ORIGINAL (e-filed)

IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA 20040298

Supreme Court No. 20040298
District Court No. 03-K-485

STATE OF NORTH DAKOTA

Plaintiff-Appellee,

vs.

LOREN BERNSTEIN

Defendant-Appellant.

Appeal from a Final Judgment entered by the District Court
for Bottineau County, Northeast Judicial District, State of North Dakota.
The Honorable John C. McClintock, Jr. presiding.

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the District Court err in refusing to admit into evidence Mr. Bernstein's testimony and his proffered Exhibit A which tended to show his knowledge concerning the existence or non-existence of license or privilege to enter the premises in question?

II. STATEMENT OF THE CASE

This is an appeal from a criminal action arising out of the District Court for Bottineau Court, Northeast Judicial District, State of North Dakota. The Defendant, Mr. Bernstein, was charged, by way of Complaint, with criminal trespass in violation of North Dakota Century Code § 12.1-22-03(3). Appendix (App.) 3-4.

The case was tried to the bench on October 8, 2004. App. 13. At the conclusion of a half-day long trial, Mr. Bernstein was found guilty of the misdemeanor as charged. Id. In the course of finding Mr. Bernstein culpable, the trial court concluded that certain evidence proffered by the Defendant at trial was irrelevant and, therefore, inadmissible. App. 11:10-13.

Judgment was entered on October 13, 2004 and it ordered a deferred imposition of sentence. App. 13. Mr. Bernstein filed his timely Notice of Appeal on October 21, 2004. App. 1; 14-15.

III. STATEMENT OF THE FACTS

The course of events giving rise to the case before this Court is essentially undisputed. In order to give context to those events, a bit of detail is necessary.

As noted above, this appeal concerns a criminal trespass prosecution. The piece of real property allegedly trespassed upon by Mr. Bernstein is located in Botttineau County, North Dakota and is owned by an individual known as Caroljoy Richard. Transcript (Tr.) 5:16-22; 6:10-14. The parcel was deeded to her by her father, LeRoy Bernstein, in the year 1988. Tr. 6:24-7:4.

Two houses are located on the land. Tr. 6:17-21. One belongs to, and is resided in, by Mrs. Richard. Tr. 6:19. The other home, at all times relevant to this appeal, was lived in by LeRoy Bernstein.[1] Tr. 6:19-21. Though both are located on Mrs. Richard's land, the houses each had their own driveway. Tr. 10:22-25.

While the facts are somewhat unclear as to the actual state of title concerning the house occupied by LeRoy Bernstein, all agree it was the intent of the various parties that he live there during his lifetime. Tr. 26:14-

[1] LeRoy Bernstein passed away in early 2004. Tr. 9:7; 9:12-15.

16. He had the authority to have guests into his home. Tr. 26:17-19. He had no other place to live. Tr. 26:3-6.

Further, LeRoy Bernstein paid the taxes assessed on the house. Tr. 27:6-8. Indeed, Ms. Richard's testimony at trial was to the effect that LeRoy Bernstein had "authority" over the use of the structure though it was located on property owned by her. Tr. 26:25-27:3.

The Defendant, Loren Bernstein, is the son of LeRoy Bernstein. Tr. 6:2-5; 9:3-4. Important for purposes of this appeal, are the facts that he, more-or-less on a daily basis, visited his father at the house on Caroljoy Richard's property. Tr. 50:24-51:1. This visitation had been going on for the entire time the Defendant's father lived in the house in question. Id. This period of time approximated sixteen years. Tr. 9:7-11.

Loren Bernstein believed his father had authority to allow him into his home and, in fact, was under the impression that LeRoy Bernstein retained a life estate in the property. Tr. 51:4-16.

During the day at issue in the prosecution for criminal trespass, November 1, 2003, the defendant's father was in the hospital and was to remain there for a period of time. Tr. 11:25-12:6. The Defendant visited him at the medical facility. Tr. 40:9-15.

As a result of his expected stay away from home, Leroy Bernstein requested that the Defendant go into his domicile to retrieve some personal items. Tr. 39:23-25. Upon arriving at LeRoy Bernstein's house, Loren Bernstein found that the hidden key he usually used to gain admission was missing and the house was locked. Tr. 40:20-25; 41:7-25. He also noticed a "No Trespassing" sign had been posted at the head of his father's driveway. Tr. 41:1-6.

