IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota

Plaintiff/Appellee,

VS.

Verdane R. Georgeson,
Defendant/Appellant.

Supreme Court No. 20060211

Benson County Ct. 05-K-00135

RESPONSE TO APPEAL FROM THE CRIMINAL JUDGMENT
Northeast Judicial District,
Benson County District Court, North Dakota,
The Honorable Lee A. Christofferson, Presiding

BRIEF OF APPELLEE

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Statement of the Issues

1. Whether the preliminary instruction to the jury "the law never imposes on the defendant in a criminal case the burden of calling any witnesses or introducing any evidence" constitutes reversible error.

2. Whether the trial court's quality of admonishment to the jury prior to recesses constitutes reversible error.

3. Whether sufficient evidence was presented at trial to sustain a jury verdict of guilty.

Statement of Facts

On October 24, 2005, the Defendant Verdane Russell Georgeson (hereinafter "Georgeson") was charged with Gross Sexual Imposition, NDCC 12.1-20-02 (a) a class A Felony, by Complaint and pled Not Guilty to the offense.

On May 4th and 5th 2006, a jury trial was conducted with Georgeson being found guilty of the offense.

Georgeson's version of the facts of the case, for the most part, is correct. Additional facts as they relate to each issue shall be brought out in the brief.

Law and Argument

I. Whether the preliminary instruction to the jury "the law never imposes on the defendant in a criminal case the burden of calling any witnesses or introducing any evidence" constitutes reversible error.

Georgeson contends the trial judge improperly instructed the jury, with the following partial instruction "The Law never imposes on the defendant in a criminal case, the burden of calling any witnesses or introducing any evidence" Tr. P. 115, L. 6-8.

Georgeson argues such an instruction gives an adverse inference when the defendant does testify.

N.D. R. Crim. P. 30 states the Court must:

(1) (A) Must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury argument

(B)(3) Immediately after the jury is sworn, the Court may give instructions concerning

(A) jury duty and conduct

(B) the order of proceeding: and

(C) elementary legal principles [emphasis applied]

The instructions which Georgeson argues "gives an adverse inference" were Preliminary Instructions. T.R. P. 108-116. The specific Outline Of The Trial is found at Tr. P. 115-116. The North Dakota Administrative Rules have adopted standards for trial judges to deliver instructions to individuals unfamiliar with the legal system. See, Standard 16 (c) i, ii, and iii of the Standards Relating to Juror Use and Management, ND Admin. Rules.

N.D. R. Crim. P. 30 indicates the Court may give the instruction immediately after the Jury is sworn. The Preliminary Instructions were in writing. Appellants Appendices P. 44-51.

The State contends the Preliminary Instruction to the Jury "The Defendant does not have to do anything in a criminal case and the burden is on the state." is an elementary legal principle and indeed a privilege Americans cherish.

The quote in the Appellant's Brief bears repeating:

"The very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof. To instruct them in the meaning of the privilege [emphasis applied] against compulsory self-incrimintaion is no different." Lakeside v. Oregon, 98 S. Ct. 1091, 1096 (1978).

N.D. Rule of Criminal Procedure 30(3)(B) allows the Court to give instructions on the Order of Proceedings. The instruction would be incomplete if it only addressed the State's role in the trial. A juror may sit the entire trial not focused, all the while wondering "What does the other side do in this trial?

Georgeson did not make any objections on the record as to the proposed Preliminary Instructions. Georgeson has not claimed any prejudice. Rather, Georgeson claims the Preliminary Instructions on the Outline Of The Trial may create an adverse inference when he testifies.

This Court may consider whether the Preliminary Instructions was an error in the trial. If it was an error, did it affect Georgeson's constitutional right against self-incrimination?

In deciding whether or not error is harmful, the entire record is to be examined and evaluate the error in the context of the circumstances in which it was made, to see if it had a significant impact upon the jury's verdict: of considerable consequence is relative strength of the case against defendant. State v. Demery, 331 NW 2d 7, 13 (N.D. 1983).

Under N.D. Crim. P. 52(b) "obvious errors or defects affecting substantial rights may be noticed although they are not brought to the attention of the court". The note to Rule 52(b): "the power to notice obvious error, whether at the request of counsel or on the court's own motion, is one the courts should exercise cautiously and only in exceptional circumstances. The power should be exercised only where a serious injustice has been done to the defendant." State v. Smith, 1999 ND 109 ¶14, 595 N.W. 2d 568 citing, Explanatory Note N.D.R. Crim.P. 52.

The Court in Smith, further held "our power to notice obvious error is exercised cautiously and only in exceptional situations where the defendant has suffered serious injustice." Id. ¶14, citing, State v. Smuda, 419 N.W. 2d 166, 168 (N.D. 1998).

