Morrow testified the vehicle was traveling between 10 to 15 miles per hour and topping for approximately thirty to forty-five seconds for no real reason. Tr. p. 255. Mr. Morrow estimated the vehicle made those intermittent stops for no real reason approximately three to four times. Tr. p. 256. Mr. Morrow suspected the driver was probably intoxicated because of the behavior the vehicle was displaying. Tr. p. 256. Based on his observations, Mr. Morrow testified he felt he needed to report the vehicle because he did not want the driver to hit somebody or kill somebody. Tr. p. 257.

[¶4] Mr. Morrow testified he was eventually able to pass the vehicle, get a distance of four to five car lengths ahead of the vehicle, and pull over to make a call and report a possible drunk driver. Tr. p. 257. Mr. Morrow testified the vehicle seemed confused by what Mr. Morrow had done because it slowly approached Mr. Morrow's stopped vehicle to the point Mr. Morrow was concerned the vehicle would hit his vehicle. Tr. p. 258. Mr. Morrow testified he put on his hazard lights and the vehicle slowly went around him. Tr. p. 259. Mr. Morrow explained that as the vehicle passed his, he could see the driver appeared to have his head down. Tr. p. 259-60. Mr. Morrow testified he observed the vehicle park and an individual exited the vehicle, and stumbled around the back of the vehicle and use the car while walking. Tr. p. 261-62. Mr. Morrow observed

the driver approach a house and a few minutes later he saw two small children run out and into the parked vehicle. Tr. p. 263. Mr. Morrow estimated the children were approximately 8 and 10 years old. Tr. p. 263. Mr. Morrow testified he observed the vehicle continue to drive and exhibit the same driving behavior he previously observed. Tr. p. 264. Mr. Morrow testified that at this point, he observed a police vehicle arrive, turn around, and get behind the vehicle that had been driving erratically. Tr. p. 265.

[¶5] Officer Black responded to the call from Mr. Morrow and located the suspect vehicle near 40th Avenue South and Cherry Street. Tr. p. 339. Officer Black pulled behind the vehicle and observed the vehicle proceed through an intersection and stop in the middle of the road. Tr. p. 341-42. When the vehicle did not move, Officer Black turned on his overhead lights and sirens in his marked police car. Tr. p. 342, 343. The vehicle continued stationary for ten seconds and then started to drive away. Tr. p. 344. Officer Black followed the vehicle with his lights and sirens still on. Tr. p. 344. Officer Black observed the vehicle traveling approximately twenty-five miles per hour and almost strike a curb. Tr. p. 344-45. Officer Black observed another marked patrol car with its lights and sirens on arrived on scene. Tr. p. 345-46.

[¶6] The suspect vehicle drove through the intersection of 40th Avenue and South Washington when the light was red. Tr. p. 346. There were other vehicles in the area as it was approximately 6:00 p.m. and a common time to find vehicles on the roadway. Tr. p. 347. Both marked squad cars pursued the suspect vehicle with their lights and sirens activated. Tr. p. 347. The officers had been following the vehicle eight blocks which Officer Black called a pursuit at that point. Tr. p. 347. While pursuing the vehicle, it continued to commit numerous traffic violations ranging from weaving between the left

turn lane to the center lane to the right lane, riding the centerline, to using its blinker without making a turn. Tr. p. 348. The vehicle ranged speeds of 18 miles per hour to 40 miles per hour.

[¶7] The suspect vehicle made a u-turn in the 4800 block of South Washington Street. Tr. p. 349. A police vehicle attempted to get in front of the suspect vehicle to bring it to a stop but the suspect vehicle drove around the police vehicle. Tr. p. 349. A third marked police vehicle with lights and sirens joined the pursuit northbound on South Washington Street. Tr. p. 350. The suspect went through another intersection with a red light. Tr. p. 50. Officer Black testified that the suspect vehicle was traveling approximately 25 miles per hour. Officer Black explained that while the suspect vehicle's speeds were low, they were very dangerous due to the weather, the low visibility, and the blowing snow. Tr. p. 350. Officers were also able to confirm there were two minor children in the vehicle. Tr. p. 351. It took all three police vehicles to channel the suspect vehicle, box it in, and force it to come to a stop. Tr. p. 351-52. Officer Black testified he did not believe the vehicle would have come to a stop on its own. Tr. p. 352. Officer Black testified the pursuit was approximately 18 blocks and lasted under ten minutes. Tr. p. 358.

[¶8] Officers removed the suspect from the vehicle. Tr. p. 363. Officers made initial observations of alcohol impairment. Tr. p. 364-65. Officers identified the suspect as Saha Darji, Defendant. Tr. p. 365. Officers utilized an interpreter on the phone to communicate with Defendant. Tr. p. 366. The Defendant was placed under arrest. Tr. p. 367. The Defendant was transported to the hospital as the Defendant was saying the word diabetes or med kit. Tr. p. 369.

