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20070126

IN THE SUPREME COURT

FILED
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CLERK OF SUPREME COURT

STATE OF NORTH DAKOTA

NOV 20 2007

State of North Dakota,)
)
Plaintiff-Appellee,)
)
vs.)
)
Cody G. Carlsen,)
)
Defendant-Appellant.)

STATE OF NORTH DAKOTA

Supreme Court No. 20070126

APPEAL FROM THE WILLIAMS COUNTY DISTRICT COURT

NORTHWEST JUDICIAL DISTRICT

THE HONORABLE GERALD H. RUSTAD, PRESIDING

BRIEF OF APPELLEE
STATE OF NORTH DAKOTA

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1. STATEMENT OF THE ISSUES

2. 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?
3. Whether there was sufficient evidence to convict Cody G. Carlsen of the offense of Reckless Endangerment (Under Circumstances Manifesting Extreme Indifference to Value of Human Life)?

4. STATEMENT OF THE CASE

5. The Defendant's brief correctly recites a broad procedure of this case. The State, however, would like to supplement with the following:
6. In its criminal complaint dated September 1st, 2006, the State charged the Defendant with Reckless Endangerment under circumstances manifesting his extreme indifference to the value of human life, to-wit: Cody Carlsen aimed his vehicle at Trooper Huschka's patrol vehicle and ran into Trooper Huschka's patrol vehicle. Cody Carlsen also attempted to hit a semi while driving. The Information filed by the State at the preliminary hearing on November 8, 2006, also contained the same language.
7. On the morning of March 28, 2007, the State faxed a proposed Amended Information to the Defendant. The State requested and received the trial court's permission to file the Amended Information prior to the commencement of the jury trial on March 29, 2007. The Amended Information stated: "Cody Carlsen, created a substantial risk of serious bodily injury or death to another in a manner manifesting his extreme indifference to the value o human life, to-wit: Cody Carlsen drove his vehicle is [*sic*] such a manner that he created a substantial risk of serious bodily injury or death to Trooper Jamie Huschka and/or the driver of a semi."

8. STATEMENT OF THE FACTS

9. Deputy Matthew Wallace (hereinafter "Wallace") of the Roosevelt County Sheriff's Office testified that on August 27th, 2006, he was on duty in the town of Culbertson, Montana. (T. at 19). Wallace testified that Culbertson, MT, is approximately 35 miles from the City of Williston. (Id). Wallace testified that he received a call from dispatch in Wolf Point, MT, regarding an impaired driver, Cody Carlsen. (hereinafter "Carlsen"). (T. at 19-20). Wallace received this call at approximately 2:30 AM and drove approximately 2 miles west of Culbertson on US 2 and waited for Carlsen's vehicle as it was heading eastbound into Culbertson. (T. at 20). Wallace received a description that the Carlsen vehicle was white and the person who was calling in said the vehicle was driving in the wrong lane. (Id). Wallace observed a white vehicle pass him and started following the vehicle. Wallace observed the white vehicle crossing the center line and not maintaining a steady speed. (T. at 21). Wallace attempted to initiate a traffic stop once they got within the city limits of Culbertson. (Id). Wallace gave Carlsen ample time to pull over, but he continued to drive through the City of Culbertson weaving and not maintaining a steady speed. Once he cleared the Culbertson city limits, Wallace turned on his sirens. (T. at 22). Wallace testified that Carlsen didn't pull over after the sirens were initiated and Wallace realized Carlsen wasn't going to stop.
10. Wallace contacted dispatch for Trooper Kessner (hereinafter "Kessner") to come and assist. (T. at 22-23). Wallace testified that there were four red and blue flashers and two white strobes in the headlights of his patrol pickup and that Carlsen never slowed down or attempt to pull over. (T. at 23). Wallace turned the pursuit over at this time to Montana Trooper Kessner. (Id). Wallace stayed with the pursuit into North Dakota behind Kessner. (T. at 24-25). Wallace testified that both he and Kessner had lights and sirens going at this time. (T. at 25). Wallace testified that he witnessed the use of three spike strips and also a boxing maneuver to try to get

Carlsen to stop. (Id). Wallace testified after a U-turn near Miller [sic] Oil, he witnessed a lot of the police cars swerve at the same time, then, from what he assumed, to get away from Carlsen's vehicle. (T. at 26).

