ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20070126

DISTRICT COURT CASE NO.: 53-06-K-01065

State of North Dakota,

Plaintiff/Appellee,

- vs -

Cody G. Carlsen,

Defendant/Appellant.

APPELLANT'S BRIEF

BENJAMIN C. PULKRABEK
Attorney for Appellant

402 First Street NW
Mandan, North Dakota 58554
(701)663-1929
N.D. Bar Board ID No. 02908

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ISSUE II. Whether there was sufficient evidence to convict Cody Carlsen of the offense of Reckless Endangerment (Under Circumstances Manifesting Extreme Indifference to Value of Human Life)?

NATURE OF THE CASE

On September 1, 2006. a criminal complaint was issued. The complaint charged Cody Carlsen with Reckless Endangerment.

A Preliminary Hearing was held on November 8, 2007. At the conclusion of the hearing Cody Carlsen was bound over for trial on the charge in the above Complaint.

The Information is dated September 29. 2006, and was filed on November 9, 2006. Cody Carlsen plead not guilty to the charge of Reckless Endangerment in that Information.

A jury trial began on March 29. 2007. On March 30. 2007. after both sides rested, the jury began deliberation.

The jury found Cody Carlsen:

1. Guilty of the crime of Reckless Endangerment (Under Circumstances Manifesting Extreme Indifference to Value of Human Life).

2. Guilty of the crime of Fleeing or Attempting to Elude a Peace Officer.

Judgment and sentence on the guilty verdicts was pronounced on April 3, 2007. The appeal only on the crime of Reckless Endangerment (Under Circumstances Manifesting Extreme Indifference to Value of Human Life) was timely filed on April 25, 2007.

This case is now before the Supreme Court.

STATEMENT OF FACTS

On August 27, 2006, Matt Wallace, a deputy sheriff in Roosevelt County, Montana received a call from dispatch about a possible drunk driver in a white vehicle

heading east on Highway 2 toward Culbertson, Montana. When Deputy Wallace got the call, he was in Culbertson, Montana, driving a Ford pickup from Roosevelt County Sheriff's Office. The Ford pickup was equipped with emergency lights and a siren. After getting the call, Deputy Wallace drove approximately two miles west of Culbertson, Montana and pulled off on a side road and waited for the white vehicle. When a white vehicle drove past Deputy Wallace, he began following it. As he followed the white vehicle, its speed varied from 45 to 75 mph. When the white vehicle was in Culbertson, Montana, Deputy Wallace decided to turn on his emergency lights because of the white vehicle's variances in speed. The emergency lights had no effect on the driver of the white vehicle and it continued to drive through Culbertson, Montana. Once outside Culbertson, Montana, Deputy Wallace turned on his siren. When that didn't stop the driver of the white vehicle, Deputy Wallace called dispatch for back up. Dispatch sent Trooper Rick Kessner of the Montana Highway Patrol. Deputy Wallace allowed Trooper Kessner's vehicle to pass his because Trooper Kessner's vehicle was better designed to pursue vehicles and it had an in-dash camera. Tr. P. 19, L. 24 thru P. 26, L. 3.

As the white vehicle, Trooper Kessner's vehicle and Deputy Wallace's vehicle approached the North Dakota state line, a call was made to North Dakota Law Enforcement for assistance. As a result of this call, Trooper Jamie Michael Huschka received a call from Williams County Deputy Steve Thompson informing him that Montana Law Enforcement was in pursuit of a vehicle on Highway 2 that was about to cross the Montana line and enter North Dakota. In response to this call Trooper Huschka leaves Williston, North Dakota and drives west on Highway 2 toward the Montana line.

While driving west, Trooper Huschka calls his supervisor Captain Bellehus and informs him that he will be involved in the pursuit of a vehicle. Joining Trooper Huschka as he proceeds westward on Highway 2 is Randy Miller of the Williams County Sheriff's Department. About eight or nine miles west of Williston, the North Dakota officers see the white vehicle pursued by Montana Law Enforcement. Trooper Huschka and Deputy Miller decide to set up spike trips on Highway 2 in front of the white vehicle. The spike trips are placed in the right east bound lane and Trooper Huschka with his emergency lights on parks in the left lane. The white vehicle approaches, drives over the spike strip. and continues on. Trooper Huschka begins to pursue the white vehicle and his vehicle now becomes the main pursuit vehicle. As the white vehicle proceeds on, after driving over the spike strips, the front tires go flat and come apart. The white vehicle continues driving on the front rims. Trooper Huschka and Captain Billehus communicate and decide to set up another spike strip position. Trooper Huschka then passes the white vehicle, so he can again park in the right lane beside the place in the left lane where the spike strip is set. Captain Billehus and Lieutenant Bitz of the Williston Police Department are also parked in the right lane. All three vehicles have their emergency lights activated. The white vehicle approaches, drives over the spike strip and the spike strip gets tangled in the undercarriage of the white vehicle. The white vehicle continues on. Law enforcement is able to keep the white vehicle out of Williston, North Dakota by getting it to head west out of Williston, North Dakota. A semi driver sees this pursuit coming toward him on Highway 2. He parks his semi trailer in the right lane and tractor in the left lane. The white vehicle keeps driving toward the semi and the driver of the