[¶9] At the hospital, the Defendant was admitted and blood work was done. Tr. p. 396. The Defendant also submitted to a urine test. Tr. p. Officer Black testified that he used an interpreter by telephone to advise the Defendant of his Miranda rights and to read the implied consent advisory. Tr. p. 402. Ultimately, the Defendant was medically cleared from Altru. Tr. p. 412. The Defendant was transported to the jail for an Intoxilyzer test. Tr. p. 413. At the jail, the Defendant performed the Intoxilyzer test and Officer Black testified that the Defendant “physically refused to take the test” based on his actions. Tr. p. 415. The Defendant was advised, through the use of an interpreter, that refusing to provide a breath sample constitutes a chemical test refusal. Tr. p. 416. Ultimately, it was determined that the Defendant’s conduct would be considered a refusal by Corporal Wadlow and Officer Black agreed. Tr. p. 417-18.

LAW AND ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF FLEEING.

[¶10] On a sufficiency of the evidence challenge, this Court reviews “the record to determine whether there is sufficient evidence that could allow a jury to draw a reasonable inference in favor of the conviction.” State v. Rai, 2019 ND 71, ¶ 13, 924 N.W.2d 410 (citing State v. Truelove, 2017 ND 283, ¶ 7, 904 N.W.2d 342). An appellate court “does not re weigh conflicting evidence or judge the credibility of the witnesses.” Id. “The defendant bears the burden of showing the evidence reveals no reasonable inference of guilty when viewed in the light most favorable to the verdict.” Id. “A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty.” State v. Christian, 2011 ND 56, ¶ 8, 795 N.W.2d 702 (quoting State v. Wanner, 2010 ND 121, ¶ 9, 784 N.W.2d 143). A reversal is warranted “only if, after viewing the

evidence and all reasonable evidentiary inferences in the light most favorable to the verdict, no rational factfinder could have found the defendant guilty beyond a reasonable doubt.” State v. Keller, 2005 ND 86, ¶ 1, 50, 695 N.W.2d 703 (quoting City of Jamestown v. Neumiller, 2000 ND 11, ¶ 5, 604 N.W.2d 441).

[¶11] The Defendant was convicted of fleeing or attempting to elude a peace officer under North Dakota Century Code section 39-10-7(1)(c) which states:

1. A driver of a motor vehicle who willfully fails or refuses to bring the vehicle to a stop, or who otherwise flees or attempts to elude, in any manner, a pursuing police vehicle or peace officer, when given a visual or audible signal to bring the vehicle to a stop is guilty of a:
 - c. Class C felony if, at any time during the flight or pursuit, the driver willfully operates the vehicle in a manner constituting an inherent risk of death or serious bodily injury to a third person.

[¶12] At trial, Mr. Morrow testified that night the roads were a little bit icy, there was snow on the ground, and it was lightly snowing. When he came upon the Defendant’s vehicle, he saw it swerving and in the direct center of the road and making intermittent stops for no reason. Mr. Morrow described the Defendant’s driving behavior as unsafe. Mr. Morrow testified he needed to report the Defendant because “obviously, it’s a public safety hazard. So I just didn’t want this person to, you know, hit somebody, kill somebody, you know.” Tr. p. 257. Mr. Morrow also went on to testify that he was concerned about somebody’s life because he believed the driver to be intoxicated and did not know what the person was going to do next or later on. Tr. p. 278-88. Mr. Morrow’s concern for the safety of somebody’s life also increased when he observed the overhead lights on the squad car turn on and the Defendant’s vehicle made a deliberate exit. Tr. p. 288.

[¶13] Officer Black testified at trial about the weather conditions on the night of

December 22, 2018. He described them as “standard North Dakota blizzard, snow on the ground and wind and very cold. The driving conditions were not ideal.” Tr. p. 340. Officer Black testified that he located the vehicle, it traveled through the intersection, and then came to a stop in the middle of the roadway for no apparent reason. Tr. p. 341-42. Officer Black testified he initiated a traffic stop with his lights and siren and the vehicle waited ten seconds before accelerating away from the officer and almost striking a curb. Tr. p. 344. Officer Black testified the vehicle drove through an intersection controlled by a red light at 6:00 p.m. when there were other vehicles on the roadway. Tr. p. 346-47. Officer Black testified that after only eight blocks the vehicle had exhibited erratic driving and that it was most important to get the vehicle stopped due to the weather conditions and the two children in the vehicle. Tr. p. 347. As he continued to follow the Defendant, Officer Black testified that the vehicle committed numerous traffic violations including weaving between all lanes on the roadway to the point he was concerned the vehicle was going to go off the roadway. Tr. p. 348. Officer Black testified the vehicle ranged from speeds of 18 to 40 miles per hour with 40 getting a little slick. Tr. p. 348.