11. Trooper Jamie Huschka (hereinafter "Huschka") of the North Dakota Highway Patrol testified that he has received evasive vehicle operations training from the training academy. (T. at 32). Huschka learned from this training how to operate his vehicle under high speeds and taking turns at a high rate of speed. (T. at 33). Huschka testified that he was on call on August 27th, 2006. Huschka was contacted by the Williams County Correctional Center and informed that Montana authorities were in pursuit of a vehicle in Montana about to cross the Montana-North Dakota state line. (Id). Huschka responded to the call and headed west out of Williston and also had State Radio contact Captain Alan Billehus of the North Dakota Highway Patrol according to Highway Patrol policy. (T. at 34-35).
12. Huschka recorded this incident on his in-car camera which was admitted at State's Exhibit #1. (T. at 35-36). While playing his video, Huschka narrated what happened. Huschka was able to show at what point he made contact with the pursuit of Carlsen. (T. at 37). Huschka assisted Williams County Sgt. Randy Miller (hereinafter "Miller") with a spike strip location. Huschka stated it was evident that Carlsen had been fleeing from the Montana authorities for some time and they were approximately ten miles into North Dakota. It was decided it would be best to get the pursuit shut down because pursuits of this nature are inherently dangerous. (T. at 38-39). Huschka testified that pursuits involve high speeds and when Huschka turned around, he was doing about 80 miles per hour back to Miller's position and it appeared that the Montana authorities and the fleeing vehicle were catching up to him. (T. at 39). After placing the spike strip, Huschka parked in the left lane of the highway leaving only the eastbound lane available for travel, that way Carlsen would have to run over the spike strips. Carlsen traveled over the spike strip, came up

beside Huschka and Huschka took over as primary pursuer. (T. at 42). Huschka testified that at first he thought Carlsen was going to pull over, but he continued on. Huschka still had his lights and siren on. (T. at 43). Huschka testified that Carlsen lost his left tire and there was a lot of debris coming off the vehicle, you could see sparks. (T. at 44). Huschka testified that a second spike strip location was set up as Carlsen was still not stopping and Huschka stated that Carlsen was traveling at approximately 60 miles per hour at this time. (T. at 44-45). The second set of spike strips was not successful as Carlsen was driving on rims at that point and the strips got tangled up underneath the undercarriage of the vehicle. At this point, Carlsen still had both his back wheels up and the second strips were being tangled underneath. (T. at 46).

13. City of Williston police officers assisted in the pursuit by keeping the pursuit on the highway and not leading into the City of Williston where there would be more traffic. (Id). Huschka testified that as the pursuit neared the 11th street turn around by Mercy Hospital and Herman Oil, Huschka got along side Carlsen. Carlsen cut in front of Huschka making a left-hand turn and the pursuit headed back west out of town again on Highway 2. (T. at 47). Huschka testified that he had to brake to avoid being struck. (Id). Huschka testified that he told other officers that Carlsen was trying to take him out, and that Carlsen got awful close to striking the front of Huschka's vehicle. (T. at 49).
14. Huschka testified that on the bridge just west of Williston there was a tanker, a semi. The semi had seen the pursuit coming in to Williston and he had stopped as he saw us turning around. The driver of the semi had stopped his vehicle on the highway with his trailer in the right lane and his tractor truck in the left lane, in essence blocking the highway in what Huschka assumed a good Samaritan type gesture to attempt to stop the suspect driver. (T. at 49-50). Huschka explained as the video was playing that you could see the semi apply his brakes and put his hazard

lights on. Huschka testified at this point they are accelerating and Huschka sees the semi coming up ahead and backs off. When they were accelerating it was probably up to the speed of around 60 miles per hour and at this point the white vehicle is still accelerating and Huschka is backing off. (T. at 50-51).