Not being able to enter, the Defendant returned to the hospital and informed his father with regard to the state of affairs described above. Tr. 42:1-3. After speaking with LeRoy Bernstein, Loren Bernstein proceeded to attempt to locate a locksmith to help him gain entry to his father's abode. Tr. 43:19-25.

No locksmith was available and the Defendant made another trip up to his father's house in an attempt to enter and obtain the necessary personal items. Tr. 48:3-8. He was, again, unsuccessful in gaining entry to the home itself and never did procure his father's things for him. Tr. 50:4-11.

There was evidence to the effect that the Defendant had taken down the "No Trespassing" sign at the head of his father's driveway and placed it in the garage of his father's house during his second visit. Id.; Tr. 15:13-16:25.

Prior to posting the "No Trespassing" sign, Mrs. Richard testified she verbally told the Defendant to stay away from their father's house while he was in the hospital. Tr. 18:17-19:17.

Later, Caroljoy Richard became aware that the Defendant had been in LeRoy Berstein's garage on November 1, 2003, despite the presence of the "No Trespassing" signs. Tr. 14:20-15:6. As a result, she signed the criminal complaint that became the basis of the prosecution of the Defendant. App. 3-4.

Loren Bernstein went to trial on October 8, 2004, contesting the State's case against him. In particular, the Defendant took the position that he believed his father's permission to enter the property gave him license or privilege to enter despite Caroljoy Richard's wishes. Tr. 51:9-16.

In support of his defense, Loren Bernstein offered Defendant's Proposed Exhibit A, which consisted of the affidavit of LeRoy Bernstein and which read:

> In late October and early November of 2003 I was hospitalized after suffering a reaction to the flu shot. During this time I requested of my son Loren Bernstein that he go to my home and bring me my shaver, a pair of trousers and my Bible as I was to be in swing bed for a period of time.
>
> He came back to the hospital and told me that the doors to my house were locked and he could not get in to get my things. I granted him

permission to go and get the door opened however [sic] would be required to bring me what I was in need of.

Loren had the authority to go to my home and get whatever I needed as I had given him power of attorney earlier. I had named Loren my power of attorney as I had confidence that he would assist me in managing my affairs in a manner that I would approve of.

Ss: LeRoy Bernstein

Tr. 56:15-25; App. 17.

Loren Bernstein also offered testimony to the same effect as the information contained in the affidavit. Tr. 36:13-19.

At the point this evidence was offered, the State's Attorney objected to it on hearsay grounds. Id.; Tr. 57:1-20. Defense Counsel made an offer of proof that the statements were not offered to prove the truth of the matters asserted but, rather, were offered to show the Defendant's understanding as to his license to enter his father's house. Id. The Court took the issue under advisement. Id.

After the close of evidence, Judge McClintock found the Defendant guilty of criminal trespass. Tr. 63:20-23. In the course of doing so, the Court ruled the contested evidence inadmissible, not on hearsay grounds, but because the judge deemed it irrelevant. Tr. 67:5-15. Specifically, Judge McClintock found LeRoy Bernstein lacked actual authority to give the

Defendant permission to enter the house. Id. As this was so, the Court felt that the Defendant's state of mind as to his license to enter was irrelevant. Id.

IV. ARGUMENT

A. The District Court erred in refusing to admit into evidence Mr. Bernstein's testimony and his proffered Exhibit A which tended to show his knowledge concerning the existence or non-existence of license or privilege to enter the premises in question.

1. Standard of Review.

A trial court's decision whether to admit or to exclude evidence is reviewed for abuse of discretion. City of Fargo v. Habiger, 2004 ND 127, ¶ 31, 682 N.W.2d 300 (citing State v. Gagnon, 1999 ND 13, ¶ 9, 589 N.W.2d 560). An abuse of discretion occurs when a court "acts in an arbitrary or capricious manner or misapplies or misinterprets the law." Gagnon, 1999 ND 13, ¶ 9, 589 N.W.2d 560.

2. Mr. Bernstein was charged with violating North Dakota Century Code § 12.1-22-03(3).

The point of beginning for this rather simple argument is the language of the charging statute itself. North Dakota Century Code § 12.1-22-03(3) reads:

A person is guilty of a class B misdemeanor if, knowing that that person is not licensed or privileged to do so, that person enters or remains in any place as to which notice against trespass is given by actual communication to the actor by the person in charge of the premises or other authorized person or by posting in a manner reasonably likely to come to the attention of intruders. The name of the person posting the premises must appear on each sign in legible characters. A person who violates this subsection is guilty of a class A misdemeanor for the second or subsequent offense within a two-year period.