[¶14] Officer Black also testified that other marked squad cars with their lights and sirens activated joined the pursuit and attempted to stop the Defendant’s vehicle by putting their vehicle in front of the Defendant to obstruct further driving. However, this was unsuccessful as the Defendant drove around the marked squad cars. Tr. p. 349. Officer Black continued to explain the numerous traffic violations that continued once the vehicle was heading northbound on South Washington at speeds of 25 miles per hour which is very dangerous. Tr. p. 350. Officer Black explained that due to the totality of the circumstances – the weather, low visibility, blowing snow, driving through a red light when vehicles on

either side have a green light and are unaware of the Defendant's vehicle and three marked squad cars following was very dangerous. Tr. p. 350-51. Officer Black testified the Defendant driving through these conditions concerned him for the welfare of the minor children in the backseat. Tr. p. 351.

[¶15] Officer Black testified that the officers became more concerned as the Defendant's vehicle approached 32nd Avenue South which is an even more highly trafficked area given the previously observed driving behavior. Tr. p. 352. Officer's concern for safety rose due to the area Defendant was approaching. Tr. p. 352. Officers came to the conclusion that the Defendant's vehicle was not going to voluntarily stop and that they would need to use a channeling technique to force the vehicle to stop. Tr. p. 352. Three marked squad cars with lights and sirens activated got next to, in front of, and behind the Defendant's vehicle and slowed their speed to force the Defendant's vehicle to come to a complete stop. Tr. p. 354.

[¶16] There was sufficient evidence presented at trial that the Defendant fled from a marked squad car with its lights and sirens activated while he had two minor children in the vehicle. The weather conditions were described as a standard North Dakota blizzard with snow, blowing, and low visibility. The Defendant committed numerous traffic violations while fleeing from officers including running through multiple red lights during a time highly trafficked and almost driving off the road. Considering all of the circumstances of the evening, a reasonable fact finder could conclude the evidence was sufficient to convict the Defendant beyond a reasonable doubt that he had fled law enforcement and drove his vehicle in a manner constituting an inherent risk of death or serious bodily injury to the two minor children in the backseat.

II. THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF RECKLESS ENDANGERMENT.

[¶17] As previously stated under issue I, on a sufficiency of the evidence challenge, this Court reviews “the record to determine whether there is sufficient evidence that could allow a jury to draw a reasonable inference in favor of the conviction.” Rai, 2019 ND 71, ¶ 13. The Defendant was convicted of reckless endangerment under North Dakota Century Code section 12.1-17-03 which states “[a] person is guilty of an offense is he creates a substantial risk of serious bodily injury or death to another. The offense is a class C felony if the circumstances manifest his extreme indifference to the value of human life.” The statute also states “[t]here is risk within the meaning of this section if the potential harm exists, whether or not a particular person’s safety is actually jeopardized.” Id.

[¶18] The Defendant argues in his brief that the State is using the same factual basis for the fleeing charge as the reckless endangerment charge in the information. App. Br. p. 11. This issue was never raised in the district court in a pretrial motion or during defense counsel’s Rule 29 motion for acquittal. Defense counsel made the following motion at trial “[a]t this time defense moves for a Rule 29 on the basis that the State has failed to provide a sufficient basis from which the trier of fact could render a verdict of guilty on any of the four charged offenses.” Tr. p. 580. This Court has “long held that issues not raised or considered in the district court cannot be raised for the first time on appeal.” State v. Dockter, 2019 ND 203, ¶ 8, 932 N.W.2d 98.

[¶19] The Defendant specifically challenges the sufficiency of the evidence that the Defendant’s driving created a substantial risk of serious bodily injury or death to his children. App. Br. p. 11. As argued in issue I, there was more than sufficient evidence for

a reasonable factfinder to conclude beyond a reasonable doubt that the Defendant's driving behavior on December 22, 2018, created a substantial risk of serious bodily injury or death to his children. The Defendant was intoxicated and driving a motor vehicle in a very reckless and unsafe manner. The Defendant was making intermittent stops in the middle of the roadway for no reason. The Defendant was driving all over the road including into the on-coming lane of traffic at approximately 6:00 p.m. which is a time when there are usually a higher number of vehicles on the roadway. When a police officer in a marked squad car turned on his overhead lights and sirens to initiate a traffic stop of the Defendant's vehicle, he quickly drove off away from the officer. The Defendant continued to flee from law enforcement and engage in reckless driving behavior that included multiple traffic violations. Officers believed the Defendant was going to drive off the roadway at one point. The Defendant ultimately evaded three marked squad cars who were trying to initiate a stop using lights and sirens. It took three squad cars to box in the Defendant's car and force the Defendant's car to a stop.