15. Huschka testified that he and Billehus attempted a moving roadblock where they try to box in Carlsen and slow him down by putting one vehicle in front of Carlsen and another vehicle alongside Carlsen and both vehicles would slow down trying to stop the suspect vehicle. (T. at 51). Huschka relayed to Billehus that after what happened back on 11th street, he didn't know what was going to happen with the box maneuver or roadblock. (T. at 52). Huschka testified that at this point, he was thinking that if we didn't get Carlsen slowed down, he may hurt somebody. Huschka was concerned for the individuals behind him in case Huschka got spun out. Huschka felt that as close as Carlsen had passed the semi, that Carlsen was a danger. (T. at 53). Huschka testified that he and Billehus had Carlsen in the box maneuver with Huschka beside Carlsen and Billehus ahead of him. Carlsen swerved towards Huschka. Huschka had to back off and swerve. Then Carlsen struck Huschka's patrol unit in the front right corner possibly with his back left bumper. Huschka was able to maintain control of his vehicle. (T. at 54). Huschka testified that Carlsen is traveling at a speed of about sixty miles per hour and there is debris coming off the car, rocks being kicked up over the road from the spike strip, pieces of the spike strip coming off on the highway. Two other passers-by had their tires deflated by pieces of spike strips. They decide the box maneuver won't work. (T. at 55).

16. Huschka testified that a third set of spike strips was deployed and was successful. Carlsen's rear tires were deflating. Carlsen started to fishtail, getting worse and worse and eventually his tires came off the rims and he was on all four rims. Huschka has been involved in the pursuit now for about twenty minutes. And now there are a total of six vehicles behind him. (T. at 56). Carlsen is driving erratically,

crossing over the fog line several times, crossing over the center line. There are gouges in the road from the rims. Huschka testified that he decided to just stay behind Carlsen until he stops, runs off the road and has no traction, or runs out of gas. This decision was made for the safety of everybody involved. They had spiked the vehicle numerous times. They tried a moving roadblock. Carlsen exhibited the fact that he would strike other vehicles. (T. at 57). The pursuit goes through Trenton, North Dakota. Carlsen finally stops and the officers initiate a felony stop. (T. at 59). Huschka testified that Carlsen stated to him that he didn't intend to drive as far as he did. (T. at 64).

17. Huschka testified that he has covered approximately one hundred crashes, probably seventy or eighty where he was directly involved as an investigating officer. (T. at 66). Huschka testified that fatal accidents can occur at nearly any speed. The lowest speed fatality he has covered was probably doing only 50 miles per hour. Huschka also testified that substantial injuries can happen even at speeds of 20 miles per hour. (T. at 67). It was Huschka's opinion that the most dangerous part of the pursuit was when Carlsen nearly struck the semi on the driver's side of the semi. (T. at 69). During cross examination, Huschka testified that the semi driver had to back up to avoid being struck by the suspect vehicle. The State's Exhibit #1, Huschka's in-car video, was shown again. Huschka pointed out during the playing of the video the point where the semi backed off to allow the car to pass by. (T. at 70-71).
18. During cross examination, Huschka testified that Carlsen attempted to hit the semi because if the semi hadn't backed up out of the left lane, the suspect vehicle would have struck the semi. Carlsen was not slowing down when approaching the semi and came within inches of hitting the semi. (T. at 76). Huschka estimated that when Carlsen passed the semi, he was going around 60 miles per hour. (T. at 80).
19. Billehus testified that he participated in the box maneuver with Huschka and that it didn't work. (T. at 94-95). Billehus testified that there is no standard vehicle speed

where fatalities or serious injuries can occur. Billehus stated that it doesn't take much to create trauma, fatal trauma, or injuries.