N.D.C.C. § 12.1-22-03(3) (West 2004)(emphasis added).

The Defendant did not contest any of the elements of the charge but for that concerning his knowledge as to any license or privilege to enter or remain in the place in question. This being the trial strategy, all evidence bearing on said knowledge, or lack thereof, was exceptionally important.

3. North Dakota Century Code § 12.1-22-03(3) does not define a strict liability offense and, thus, the defendant's intent is an element to be proven by the State.

As the language of Section 12.1-22-03(3) states, in order for a defendant to be found guilty of violating the prohibition contained in that statute, there must be proof that he or she knew that there existed no license or privilege to enter the premises in question. See N.D.C.C. § 12.1-22-03(3). The presence or absence of actual license or privilege is not dispositive of the question that must be answered by the finder-of-fact at trial. Instead, what the defendant believed to be the case is important as well.

Were a defendant's understanding of his or her license to enter property irrelevant, Section 12.1-22-03(3) would, then, set out a strict liability offense. This is to say, in such a situation, a person could be found guilty when charged with transgressing the prohibition found there no matter what their beliefs were with regard to any permission to enter so long as actual license or privilege was lacking.

Though this Court does not appear to have confronted this specific issue, another state's appellate court has done so in the context of a criminal trespass statute containing language very similar to that found in Section 12.1-22-03(3). In Commonwealth v. Namack, 663 A.2d 191 (Pa. Super. 1995), the Superior Court of Pennsylvania was confronted with a case charging something known as "defiant trespass."[2] Id. at 192.

The statute under which Mr. Namack was charged read:

> A person commits [the offense of defiant trespass] if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by: (i) actual communication to the actor; or (ii) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or (iii) fencing or other enclosure manifestly designed to exclude intruders.

Id. at 194 (citing 18 Pa.C.S. § 3503(b)(1)).

[2] The Pennsylvania Court does note that "defiant trespass" is a "subspecies of criminal trespass." Namack, 663 A.2d at 193.

The above being the relevant statutory language, the Court set out its view of the elements to be proven in order to secure a conviction for defiant trespass: (1) The defendant entered or remained upon property without a right to do so; (2) while knowing that he had no license or privilege to be on the property; and (3) after receiving direct or indirect notice against trespass. Id. (emphasis in original).

These three being the elements of the crime, the court wrote, "[t]he crime of defiant trespass thus includes an element of intent or mens rea. Id. (citing Commonwealth v. Carter, 393 A.2d 660 (Pa. 1978) and Commonwealth v. DeWitt, 608 A.2d 1030 (Pa. 1992)). "This element of intent, like every other element of the crime, must be proven beyond a reasonable doubt if the conviction is to survive…." Id.

Having outlined the law, the Superior Court turned to the facts before it. The property in question was owned by one John McKay and across the property ran a trail leading to the Deleware river. Id. at 192. The defendant enjoyed using the trail had been doing so for some period of time. Id. at 192-93. Indeed, the testimony at trial indicated that others in the defendant's family had been using the trail with the knowledge of, but without the permission of, the various owners of the property since the 1920's. Id. at 193.

A dispute arose between the defendant and John McKay concerning the terms of the defendant's using the trail. Id. at 192. In particular, John McKay wanted Mr. Namack to sign a hold-harmless agreement in exchange for permission to continue his use of the path. Id. at 193. This Mr. Namack refused to do. Id.

As a result, John McKay filed a private criminal complaint alleging defiant trespass. Id. A non-jury trial was held and Mr. Namack was found guilty by the judge. Id.

In making its review, the Pennsylvania appellate court found insufficient evidence to support the conviction on the ground that, as the intent element needed to be proven by the State in order to secure a conviction, Mr. Namack's belief in his acquisition of an easement by prescription precluded criminal liability. Id. at 194.

The same reasoning applies to prosecutions under North Dakota Century Code § 12.1-22-03(3). The North Dakota statute explicitly requires that a defendant know he was neither licensed nor privileged to enter the relevant premises, just as does the Pennsylvania defiant trespass law. Compare N.D.C.C. § 12.1-22-03(3) with 18 Pa.C.S. § 3503(b)(1). This element going to the mental state of the defendant is nothing more than a mens rea

requirement which compels the State to prove, beyond a reasonable doubt, that an accused possessed the relevant intent.