[¶20] The Defendant's driving behavior was extremely risky especially considering the driving conditions which were described by officers as a typical North Dakota blizzard, windy, snowing, and low visibility. The statute states "[t]here is risk within the meaning of this section if the potential for harm exists, whether or not a particular person's safety is actually jeopardized." N.D.C.C. § 12.1-17-03. The Defendant put two minor children's safety at risk and actually jeopardized their safety based on his driving behavior, while intoxicated, and fleeing three marked police cars with lights and sirens activated at 6:00 p.m. during a highly trafficked time and area in Grand Forks County.

III. THE DEFENDANT WAS NOT UNCONSTITUTIONALLY CONVICTED OF REFUSAL TO SUBMIT TO A CHEMICAL TEST.

[¶21] The Defendant raises the validity of the implied consent advisory read to the Defendant for the first time on appeal. “In criminal cases, errors not raised in the district court may fall into one of three categories: forfeited error, waived error, and structural error.” State v. Rogers, 2018 ND 244, ¶ 3, 919 N.W.2d 193. “A structural error is a ‘defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” Id. (quoting Johnson v. United States, 520 U.S. 461, 468 (1997)(quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991))). “Only a handful of situations have been determined to fall within the structural error category: deprivation of right to counsel, lack of judicial impartiality, racial exclusion from a grand jury, violation of the right to self-represent, and denial of the right to a public trial.” Id. (quoting State v. Decker, 2018 ND 43, ¶ 8, 907 N.W.2d 378). The Defendant’s issue is not a structural error. A forfeited error “is the failure to timely assert a right, while waiver is the intentional relinquishment of a right, and [N.D.]R.Crim.P. 52(b) applies only to ‘forfeited’ and not to ‘waived’ errors.”

[¶22] A motion to suppress is a motion that “must be made by pretrial motion.” N.D.R.Crim.P. 12(b)(3)(C). North Dakota Rules of Criminal Procedure 12(c)(1) states “[t]he court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.” The court “may extend or reset the deadline for pretrial motions” any time before trial. N.D.R.Crim.P. 12(c)(2). However, “[i]f a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows

good cause.” N.D.R.Crim.P. 12(c)(3). “[F]ailure to make a motion required to be made prior to trial pursuant to N.D.R.Crim.P. 12(b), operates as a waiver of that motion under N.D.R.Crim.P. 12(f).” State v. Valgren, 411 N.W.2d 390, 393 (1987).

[¶23] On February 11, 2019, the Defendant waived his preliminary hearing. App. p. 6, Index #27. On August 1, 2019, the Defendant filed a motion in limine to exclude evidence of prior bad acts, specifically his prior DUI convictions. On August 5, 2019, the Defendant filed an objection to the prohibition against re-cross examination of witnesses and the imposition of a trial time limit by the district court. The Defendant did not file any motion to suppress or motion in limine to exclude any evidence regarding the chemical breath test obtained prior to trial. The Defendant did not make an oral motion at the status conference on August 5, 2019, to suppress or exclude evidence of the chemical breath test. The only issue Defendant raised about the chemical breath test was the admissibility of the test results since they had invalid results. Tr. p. 289. The Defendant did not raise this issue at the district court level and should be precluded from raising it at the appellate level.

CONCLUSION

[¶24] Based on the foregoing reasons, the State asks this Court to affirm the criminal judgment of the district court.

Respectfully submitted this 11th day of March, 2020.

/s/ Sarah Gereszek
Sarah Gereszek
Assistant State's Attorney
ND Bar ID #07017
124 South 4th Street
P.O Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
sasupportstaff@gfcounty.org
Email: sarah.gereszek@gfcounty.org

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CERTIFICATE OF COMPLIANCE

SA#149641

[¶1] The State of North Dakota, by and through Assistant State's Attorney Sarah Gereszek hereby certifies that the attached brief complies with the page limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The electronically filed brief contains 16 number of pages.

Dated this 11th day of March, 2020.

/s/ Sarah Gereszek
Sarah Gereszek
Assistant State's Attorney
ND Bar ID #07017
124 South 4th Street
PO Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org

jlf

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AFFIDAVIT OF SERVICE
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STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 11th day of May, 2020, she served true copies of the following documents:

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Certificate of Compliance

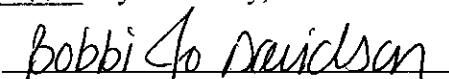
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Kiara C. Kraus-Parr
Kraus-Parr, Morrow, & Weber
424 Demers Ave
Grand Forks, ND 58201
service@kpmwlaw.com



State Attorney's Office

Subscribed and sworn to before me this 11 day of January, 2020.



Notary Public

jlf