The dissenting opinion in Smith is useful in the Court reviewing the framework to review obvious error. "Under the framework adopted in State v. Olander, 1998 ND 50, 575 N.W. 2d 658, before we may take notice of obvious error there must be (1) error, (2) that is plain, (3) affects substantial rights. Once this is established we have discretion to correct the obvious error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." State v. Smith, 1999 ND 109 ¶18, 595 N.W. 2d 568.

In this case the instruction objected to only on appeal is an elementary legal principle communicated to explain the outline of the trial. Such an instruction fulfills a basic need of jury awareness. If it creates an adverse inference as alleged by Georgeson, the State contends it does not constitute an Obvious Error as defined by N.D. R. Crim. P. 52(b) resulting in reversible error when applied to the facts in this case.

II. **Whether the trial court's quality of admonishment to the jury prior to recesses constitutes reversible error.**

The trial court's quality of the admonishment to the jury prior to the 10:06 a.m. recess did not constitute Reversible Error.

Georgeson is correct in that N.D.C.C. § 29-21-28 requires trial courts to admonish jurors at each adjournment. Georgeson contends the court erred in failing to adequately admonish the jury prior to a 10-minute recess. This recess occurred at 10:06 a.m. May 4th 2006. Tr. P. 50, L. 21.

Prior to the recess, Trial court gave the following admonishment:

"I just want to alert you and give you a bit of cautionary instruction. Now you know a little bit about -- not much but you know a little bit about the case, and this would be a great time for you to be jawing about it out in the halls, and I don't want you to do that, okay? Because you may not know much or have strong feelings, but somebody else might and they may impact you out in the hallway. You can talk amongst each other about sports, weather, farming, you name it. Politics - - well maybe not politics because I don't want any disputes out there. You know, the outlet, or whatever it is, anything you want but don't talk about this case or the issues that surround it, okay, during the break, because you have already answered questions and some of these people out here in the audience are with you. They haven't answered any questions. They may have a strong feeling about something or another. So I just ask you not to do that. And this will go on and on throughout the whole trial if you're selected. We'll have a jury, I'm sure, by noon and so you'll know whether you're on the jury or not. But just honor that. I appreciate it. Okay, we'll stand in a short recess for about ten minutes. .... Tr. P. 49, L 19-25, and P. 50, L. 1-20.

The recess at 10:06 a.m. does not constitute an adjournment. The Supreme Court has held "Our more recent decisions however, suggest the jury should be admonished before all breaks, even if in a short form admonition referring back to a full admonition." State v. Meyers, 2006 ND 242 ¶246, citing State v. Olson, 274 N.W.2d 190-191(N.D. 1978). The State contends in this case the admonition given prior to the 10:06 a.m. break is adequate admonition to the jury prior to a break.

The admonition given prior to the break at 10:06 a.m. in this case was addressed to the entire prospective jury panel. Tr. P. 50, L. 11-12. The Court held questioning of perspective jurors in chambers and then took another recess. At this recess the Court again cautions the prospective jurors "Again, I don't want you talking about the case. Okay?" Tr. P. 57, L. 20-21.

This Court has held "there was no prejudice to the Defendant where short form admonition was given and the Defendant failed to object, despite lack of a full admonition of record." Meyers Court citing, State v. Julson, 202 N.W.2d 145,155,156 N.D. 1972. The Court held, better practice was to repeat full admonition at each adjournment, but short-form admonition was not prejudicial to the defendant. Id.

Georgeson also contends the Judge failed to give an admonishment to the prospective jury preceding the noon recess. "I think we are going to take our noon break Mr. Wang, because there's only one restaurant in town, I want to get you there. I want you to not talk about the case ..." Tr. P. 96, L. 9-12, The Transcript further reads (Admonishment of prospective jury, Tr. P. 96, L. 13. and then the (noon recess) Tr. P. 96, L. 14.

To insure a fair trial, civil or criminal, it is essential that a jury be cautioned as to permissible conduct and conversations outside the jury room. United States v. Williams, 635

F. 2d 744, 745-46 (8th Cir. 1980). It is fundamental that a jury be cautioned from the beginning of their trial and generally throughout the trial and keep their considerations confidential and to avoid wrongful, often subtle, suggestions offered by outsiders. United States v. Williams, 635 F. 2d 744, 745-46 (8th Cir. 1980). Nevertheless, this Court has never held that such admonitions must be repeated at every recess.

In the present case, the trial court had given a sufficient admonition to the jury beginning at the 10:06 a.m. recess, and again admonished the jury prior to going into voir dire in chambers and again prior to recessing for lunch. The instances complained of by Georgeson involve all of the recesses including the lunch recess. Following any of the recesses, Georgeson made no objection to the lack of admonition, or to the sufficiency of admonition. Further, in raising the issue on appeal, Georgeson has not claimed nor shown the failure to give an admonition before the recesses above-mentioned, prejudiced him in any way.

Absent an objection by defense counsel during trial, or a claim that the failure resulted in a prejudice to them, the trial court did not commit reversible error for failing to admonish the jury prior to a single recess. State v. His Chase, 531 N.W. 2d 271, 274 (N.D. 1995).