4. <u>The proffered testimony, as well as Exhibit A, were relevant to prove Mr. Berstein's knowledge concerning license or privilege and, thus, his intent</u>.

Having completed the discussion set out above, the facts of the case before the Court must be focused upon. Mr. Bernstein, in the way previously described, attempted to introduce evidence at trial concerning his knowledge as to a perceived license to enter his father's house and retrieve several personal items. Tr. 56:15-25; Tr. 36:13-19; App. 17. Judge McClintock refused to admit the testimony and proffered document on the basis that both were irrelevant to his decision. Tr. 67:5-15. For the reasons that follow, this was an abuse of discretion.

Beginning at the beginning, we start with the undeniable proposition that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.D.R.Ev. 401 (West 2004). Furthermore, "[a]ll relevant evidence is admissible…." N.D.R.Ev. 402 (West 2004). "Evidence which is not relevant is not admissible." <u>Id.</u>

Mr. Bernstein's understanding, or knowledge, as to his father having given him license[3] to cross the property and enter the house, was a "fact…of consequence to the determination of the action" insofar as it bore directly on the element of intent. It was an element of the crime which the State was bound to prove in order to secure a conviction. See Namack, 663 A.2d at 194. This sort of evidence is, doubtlessly, relevant per the terms of Evidence Rule 401. As such, and barring some other ground of exclusion, it must be admitted in evidence. N.D.R.Ev. 402.

When the District Judge excluded the testimony and the document, he refused to consider evidence that bore directly upon an element of the crime charged. This, in turn, effectively relieved the State of its burden to prove that aspect of the charged crime beyond a reasonable doubt.

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[3] One is privileged to enter property under the terms of North Dakota's criminal trespass statute when he or she has "freedom or authority to act and to use the property." State v. Purdy, 491 N.W.2d 402, 410 (N.D. 1992) (citing State v. Mehralian, 301 N.W.2d 409, 417 (N.D. 1981)). Privilege has also been framed in terms of a "nonconsentual entry where the actor may naturally be expected to be on the premises often and in the normal course of his duties or habits." State v. Ronne, 458 N.W.2d 294, 297 (N.D. 1990) (citing State v. Kreth, 553 A.2d 554 (Vt. 1988)). On the other hand, a person is licensed to enter property when the entry is consentual. Id. (citing Ronne, 458 N.W.2d at 297). The evidence proffered in this case would seem to bear on the Defendant's knowledge as to the existence of both privilege and/or license insofar as it was his habit to visit his father's house and his father also seemed have given him permission to enter.

This refusal to admit highly probative evidence of Loren Bernstein's intent was an abuse of discretion as defined in this Court's decisions. An abuse of discretion occurs when a court "acts in an arbitrary or capricious manner or misapplies or misinterprets the law." Gagnon, 1999 ND 13, ¶ 9, 589 N.W.2d 560. Failure to consider evidence bearing on the intent element of a charged crime and, thus, not holding the State to its burden of proof is nothing other than a misapplication or misinterpretation of the law.

For this reason, Mr. Bernstein's conviction should be reversed and the case remanded for further proceedings that fully comply with the North Dakota Century Code and the North Dakota Rules of Evidence.

5. **The failure to receive the testimony and Exhibit A into evidence was not harmless error.**

It is well known that an error in the admission of, or failure to admit, evidence at trial is subject to what has come to be called harmless error analysis. An error is harmless "unless a substantial right of the party is affected…." N.D.R.Ev. 103(a) (West 2004). Any error that does not affect a substantial right "shall be disregarded." N.D.R.Crim.P. 52(a) & Note (Rule 52 is applicable to appellate courts).

In this case, the trial judge's misapplication of the law severely prejudiced the Defendant's substantial rights. This is illuminated by reference to the judge's findings made at the time the guilty verdict was handed down.[4] The judge stated:

> [T]he way the Court sees this matter is that the basic issue is did Loren Bernstein have license or privilege to be on the property on that particular day, Friday, November 1st 2003?
>
> …
>
> I see it that the Richards were in total control of that property because LeRoy Bernstein was not present on the premises. And according to their testimony, that's the only time that he had authority over that property, was when he was on the premises.
>
> …
>
> I guess my ruling is [the testimony and proposed Exhibit A] they're not—that's not relevant. I didn't find that Mr. Loren [sic] Bernstein had any authority, so any conversation that he had is not relevant then.