semi decides to move the semi and allow the white vehicle to get by.

Next, the North Dakota officer decides to try a moving roadblock. To do this Captain Billehus with his emergency light activated gets in front of the white vehicle while Trooper Huschka's vehicle pulls along side the white vehicle. Then both law officer's vehicles slow down and try to stop the white vehicle. This moving road block fails when the white vehicle strikes Trooper Huschka's vehicle.

A third North Dakota unit then deploys spike strips west of Williston, North Dakota at the weigh station junction of Highway 85 and Highway 2. This spiking works and both rear tires deflate and come off the rims. The white vehicle continues driving on four rims with four North Dakota units and two Montana units in pursuit.

The white vehicle turns off of highway 2 and onto highway 1804. There is a deer laying on 1804 and the white vehicle runs over it. The white vehicle continues on through Trenton, North Dakota with the law enforcement units in pursuit. After going through Trenton, the white vehicle stops. The driver of the white vehicle gets out of his vehicle and is told to lay on the ground by the law enforcement officers. The driver of the white vehicle is handcuffed, is identified a Cody Carlsen, and he is put in Trooper Huschka's patrol car. Trooper Huschka notices an odor of an alcoholic beverage coming from Mr. Carlsen and that Mr. Carlsen's speech is slurred. Tr. P. 31, L. 19 to P. 61, L. 3.

Mr. Carlsen is charged with two offenses. The first crime of Fleeing or Attempting to Elude a Peace Officer, Criminal No. 06-K-1062, and the second crime of Reckless Endangerment (Under Circumstances Manifesting Extreme Indifference to the Value of Human Life). Criminal No. 06-K-1065. To these charges, Mr. Carlsen pleads

not guilty.

At a jury trial on March 29, 2007, Mr. Carlsen is found guilty on both counts.

Mr. Carlsen then appeals after the judgment and sentence only on his being found guilty of the crime of Reckless Endangerment Under (Circumstances Manifesting Extreme Indifference to the Value of Human Life).

ARGUMENT

ISSUE I: When a jury in deliberation sends a note to the trial judge requesting a definition of extreme and a question the trial judge doesn't understand, did the trial judge err by declining to give the jury a definition of extreme and not asking the jury to more clearly define the question?

After the jury started deliberating, they sent a note through the bailiff asking the trial judge the following questions:

1. Is the charge of reckless endangerment towards Huschka and the truck driver according to the Preliminary Instructions?

2. Only testimony from truck driver? From transcript before?

3. Definition of "extreme". Tr. P. 178, L. 5-25 and P. 179, L. 1-13.

The prosecutor's response to the jury's request for a definition of extreme was: "I don't think we can respond to it at all. Because if we say you must use yur (sic) common sense to decide, you got twelve people in there with different ideas of what extreme means. I think if we respond to it at all, we are going on create problems as opposed to resolving a problem." Tr. P. 179, L. 19-24.

The defense attorney's response to the jury's request for a definition of extreme

was: "It would probably be an inappropriate reply, but just on the record with all present, I know that the statutory interpretation, the statute should be interpreted according to the commonly understood meaning of the word. But I do not know if that is something that should be provided to them or not. I am just trying it out for what it may or may not be worth, and I know oftentimes dictionary definitions are used, but that may or may not be the appropriate response to them. I am just mentioning that. Tr. P. 180, L. 3-12.

The trial judge's instructions to the jury on the above three questions was:

1. On question number one, I am inclined to write to follow the charge to the jury on the preliminary instruction. Tr. P. 180, L. 13-15.

2. On question number two, the trial judge's explanation was: I put: "Decide the case on the evidence presented at trial." I have no idea what the hell that question really is, . . . Tr. P. 180, L. 25 and P. 181, L. 1-2.