The trial court in this case, as in His Chase, did not commit reversible error since no objection was made as to the sufficiency of the admonition and no prejudice was claimed.

III. Whether sufficient evidence was presented at trial to sustain a jury verdict of guilty.

Defendant Georgeson made a motion pursuant to Rule 29(a) of the N.D. Rules Of Criminal Procedure for Judgment of Acquittal. Tr. P 342, L.5-10. The trial court judge denied the Motion for Judgment of Acquittal. Tr. P. 342, L. 19,20,21.

Rule 29(a) N.D. Rules Of Criminal Procedure, provides that the Court, on its own motion, or the defendant's motion, following the close of evidence on either side, shall enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. In the case before this Court, Georgeson made such a motion, asserting the evidence presented did not comport to the information that has been filed in this case Tr. P. 342, L. 9,10.

In an appeal challenging the sufficiency of the evidence, the defendant must show the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt. State v. Noorlun, 2005 ND 189 ¶20; 705 N.W. 2d. 819.

In resolving the sufficiency of the evidence, this Court has previously declined to resolve conflicts in the evidence or weigh the credibility of the witnesses. State v. Pollack 642 N.W. 2d. 119, 121 (N.D.1990). Only if the record presents no substantial evidence to support the verdict will a jury's determination be reversed. . State v. Lund 424 N.W. 2d 645 (ND 1988).

The evidence presented at trial in this case which supports the verdict, is as follows:

In 1999 a minor child, SK, was with the Defendant Verdane R. Georgeson at his house in Maddock, ND. Tr. P. 156, L. 8-10. A minor child, SK, established that she was 8 years old in 1999. Tr. P. 156, L.1. The Defendant Georgeson, then pulled up SK's shirt and sports bra and fondled her boobs. Tr. P. 161, L.10-12.

A second allegation of sexual contact in the criminal information is also supported with the testimony of SK, the minor child. The Defendant Verdane Georgeson and the victim's mother lived in the same house. Tr. P. 164, L.1,2. The incident occurred in August of 2001. Tr. P. 164, L.9. The Defendant in August 2001 was 10 years old. Tr. P. 164, L. 15-17. The victim's mother was out of town for a medical procedure in Grand Forks North Dakota, overnight. Tr. P. 165, L.12-14. SK. the minor child, was going to stay at the Defendant's house while her mother was away. Tr. P. 165, L.16. SK, the minor child, described the sleeping arrangements in the Defendant's home during the August 2001 incident. Tr. P. 166, L. 13-16. SK, the minor child, would sleep on the living room floor on couch cushions. Tr. P. 171, L.8,9. SK. the minor child, fell asleep, and woke up with Verdane Georgeson laying beside her. Tr. P. 173, L.10,11,12. Georgeson had his hand on her crotch. Tr. P. 173, L.21-23. Touching her with his full hand on the outside of her underwear. Tr. P. 174, L.3-5.

This testimony presented by SK, the minor child, was in part, the evidence presented to support the jury's verdict and which does sustain the elements of the offense as set out in the final jury instructions.

Georgeson has failed to show, based on the evidence, that "no rational fact finder could have found the Defendant guilty beyond a reasonable doubt." See, State v. Kringstad, 353 N.W.2d. 302. 306 (ND 1984) Therefore Georgeson's argument must fail on this issue, and this Court should deny his appeal and affirm his conviction.

Conclusion

Georgeson has failed to establish that he was prejudiced when the trial court gave the preliminary instructions indicating a defendant does not have to call witnesses or introduce evidence. Even if the preliminary instruction is perceived to create an adverse inference regarding a defendant not having to testify, it constitutes harmless error and is not grounds for reversal. Georgeson has failed to establish he was prejudiced when the trial court admonished the jury prior to recesses. The evidence presented to the jury was sufficient to sustain the verdict. The jury obviously believed the testimony of the State's witnesses.

The State respectfully requests the conviction be affirmed.

Dated this 9th day of March 2007.

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CERTIFICATE OF SERVICE BY MAIL

James P. Wang certified that he is and attorney for a party herein and on March 9, 2007, he served the attached BRIEF OF APPELLEE, upon BENJAMIN C. PULKRABEK, and by placing a true and correct copy in an envelope addressed as follows:

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and depositing the same, with first class postage prepaid, in the United States mails at Minnewaukan, North Dakota.

Dated this 9th day of March, 2007.

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CERTIFICATE OF SERVICE BY MAIL

James P. Wang certified that he is and attorney for a party herein and on March 9, 2007, he served the attached original BRIEF OF APPELLEE, and 7 copies, and a 3 ½" diskette containing the full text of the brief, upon Penny Miller, Clerk, and by placing a true and correct copy in an envelope addressed as follows:

Penny Miller, Clerk
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Bismarck, ND 58505-0530

and depositing the same, with first class postage prepaid, in the United States mails at Minnewaukan, North Dakota.

Dated this 9th day of March 2007.

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