App. 6:6-9; 7:15-19; 11:10-13.

What these findings make obvious is the fact that Judge McClintock did not address the intent element of Section 12.1-22-03(3) in his analysis. He speaks of whether Loren Bernstein actually had license or privilege to be on

[4] It is true that when a judge sits as the finder of fact at a criminal trial, he or she need not make special findings in connection with the general verdict of guilty or not guilty. N.D.R.Crim.P. 23(d) (West 2004). However, such special findings can be considered by a reviewing court in that they "often aid appellate review" and Rule 23(d) does not prevent a trial court from making findings beyond mere guilt or innocence. City of Fargo v. Brennan, 543 N.W.2d 240, 242 n.1 (N.D. 1996).

the property rather than of the Defendant's personal belief as to the existence of license or privilege.

In addition, the judge discusses only whether LeRoy Bernstein had actual authority to grant privilege or license to his son while he was in the hospital. Given the foregoing points of law, this is not the salient issue. Instead, to be considered was LeRoy Bernstein's apparent authority and the effect of this apparent authority on Loren Bernstein's knowledge concerning license or privilege.

In sum, the findings show that the trial court deemed the proffered evidence irrelevant because it was holding the Defendant to a strict liability standard rather than holding the State to its burden to prove Loren Bernstein's intent beyond a reasonable doubt.

This failure to force the State to prove all the elements of the offense and, in conjunction with this error, to refuse to admit highly probative evidence bearing on an element of the offense did, without any doubt, affect the Defendant's substantial rights. Therefore, the error requires the reversal of Loren Bernstein's conviction.

V. CONCLUSION

For the reasons stated above, Loren Bernstein's conviction should be reversed and this case should be remanded to the trial court for further proceedings conforming with this Court's decision.

Dated this 18th day of January, 2005.

Ss// James G. Wolff
James G. Wolff
Attorney for Appellant Loren Bernstein

CERTIFICATE OF ELECTRONIC FILING AND ELECTRONIC SERVICE

I certify that on the 18th day of January, 2005, I transmitted, via electronic mail, the foregoing Appellant's Opening Brief in Adobe Portable Document Format and directed the document to:

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ADDENDUM

C
NORTH DAKOTA CENTURY CODE
TITLE 12.1. CRIMINAL CODE
CHAPTER 12.1-22. ROBBERY-- BREAKING AND ENTERING OFFENSES

12.1-22-03 Criminal trespass.

1. A person is guilty of a class C felony if, knowing that he is not licensed or privileged to do so, he enters or remains in a dwelling or in highly secured premises.

2. A person is guilty of a class A misdemeanor if, knowing that he is not licensed or privileged to do so, he:

a. Enters or remains in any building, occupied structure, or storage structure, or separately secured or occupied portion thereof; or

b. Enters or remains in any place so enclosed as manifestly to exclude intruders.

3. A person is guilty of a class B misdemeanor if, knowing that that person is not licensed or privileged to do so, that person enters or remains in any place as to which notice against trespass is given by actual communication to the actor by the person in charge of the premises or other authorized person or by posting in a manner reasonably likely to come to the attention of intruders. The name of the person posting the premises must appear on each sign in legible characters. A person who violates this subsection is guilty of a class A misdemeanor for the second or subsequent offense within a two-year period.

4. A person is guilty of a class B misdemeanor if that person remains upon the property of another after being requested to leave the property by a duly authorized person. A person who violates this subsection is guilty of a class A misdemeanor for the second or subsequent offense within a two-year period.

5. This section does not apply to a peace officer in the course of discharging the peace officer's official duties.

Source: S.L. 1973, ch. 116, § 21; 1989, ch. 165, § 1; 1991, ch. 126, § 1; 1991, ch. 127, § 1; 1997, ch. 121, § 2.

NOTES, REFERENCES, AND ANNOTATIONS

Effective Date.

The 1997 amendment of this section by section 2 of chapter 121, S.L. 1997 became effective August 1, 1997.

Evidence Sufficient.

Where the defendant entered a friend's unlocked home at 2 a.m. while intoxicated, brandished a knife, stabbed the friend's dog, told the friend he was there to kill him, and the friend yelled for his daughter to secure help by calling 911, the evidence was sufficient to sustain the jury's finding that the defendant had