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OCT 30 '00

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

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SUPREME COURT

The State of North Dakota,)
)
Plaintiff/Appellee)
)
-vs-)
)
Thomas Lee Kelly,)
)
Defendant/Appellant)

Supreme Court No.
20000154

Burleigh County No.
08-99-K-02978

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

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BRIEF FOR APPELLANT

STATE OF NORTH DAKOTA

Appeal Taken from the Judgment of Conviction
Dated May 16, 2000
Burleigh County District Court Case No. 08-99-K-02978
South Central Judicial District
The Honorable Donald L. Jorgensen, Presiding

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ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE COURT ERRED IN GIVING ITS JURY INSTRUCTION ON WEIGHT AND BELIEVABILITY OF THE EVIDENCE.

- II. WHETHER THE COURT ERRED IN ITS INSTRUCTION ON THE ESSENTIAL ELEMENTS OF THE OFFENSE OF FELONIOUS RESTRAINT.

- III. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICTS.
 - A. GROSS SEXUAL IMPOSITION.
 - B. CRIMINAL ATTEMPT.
 - C. FELONIOUS RESTRAINT.
 - D. THEFT OF PROPERTY.

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW.

This is an appeal in a criminal case. Appellant, Thomas Lee Kelly (hereinafter "Kelly") is appealing to this Court from his judgments of conviction for the felony offenses of gross sexual imposition (a violation of §12.1-20-03 NDCC), criminal attempt (a violation of §12.1-06-01(1) NDCC), felonious restraint (a violation of §12.1-18-02 NDCC), and theft of property (a violation of §12.1.-23-02 NDCC). See, Criminal Complaint and Second Amended Information, Appendix to the Briefs, pages 3-4, 5-6, and Criminal Judgment, Appendix to the Briefs, pages 8-11. Kelly was charged with these offenses on November 12, 1999, although the offenses were alleged to have occurred on or about May 2, 1999. See, Clerk's Register of Actions, entry 01, Appendix to the Briefs, pages 1-2, and Criminal Complaint, Appendix to the Briefs, pages 3-4.

Kelly's preliminary examination and arraignment were conducted on December 27, 1999. Kelly entered a plea of not guilty at his arraignment, and requested a speedy trial under the authority of §29-19-02 NDCC. See, Clerk's Register of Actions, entry 13, Appendix to the Briefs, pages 1-2.

This case went to trial on March 9-10, 2000. Kelly was found guilty of every charge against him, although,

as to count one of the information, the jury found Kelly guilty of the included offense of gross sexual imposition, a class B felony, rather than gross sexual imposition, a class A felony. See, Verdicts of Guilty, Clerk's Register of Actions, documents numbered 53-56, Appendix to the Briefs, pages 1-2). Kelly's motion for a judgment of acquittal under Rule 29, North Dakota Rules of Criminal Procedure, was denied by the trial court. (Trial Transcript, pages 147-149)

Kelly was sentenced on May 16, 2000, after a presentence investigation was conducted. Kelly was sentenced to serve prison sentences of ten years for the crime of gross sexual imposition, ten years for the crime of criminal attempt, five years for the crime of felonious restraint, and five years for the offense of theft of property. The court suspended the execution of three years of the sentences for gross sexual imposition, criminal attempt, and theft of property. None of the five-year sentence for felonious restraint was suspended. All of the sentences were to be served concurrently, except that the sentence for theft of property was to be served consecutively to the other sentences. (Sentencing Transcript, pages 15-18). See, Criminal Judgment, Appendix to the Briefs, pages 8-11. Therefore, Kelly must serve initial terms of imprisonment of seven years for counts one and two, including a concurrent five year term for felonious restraint, followed

by another term of imprisonment of two years for the offense of theft of property.

Kelly filed a timely notice of appeal with the clerk of court's office on May 22, 2000. See Notice of Appeal and Notice of Filing of the Notice of Appeal, Appendix to the Briefs, pages 12 and 13.

