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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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State of North Dakota,

Plaintiff-Appellee,

-vs-

Thomas Lee Kelly,

Defendant-Appellant.

Supreme Court No. 20000154

FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT

NOV 30 2000

STATE OF NORTH DAKOTA

BRIEF OF PLAINTIFF-APPELLEE

Appeal from 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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STATEMENT OF THE CASE

Kelly was charged with one (1) count of gross sexual imposition by force (class A felony), one (1) count attempted gross sexual imposition (class A felony), one (1) count of felonious restraint (class C felony), one (1) count of theft of property (class C felony), by information and pled not guilty to the offenses. On March 10, 2000, a jury trial was conducted with Defendant being found guilty of all offenses.

Kelly's version of the facts of the case is correct and additional facts as they relate to each issue shall be brought out in the brief.

I. WHETHER THE TRIAL COURT ERRED IN GIVING THE JURY A WEIGHT AND BELIEVABILITY OF THE EVIDENCE INSTRUCTION.

A party must specifically object to a jury instruction at trial to preserve an issue for appellate review under N.D.R.Crim.P. 30. State v. Mathre, 1999 ND 224, ¶ 5, 603 N.W.2d 173. "Under N.D.R.Crim.P. 30(c), if the court gives counsel an opportunity to object to proposed instructions, counsel must designate the omissions of instructions that are objectionable and thereafter only the omissions so designated are deemed excepted to by counsel." State v. Olander, 1998 ND 50, ¶ 9, 575 N.W.2d 658; see also State v. Barnes, 551 N.W.2d 279, 281 (N.D. 1996) (noting a defendant cannot predicate error upon omissions in jury instructions given if he or she fails to request a more comprehensive instruction). As the Court explained in Olander, at ¶ 10 (quoting State v. McNair, 491 N.W.2d 397, 399 (N.D. 1992)),

> An attorney's failure to object at trial to instructions, when given the opportunity, operates as a waiver of the right to complain on appeal of instructions that either were or were not given. State v. Johnson, 379 N.W.2d 291, 292 (N.D.), cert.denied,

> 475 U.S. 1141, 106 S. Ct. 1792, 90 L.Ed.2d 337 (1986); Rule 30(c), N.D.R.Crim.P. To preserve a challenge to a jury instruction, an attorney must except specifically to the contested instruction, regardless of whether the attorney proposed another instruction on the same issue. See Andrews v. O'Hearn, 387 N.W.2d 716, 728 (N.D. 1986), and Matter of Estate of Honerued, 294 N.W.2d 619, 622 (N.D. 1980), construing Rule 51(c), N.D.R.Civ.P., which is identical to Rule 30(c), N.D.R.Crim.P.

"If the defendant does not request an instruction or object to the omission of an instruction, we will not reverse unless the failure to give the instruction constitutes obvious error." Barnes, 551 N.W.2d at 281-82.

The Court exercises its "power to notice obvious error cautiously and only in exceptional circumstances where the accused has suffered serious injustice." Olander, at ¶ 12; see also Mathre, at ¶ 5; State v. Burger, 1999 ND 30, ¶ 13, 590 N.W.2d 197. When analyzing the record for

obvious error, the burden is on the defendant to show he or she was prejudiced as a result of the error. Burger, at ¶ 13. A review of the entire record and the probable effect of the error in light of the evidence presented is necessary. Olander, at ¶ 12. Under N.D.R.Crim.P. 52(b), obvious error is rarely recognized by the Court. Id. (citing State v. Kraft, 413 N.W.2d 303, 307 (N.D. 1987); State v. Hersch, 445 N.W.2d 626, 634 (N.D. 1989); State v. Wiedrich, 460 N.W.2d 680, 685 (N.D. 1990)); Mathre, at ¶ 5.

The Court has applied the United States Supreme Court's framework for the analysis of obvious errors. Olander, at ¶ 18 (adopting the obvious error analysis outlined in United States v. Olano, 507 U.S. 725 (1993)). "For th[e] Court to notice a claimed error not brought to the attention of the trial court it must be an (1) error, (2) that is obvious, and (3) affects substantial rights." Mathre, at ¶ 5 (quoting Olander, at ¶ 14). An error is defined as a forfeited deviation from an applicable legal rule. Olander, at ¶ 14. An obvious error is an error that represents a "clear deviation from an applicable legal rule under current law." Id. "Under Olano, . . . a clear or obvious deviation from an applicable legal rule also must affect 'substantial rights,' that is

it must have been prejudicial, or affected the outcome of the proceeding." Id. at ¶ 15. Even if the Court decides an error affected Kelly's substantial rights, "an appellate court has discretion to correct the error and should correct it if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Id. at ¶ 16 (citations omitted).

The Olano framework as applied in Olander, at ¶¶ 18-28, mandates three conclusions in the present case: (1) There was no obvious error; (2) Kelly's substantial rights were not affected; and (3) Even if there was an obvious error, exercising the Court's discretion to not correct the obvious error would not seriously affect the fairness, integrity, and public reputation of jury criminal trials.