3. On question number three, the definition of extreme, I would be inclined to write: The Court declines to give definition. Tr. P. 181, L. 3-4.

The duty of a trial judge to instruct the jury on questions of law is set out in State v. Kraft, 413 N.W.2d 303 (N.D. 1987), "Rule 30 of the North Dakota Rule of Criminal Procedure 2 provides when and upon what the jury is to be instructed, and the methods of doing so. It is the duty of the court to instruct the jury upon questions of law applicable to the case."

The Rule of Criminal Procedure that is applied when a trial judge fails to properly instruct a jury in Rule 52.

Rule 52 of the North Dakota Rules of Criminal Procedure states:

(a) **Harmless error.** Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded.

(b) **Obvious error.** An obvious error or defect that affects substantial rights may be considered even though it was not brought to the court's attention.

Defendant/Appellant, Cody Carlsen ("Carlsen") believes that the trial court failed to properly instruct the jury on questions two (2) and three (3) in the above jury note. Carlsen also believes that the trial judge's failure to properly instruct the jury affected his substantial rights within the meaning of Rule 52(b) of the North Dakota Rules of Criminal Procedure.

The following language in Kraft sets out the standard of review when a defendant's substantial rights are affected:

"Even though the general rule is that an issue will not be noticed unless raised at trial, an error that infringes upon substantial rights of the defendant is noticeable notwithstanding lack of an objection or, as in this case, in the absence of a request for an instruction. See Rule 52(b), supra; see also, State v. Miller, 388 N.W.2d 522, 522 (N.D. 1986) (obvious error is an exception to the general rule that issues not raised at trial will not be addressed on appeal).

The power to notice obvious error is exercised cautiously and only in exceptional circumstances where the defendant has suffered a serious injustice. State v. Janda, 397 N.W. 2d 59, 70 (N.D. 1986); Explanatory Notice to Rule 52, N.D.R.Crim.P.; see also State v. Johnson, 379 N.W.2d 291, 293 (N.D.), cert. denied,106 S.Ct. 1792 (1986). In assessing the possibility of error concerning substantial rights under Rule 52(b), it is

necessary to examine the entire record and the probable effect of the actions alleged to be error in light of all the evidence. Johnson, supra. Furthermore, Rule 52 applies to both the trial court and the appellate court. Explanatory Note to Rule 52, supra.

In Tatum v. United States, 190 F.2d 612, 615 (D.C. Cir. 1951), cert. denied, 356 U.S. 943, 78 S.Ct. 788, 2 L.Ed.2d 818 (1958), quoting Kreiner v. United States, 11 F.2d 722, 731 (2d Cir. 1926), the District of Columbia Court of Appeals stated that the "[f]ailure on the part of a trial court in a criminal case to "instruct on all essential questions of law involved in the case, whether requested or not" would clearly affect substantial rights within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure.6 It was further stated that "in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility." Tatum, supra, at 617 (citing 53 Am.,Jur., Trial § 580); State v. Thiel, 411 N.W.2d 66 (N.D. 1987); see also 75 Am. Jur. 2d, Trial §§ 575, 652 (1974)."

The purpose of NDCC 12.1-17-03 Reckless Endangerment and why it is a graded statute is found in State v. Hanson, 256 N.W. 2d 364 (N.D. 1977) "The purpose of the reckless-endangerment statute is to protect society from the reckless risk of serious bodily injury or death. As pointed out in Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. II, p. 836, an unsuccessful effort to cause serious injury or death is proscribed by our attempt laws. What the reckless-endangerment statute does is protect against the risk of such injury or death. It is the risk that is to be avoided.

The statute is graded, then, according to the severity of the risk created. If a person engages in conduct which creates a substantial risk of serious bodily injury or death, and consciously and unjustifiably disregards that risk, and if he does so under particular circumstances, then he commits a Class C Felony. If he does so under other circumstances, then he commits a misdemeanor. The circumstances that bring an act within the scope of the felony violation are those manifesting the actor's extreme indifference to the value of human life. Any other circumstances may bring the act within the scope of the misdemeanor violation."