B. STATEMENT OF FACTS

The critical facts of this case were brought into evidence during trial by the testimony of Kelly and Crystal Bobbe, the alleged victim. They gave similar, but different versions of what had transpired on the early morning of May 2, 1999. Crystal Bobbe's story was as follows. Crystal Bobbe testified that she is a twenty-year old college student. On May 1, 1999, she had been visiting some friends in Mandan. Bobbe testified that she had three alcoholic drinks over a period of 4-5 hours. (Trial Transcript, pages 35-36) Bobbe testified that she left her friends' place at about 1:00 a.m. to drive home with two roommates, but after dropping her roommates off, she decided to visit two other friends, Matt and Tom, who were staying at the Nodak Motel in Bismarck. (Trial Transcript, pages 37-38) According to Bobbe, as she was looking for her friends' vehicle, she was flagged down by the occupants of a blue Blazer-type vehicle. The passenger of the Blazer-type vehicle got out and approached her on foot after she had

stopped her vehicle after leaving the Nodak Motel. (Trial Transcript, page 39) According to Bobbe, this person said that he knew Matt and Tom, and further, that he knew where they were attending a party. Bobbe identified this person as Kelly. (Trial Transcript, pages 39-40)

Kelly got into Bobbe's car to show her where Matt and Tom were, although Bobbe would have preferred to simply follow the Blazer there. Bobbe left Bismarck for the site of Matt and Tom's party with the Blazer following her, but at some point the Blazer was no longer following her. (Trial Transcript, page 44, line 3) It soon became apparent to Bobbe that Kelly had no idea where they were going. (Trial Transcript, page 44, line 10)

According to Bobbe, Kelly made repeated sexual advances towards her during the drive into the country. (Trial Transcript, pages 43-45) Bobbe stopped her car, got out, and told Kelly to get out. Kelly would not remove himself from the car so Bobbe got back into her car and agreed to drive Kelly back to Bismarck. At about this time Kelly offered her a drink of liquor from a bottle Kelly had brought with him, which she took, and then Kelly drank the rest of the alcohol himself. (Trial Transcript, page 45) Kelly continued to make sexual advances towards Bobbe and so Bobbe stopped the car again and asked Kelly if he wanted to die. (Trial Transcript, page 45) Once again, Bobbe tried to get Kelly to get out of her car, but Kelly refused

to leave and so Bobbe again agreed to return Kelly back to Bismarck and started on the way. (Trial Transcript, page 46)

Kelly continued to make more vigorous sexual advances and in so doing, shifted the car into 'park'. Bobbe stopped the car, and struck Kelly. At this time Kelly became violent in some undefined way. (Trial Transcript, page 47) Bobbe fled from the vehicle, but Kelly pursued her and tackled her in the middle of the highway. (Trial Transcript, page 47) Kelly then tried to remove her clothing. Bobbe bit Kelly on the lip, and Kelly retaliated by slamming Bobbe's head on the pavement. (Trial Transcript, page 48) Bobbe then told Kelly they can go back to Bismarck and the two of them get back into Bobbe's car. Once again, Kelly sexually assaults her and Bobbe thinks Kelly did get his finger into her vagina. (Trial Transcript, page 50, lines 1-4) Kelly is able to remove Bobbe's pants down to her knees, and is also grabbing her breasts. At this time Bobbe tells Kelly that she is willing to have sex with him, and talks Kelly into letting her go into the ditch to remove her tampon. (Trial Transcript, page 51, line 14) Bobbe then fled the scene on foot until she reached an occupied residence where she could and did make a 911 phone call and report the assault. As she was fleeing, Bobbe could see her car being driven away. (Trial Transcript, page 52, lines 15-17)

Kelly testified as follows. On May 1-2 he was living near the area of the Nodak Motel. That night he was a passenger in a vehicle driven by Charles Walking Elk when a vehicle with one headlight passing by them repeatedly flashed its headlight at them. (Trial Transcript, pages 153-155) The other vehicle then stopped and Kelly got out and walked over to talk to the driver to see what she wanted. The driver of the other vehicle was Bobbe. (Trial Transcript, pages 155-156)

Bobbe asked Kelly where the party was. Kelly replied that there was a party near McLean Bottoms, referring to a party he had been at earlier that evening. (Trial Transcript, page 157) Bobbe asked to go to the party and further asked Kelly to get into her vehicle to show her where it was. As the two vehicles left for the party the Walking Elk vehicle was in the lead, followed closely by Bobbe's vehicle. (Trial Transcript, pages 158-159) However, Bobbe soon passed by the Walking Elk vehicle at a red light and continued on out of town at a high rate of speed. The Walking Elk vehicle was soon lost from sight. (Trial Transcript, pages 159-161)

Both Kelly and Bobbe were drinking an alcoholic beverage during the drive out of town. In addition, Bobbe stopped her car to get some beer out of the trunk of her car. (Trial Transcript, pages 172-173) Once out in the country, Kelly could not locate the party site, and thinking

they had passed the turn, wanted to turn around. However, Bobbe continued on. Her driving was highly erratic. (Trial Transcript, pages 174-175) They continued to drink, and at one point started to hold hands. (Trial Transcript, page 175)

Kelly told Bobbe they had passed the turn and that they should turn around. Bobbe stopped to turn round, but then parked the car and they sat there for a while. (Trial Transcript, page 176) At that time Kelly and Bobbe started 'making out'. They were kissing and touching each other, and during this time Kelly did touch Bobbe's breast. (Trial Transcript, page 177, lines 3-21) There was nothing about Bobbe's behavior that caused Kelly to think his sexual advances were unwanted by Bobbe and all of their actions were consensual.