Jury instructions must correctly and adequately inform the jury of the law and must not mislead or confuse the jury. Olander, at ¶ 18; Barnes, 551 N.W.2d at 281. Instructions are reviewed as a whole, and "if the instructions, as a whole, correctly advise the jury on the law, they are sufficient although part of the instructions, standing alone, may be insufficient or erroneous." Id.; State v. Tipler, 316 N.W.2d 97, 100 (N.D. 1982).

Kelly argues the jury instruction "Weight and Believability of the Evidence" was erroneous. The instruction was not objected to at trial and the proper review for this is obvious error. Kelly cites a line of cases beginning with State v. Thompson, 504 N.W.2d 838 (N.D. 1993), where a similar instruction was given with the added language of "each witness is presumed to have told the truth". In Thompson the Court determined it was reversible error when the defendant did not testify at trial with this language included. In State v. Austin, 520 N.W.2d 564 (N.D. 1994) and State v.Sievers, 543 N.W.2d 491 (N.D. 1996) the Court refused to find reversible error in giving the same instruction as the defendant did testify and the instruction was not objected to by defendant.

The instruction used in the present case did not include the language "each witness is presumed to have told the truth", Kelly did not object to the instruction, and Kelly testified at trial. This language does not appear in the instruction given in this case. Kelly argues that the Court should reverse as the jury instruction did not allow the jury to find none of the witnesses were telling the truth. Kelly's argument is incorrect as the language of the instruction was proper,

Kelly did not object to the instruction at trial, and unlike the defendant in Thompson, Kelly did testify.

The instruction was proper.

II. WHETHER THE TRIAL COURT ERRED IN NOT GIVING THE JURY DEFINITIONS IN THE FELONIOUS RESTRAINT INSTRUCTION.

Kelly further argues the felonious restrain count instruction did not adequately define the terms involved. Again no objection was raised by Kelly to the instruction given at trial. Again obvious error would be the standard of review due in this case. Kelly claims the trial court should have defined "restrain", "terrorizing", or "serious bodily injury". The court in State v. Motsko, 261 N.W.2d 860 (N.D. 1977) found that words such as "deception", "force", and "intimidation" are words of common understanding which need not be defined by the court in the absence of a specific request. There is no indication the jury had any trouble with the terminology as there were no questions to the court regarding the terms.

As there was no objection to the instruction and no obvious error Kelly's argument is without merit.

III. WHETHER SUFFICIENT EVIDENCE WAS PRESENTED TO SUSTAIN THE VERDICTS FOR FELONIOUS RESTRAINT AND THEFT OF PROPERTY.

This Court has stated that it will review the entire record in determining whether or not substantial evidence exists to sustain a verdict when the defendant presents evidence after a motion for acquittal is denied at the close of the prosecutions case. State v. Schaeffer, 450 N.W.2d 754 (N.D. 1990); State v. Prociv, 417 N.W.2d 840 (N.D. 1988); State v. Kingsley, 383 N.W.2d 828 (N.D. 1986); State v. Wilson, 267 N.W.2d 550 (N.D. 1978).

The State contends that the evidence was more than sufficient to sustain the jury verdict.

> "In challenging the sufficiency of the evidence, a defendant must show that the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inferences of guilt, and we will reverse the jury's determination only if the record presents no substantial evidence to support the verdict." State v. Lund, 424 N.W.2d 645 (N.D.1988).

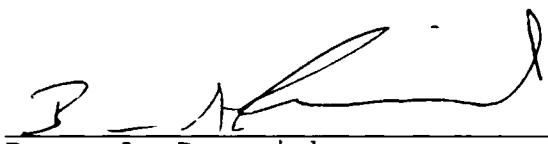
The evidence at trial indicated the crimes were committed against the victim and Kelly left the scene in the victims car (trial tran. p.52 ln.16-17). Officer Benson found the vehicle with the lights on, on the side of the road, with steam

coming out of the engine (trial tran. p.82 ln.13-19. Kelly testified he jumped in the driver seat and drove away when the victim fled. He drove the car a short distance and when the car stopped running he walked. (trial tran. p.187 ln.19-25). The evidence shows Kelly sexually assaults the victim, restrains the victim, attempts to again sexually assault the victim, and when the victim flees he takes the victims car. Simply because the vehicle stops running is the only reason Kelly left the car. He didn't leave the car once the victim fled, he stole the vehicle. There is substantial evidence Kelly took the victims car with the intent to deprive her of the car.

CONCLUSION

The trial court did not err in giving the jury the weight and believability of the evidence instruction. The instruction on the felonious restraint count was sufficient and the court did no err in giving the instruction. Sufficient evidence was presented at trial to sustain the guilty verdicts. Thus, the State respectfully requests the Court affirm the jury verdicts and Kelly's criminal convictions.

Respectfully submitted this 30th day of November, 2000.



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