The following instructions were given in State v. Kroeplin, 266 N.W.2d 537 (N.D. 1978), to help the jury distinguish felony from misdemeanor reckless endangerment: "The State in this case has charged that the more serious crime has been committed, and that the Defendant did act, under circumstances manifesting her extreme indifference to human life. It is the burden of the State to provide this allegation of extreme indifference beyond a reasonable doubt. If the State has proved beyond a reasonable doubt that Defendant committed the crime of Reckless Endangerment, but fails to prove beyond a reasonable doubt that the act was done under circumstances manifesting extreme indifference to the value of human life, you should find the Defendant guilty of the less serious charge."

The trial judge's instructions in the case now before the court on Reckless Endangerment (Under Circumstances Manifesting Extreme Indifference to Value of Human Life) are found in the Appendix on page 73. The instructions on Reckless Endangerment are found in the Appendix at page 74. The above trial judge's instructions

on Reckless Endangerment caused confusion among the jurors and resulted in the jury wanting the trial judge to define extreme. The judge's response was to decline to give a definition.

Definitions as to the meaning of some of the words used in the North Dakota Criminal Code are stated in that code. General Definitions are stated in NDCC 12.1-01-04. The word extreme is not defined in NDCC 12.1-01-04 or anywhere else in the North Dakota Criminal Code.

The following statement by the prosecutor states the problem the jury was having with the definition of extreme: "You got twelve people in there with different ideas of what extreme means. Tr. P. 179. L. 14 - 18. In order to get these Jurors to all have the same definition of extreme, the trial court should have given them a definition. Such a definition could have been found in Black's Law Dictionary Fifth Addition at page 528:

"Extreme. At the utmost point, edge, or border; most remote. Last; conclusive. Greatest, highest, strongest, or the like. Immoderate; violent."

A trial judge has a duty to instruct the jury on the law. The jury, in the case now before the court, in a note asked three questions that related to the law. The trial judge in his discussion with counsel admitted he didn't understand the question two. Therefore, in order to properly instruct the jury on question two, the trial judge should have asked the jury for additional information about question two. Instead the trial judge answered question two by telling the jury "decide the case on the evidence presented at trial."

ISSUE II. Whether there was sufficient evidence to convict Cody Carlsen of the offense of Reckless Endangerment (Under Circumstances Manifesting

Extreme Indifference to Value of Human Life)?

After the State rested. Carlsen made a motion for acquittal based on insufficiency of the evidence. Tr. P. 124. L. 19-21. The trial court denied the motion. Tr. P. 124, L. 22.

In order to successfully challenge the sufficiency of the evidence on appeal, the Defendant/Appellant must show that the evidence viewed in the light most favorable to the verdict permits no reasonable inference of guilty, State v. Fashing. 461 N.W.2d 102 (N.D. 1990).

The standard of review for the insufficiency of the evidence is a strict standard of review that only allows a motion for judgment of acquittal to be granted if the evidence is insufficient to sustain a conviction of the offense charged, State v. Ohnstad, 359 N.W.2d 827 (N.D. 1987).

CONCLUSION

When the jury sent the trial judge a note requesting a definition of the word extreme, the trial judge should have instructed the jury by giving them a definition of extreme.

When the jury sent the trial judge a note and the trial judge didn't understand question two in the note. the trial judge should have asked for clarification of the question, instead of telling the jury to use the evidence as presented.

The evidence is insufficient to find Cody Carlsen guilty of the crime of Reckless Endangerment (Under Circumstances Manifesting Extreme Indifference to Value of Human Life).

DATED this 26 day of October, 2007.

Benjamin C. Pulkrabek

Benjamin C. Pulkrabek, ID# 02908
Attorney for Defendant/Appellant
402 First Street NW
Mandan, ND 58554
(701)663-1929

CERTIFICATE OF SERVICE BY MAIL

State of North Dakota,	)	
	)	Supreme Court No. 20070126
Plaintiff/Appellee,	)	
	)	District Court Case No. 53-06-K-01065
vs.	)	
	)	
Cody G. Carlsen,	)	
	)	
Defendant/Appellant.	)	

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on October 26th, 2007, she served, by hand delivering, a copy of the following:

APPELLANT'S BRIEF

by leaving a copy with the person(s) hereinafter named or with their office, at their last known address as follows:

Nicole E. Foster
Attorney at Law
P.O. Box 2047
Williston, ND 58502-2047

The undersigned further certifies that on October 26th, 2007, she dispatched to the Clerk, North Dakota Supreme Court, an original and seven copies of the APPELLANT'S BRIEF and emailed the same containing the full text of the Brief.

Jacqueline Haag

Jacqueline Haag, Legal Assistant to
Benjamin C. Pulkrabek