After about 15 minutes had passed, Kelly told Bobbe he wanted to go on to the party. Again, Bobbe's driving was highly erratic. (Trial Transcript, page 178) Kelly became so concerned about Bobbe's driving that he demanded she stop the car so he could get out. (Trial Transcript, pages 178-180) They argued over who was going to keep the bottle of liquor that was in the car, but then started making out again. While they were kissing, Bobbe bit hard on Kelly's tongue causing Kelly a great deal of pain. (Trial Transcript, page 182) Kelly was finally able to free himself and then in rapid succession pushed Bobbe twice in the

face causing Bobbe's head to strike the car window. Kelly was spitting blood out of his mouth and started cursing at Bobbe. (Trial Transcript, page 184) Bobbe responded by swearing at Kelly and told Kelly to get out of the car. (Trial Transcript, page 186) Kelly refused to get out of the car. After much argument, Kelly talked Bobbe into letting him drive back to Bismarck. When Bobbe got out of the car, Kelly slid over into the drivers seat and drove away towards Bismarck. The car quit working after a short distance, and Kelly grabbed the bottle of liquor and left on foot. (Trial Transcript, pages 187-188) After a few unsuccessful attempts to find a ride back, Kelly found someone at home who gave him a ride into Bismarck. (Trial Transcript, pages 189-191) Once there, Kelly went to the home of his friend, Crystal Black Cloud. (Trial Transcript, page 191) Kelly denied touching Bobbe in her crotch area throughout the whole episode. (Trial Transcript, page 203, lines 19-21)

There were other witnesses during the trial. Travis Bridwell testified that he was the person whose house Bobbe stopped at on the morning of May 2 to make her 911 phone call. (Trial Transcript, pages 71-74) According to Bridwell, Bobbe was hysterical, frantic, and screaming when he answered the door. (Trial Transcript, page 73, lines 22-24) The recording of the 911 phone call was replayed for the jury after being admitted into evidence as Exhibit 10.

(Trial Transcript, pages 78-79)

Bridwell's observations of Bobbe were corroborated by Officer Robert Benson who was the Burleigh County Sheriff's Deputy who came to the Bridwell home in response to the 911 call. (Trial Transcript, pages 80-85) Benson had also observed Bobbe's car abandoned along the road on his way out to the Bridwell residence. (Trial Transcript, page 82) Benson had taken some photographs of Bobbe and these were admitted into evidence as Exhibits 12-15. (Trial Transcript, pages 91-93) On cross-examination, Benson conceded that he had not seen any skid marks on the road to corroborate Bobbe's story that Kelly had slammed her moving vehicle into park. (Trial Transcript, page 99, lines 4-6). Also on cross-examination, Benson conceded that when he took Bobbe to the hospital, it was with the expectation that a pelvic examination would be conducted, but that no such examination was ever done. (Trial Transcript, page 101)

DNA evidence derived from blood samples taken from Kelly and Bobbe determined that Kelly was the source of blood stains found on Bobbe's clothing. Trial Transcript, pages 126-134)

Crystal Black Cloud testified as a defense witness. According to Black Cloud, Kelly showed up at her residence on the morning of May 2, 1999. Kelly's speech was odd, and Black Cloud observed that Kelly's tongue appeared to

have been severely bitten and that Kelly had hickeys on his neck. (Trial Transcript, pages 214-215) Kelly's explanation for this had been that he had gone towards a party near the University of Mary with a girl, and she had freaked out on him and bit his tongue. (Trial Transcript, pages 214-215)

The State, in rebuttal, had admitted into evidence an edited recording of a telephone conversation by Kelly from the jail following his arrest. See, Trial Exhibit 21. In the recorded conversation, Kelly said that the Walking Elk vehicle had passed them on the way out of town. Further, Kelly had made a statement to the effect that "this bitch raped me". (Trial Transcript, page 218, lines 11-14, and page 219, line 17)

Among the instruction given the jury was one entitled, "Weight and Believability of the Evidence". This instruction advised the jury, in part, as follows: "If you find a conflict in the evidence, you should reconcile it, if you can. If you cannot do so, you have the right to determine whom of the witnesses you will believe, in whole or in part." See, Appendix to the Briefs, page 7; Final Jury Instructions, Document No. 51, page 7, Clerk's Register of Actions, and Appendix to the Briefs, page 2)

In another jury instruction, on the offense of felonious restraint, the court did not define restraint, even though that term, as it is used within 12.1-18-02

NDCC, is defined in 12.1-18-04 NDCC. See Final Jury Instructions, Document No. 51, page 15, Clerk's Register of Actions, and Appendix to the Briefs, page 14.

ARGUMENTS

I. THE TRIAL COURT ERRED IN GIVING ITS JURY INSTRUCTION ON WEIGHT AND BELIEVABILITY OF THE EVIDENCE.

Kelly's first argument, applicable to all counts, is that the trial court made a reversible error by giving the jury instruction, "Weight and Believability of the Evidence". This instruction compels the jury, whenever there is a conflict in the evidence, as there was here, to determine which witness it will believe. The problem with this instruction is that it requires the jury to determine that one of the witnesses is telling the truth. This rules out the possibility that both conflicting witnesses may have been dishonest in their testimony rendering both of them unworthy of belief. Therefore, in any case in which there has been any degree of supporting evidence for the testimony of the State's witness, the defendant is sure to suffer from the giving of this instruction.

In State v. Thompson, 504 N.W.2d 838 (N.D. 1993), this Court condemned the giving of the instruction in a criminal case that each witness is presumed to have told the truth and found reversible error when the defendant

had not testified. In State v. Austin, 520 N.W.2d 564 (N.D. 1994), this Court refused to find reversible error in the giving of this instruction where the defendant did testify and did not make a trial objection to the giving of this instruction. See also, State v. Sievers, 543 N.W.2d 491 (N.D. 1996).

"If a jury instruction, when read as a whole, is erroneous, relates to a central subject of the case, and affects the substantial rights of the accused, it is grounds for reversal. "State v. Jensen, 251 N.W.2d 182 (N.D. 1977), State v. Thompson, supra. It appears incontrovertible that an instruction on the credibility of conflicting witnesses relates to a central subject of the case (guilty or innocence) and also affects the substantial rights of the accused. Id. The only question is whether the given instruction was erroneous.

The presumption of truthfulness instruction, at issue in Thompson, supra, was erroneous because it impinged upon the defendant's presumption of innocence, and also invaded the province of the jury to determine witness credibility. The jury is solely responsible for judging the credibility of the witnesses and determining the weight to be given their testimony. State v. Morstad, 493 N.W.2d 645 (N.D. 1992) Kelly argues that as a corollary to the holding in Thompson, supra, this Court should also find error in any instruction which would compel a jury to find

that one of the conflicting witnesses was telling the truth. Such an instruction tells the jury that they must accept as true the testimony of at least one witness. It excludes the possibility of a jury finding that neither witness is worthy of belief and therefore deprives a defendant of his right to be found guilty beyond a reasonable doubt. The inevitable result, if the jury were to find both conflicting witnesses unworthy of belief, would be a finding that the State had failed to prove its case beyond a reasonable doubt. This instruction improperly takes that option away from the jury. Therefore, Kelly's convictions should be reversed on this ground.

II. THE TRIAL COURT ERRED IN ITS JURY INSTRUCTION ON THE
ESSENTIAL ELEMENTS OF THE OFFENSE OF FELONIOUS
RESTRAINT.

Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. State v. McIntyre, 488 N.W.2d 612 (N.D. 1992). As to the felonious restraint charge, the trial court simply instructed the jury that that State had met its burden of proof if the evidence showed, beyond a reasonable doubt: "1) On or about May 2, 1999, in Burleigh County, North Dakota, the defendant, Thomas Kelly, 2) knowingly restrained Crystal Bobbe, another human being, under terrorizing circumstances or under circumstances

exposing Crystal Bobbe to risk of serious bodily injury." See Appendix to the Briefs, page 14. The trial court did not give the jury the definition of "restrain" set out in §12.1-18-04(2) NDCC, nor did the court define terrorizing, as it is set out in §12.1-17-04 NDCC, or serious bodily injury as that term is defined for use in criminal statutes in §12.1-01-04 (29). Consequently, the jury was never properly instructed or informed on the circumstances that were necessary to make a crime of felonious restraint.

The elements of an offense include: "a. the forbidden conduct; b. the attendant circumstances specified in the definition and grading of the offense; c. the required culpability; d. any required result; and e. the nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue." §12.1-01-03(1) NDCC. The court's instruction on the offense of felonious restraint failed to define the attendant circumstances specified in the definition of the offense. The court's error was compounded by the fact that it lumped several separate elements of the offense together in one required finding, thereby depriving Kelly of his right to be found guilty only if each and every element of the offense was found to be true by proof beyond a reasonable doubt. Therefore, Kelly's conviction for the offense of felonious restraint must be reversed.

III. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICTS.

In reviewing the sufficiency of evidence in a criminal case, this Court will look only to the evidence most favorable to the verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction. A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor. See, State v. Johnson, 425 N.W.2d 903 (N.D. 1988) and State v. Vance, 537 N.W.2d 545 (N.D. 1995). Further, this Court will not weigh conflicting evidence, nor will it judge the credibility of the witnesses. Instead, the Court will look only to the evidence and inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant a conviction. State v. Gonderman, 531 N.W.2d 11 (N.D. 1995).

A. Gross Sexual Imposition. Kelly concedes that the evidence at trial, applying this Court's standards of review, was sufficient to sustain the jury verdict of guilty to the offense of gross sexual imposition.

B. Criminal Attempt. Kelly also concedes that the evidence was sufficient, under this Court's standard of review, to sustain the jury verdict as to this count.

C. Felonious Restraint. Kelly argues that the evidence

was insufficient to sustain the jury verdict on this count. First, there was no showing and certainly no finding by the jury, that restraint occurred "under terrorizing circumstances" or under circumstances exposing Bobbe to a risk of "serious bodily injury". These attendant circumstances would be necessary elements of the offense, to be proved beyond a reasonable doubt. "Serious bodily injury", as it is used throughout the criminal code, Chapter 12.1 NDCC, means a "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, or a bone fracture". Not only is the record devoid of any such evidence, the jury was not even required to make such findings. Similarly, the phrase "terrorizing" is not defined for general use in 12.1-01-04 NDCC, but it is found in §12.1-17-04 NDCC, in very close proximity to the felonious restraint law in §12.1-18-02 NDCC. It seems apparent that the terrorizing defined in §12.1-17-04 was meant to be the terrorizing alluded to and required to be found in §12.1-18-02. Again, this is evidence that is not in the record and this is an issue the jury did not apply to the evidence. Therefore, Kelly's conviction for the offense of felonious restraint must be reversed due to an insufficiency of the evidence.

D. Theft of Property. Kelly also argues that the evidence

was insufficient to sustain his conviction for the offense of theft of property. One of the elements of this offense is that the actor must act with an intent to deprive. While this requirement was read to the jury, the statutory definition set out in §12.1-23-10(3) was not. Under this section, "Deprive" means: a. to withhold property or to cause it to be withheld either permanently or under such circumstances that a major portion of its economic value, or its use and benefit, has, in fact, been appropriated; b. to withhold property or to cause it to be withheld with the intent to restore it only upon the payment of a reward or other compensation; or c. to dispose of property or use it or transfer any interest in it under circumstances that make its restoration, in fact, unlikely.

All of the evidence, including the testimony of Crystal Bobbe, shows that Kelly drove the Bobbe vehicle for the sole purpose of returning to Bismarck. There was no showing that Kelly was going to retain the vehicle permanently. In fact, it was found a short distance from where Kelly had taken it. There was no showing that a major portion of the economic value of the vehicle had been appropriated. There was no showing that Kelly was withholding the vehicle for a reward or other compensation. There was no showing that Kelly had disposed of the vehicle or used it or made a transfer of the vehicle that would make its restoration unlikely.

At best, the evidence might have shown an offense of unauthorized use of a vehicle, as set out in 12.1-23-06 NDCC, but that was not the charge against Kelly. Theft of property was his charged offense and that offense was not proved by sufficient evidence. Therefore, Kelly argues that his conviction for this offense should be reversed.

CONCLUSION

Kelly's convictions for all offenses should be reversed because of an erroneous jury instruction relating to the credibility of witnesses. The court's jury instruction improperly invaded the province of the jury and took away from the jury the option of determining that no witness was worthy of belief beyond a reasonable doubt.

Kelly's conviction for the offense of felonious restraint should be reversed because the jury was not given proper instruction on the elements of that offense, nor was it properly instructed on the law of felonious restraint.

Kelly's convictions for the offenses of felonious restraint and theft of property should be reversed because the evidence was insufficient to sustain the jury verdicts on those charges, especially in light of the fact that the jury was deprived of instruction on the elements of the offense or definitions of specific and critical terms within those offenses.

Dated: October 30, 2000.

A handwritten signature in cursive script that reads "Wayne Guter". The signature is written in black ink and is positioned above a horizontal line.

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