20. Miller testified that he was the second pursuit vehicle behind Carlsen when approaching the bridge after the 11th street turn-around. Miller testified that he observed a semi driver pull his semi and block both lanes by the bridge. (T. at 104). Miller testified that the white car was continuing straight at the semi and was going to try and squeeze in between them, but there was no room. The semi had to pull away. (T. at 105). Miller testified he saw the semi move to avoid being struck by the white car. (Id). Miller testified that Carlsen missed hitting the semi by just inches. (T. at 107).
21. Kessner testified that he had been contacted to assist with the pursuit of Carlsen. (T. at 112). State's Exhibit #2, Kessner's in-car video, was played and Kessner narrated what was happening. Kessner testified that he witnessed officers attempt the box maneuver on Carlsen. Kessner observed that contact was made on the trooper's car with Carlsen's car. Kessner also testified that he had his driver's side window down and could hear a sound of impact. (T. at 118). Kessner stated he is a crash reconstructionist and has been involved with approximately 800 injury, non-injury crashes, with approximately 30 of them fatal crashes. (T. at 120). Kessner testified that there is no certain speed that a car has to reach before serious injury or death occurs. (T. at 120-121). Kessner also testified that he has reconstructed two fatality crashes. In one the calculated speed was 35 miles per hour and the other the calculated speed was between 7 and 14 miles per hour. (T. at 121).

22. LAW AND ARGUMENT

23. 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?

24. During deliberations, the jury passed a note to the Court which contained three questions. Carlsen addresses jury questions two and three in his appeal.
25. Question two was: “Only testimony from truck driver?” “from transcript before?” The trial judge did not understand this question. The State believed they were wondering about any testimony from the semi driver. After discussion, the trial judge decided the answer back to the jury would be: decide the case on the evidence presented at trial. Neither the State nor Carlsen raised issue with the judge’s response. The trial court’s response in the present case is appropriate under *United States v. Neiss*, 684 F.2d 570, 572 (8th Cir. 1982): “Furthermore, it is well settled that a trial court is not required to speculate upon the purpose of the jury’s inquiry during its deliberations, the court, if it chooses to reply, should answer the inquiry within the specific limits of the questions presented. *Apel v. United States*, 247 F.2d 277, 283 (8th Cir. 1957); see also *United States v. Chatham*, 568 F.2d 445, 451 (5th Cir. 1978), rev’d on other grounds . This court has reaffirmed this position recently in *United States v. Piatt*, 679 F.2d 1228, slip op. at 5 (8th Cir. 1982) where we held that when the jury makes a specific request for reinstruction on certain issues, the district court may properly limit its reinstruction to the issues requested.”
26. The jury was given a preliminary instruction entitled “Evidence to Consider.” This jury instruction informed them of the evidence they may consider when reaching their verdict. This evidence included sworn testimony of witnesses, documents and other things received as exhibits, any facts to which all the lawyers had agreed or stipulated, and any facts that were judicially noticed.
27. In the jury’s third question, they requested the definition of “extreme.” Extreme is not defined in the North Dakota Century Code. In discussing this question, the State felt it should not be responded to at all because doing so would create problems

as opposed to resolving a problem. Carlsen mentioned using a commonly-understood meaning of the word and that oftentimes dictionary definitions are used, however, Carlsen stated he was not sure that this would be an appropriate response. The trial judge decided the answer would be that the court declined to give the definition. Neither the State nor Carlsen raised any objection.

28. "The response to a jury request for supplemental instructions is a matter within the sound discretion of the district court." *United States v. Bartley*, 855 F.2d 547, 551 (1988) (quoting *United States v. White*, 794 F.2d 367, 370 (8th Cir. 1986)). "A trial judge must be painstakingly impartial any time he communicates with the jury during deliberations. He must insure that any supplemental instructions are accurate, clear, neutral, and non-prejudicial." *Id.* *United States v. Suppenbach*, 1 F.3d 679, 683 (8th Cir. 1993)
29. In the final jury instructions, the jury was given the jury instruction entitled "Deliberations and Conduct of Jury in Retirement." This instruction clearly stated that "[i]f it becomes necessary for you to communicate with me during your deliberations, the Jury Leader should send a note to the bailiffs. All questions to the Judge must be reviewed by the attorneys. This may take a period of time, and some questions may not be answered." (emphasis added)
30. The trial court responded to the jury questions appropriately. The trial court did not commit any obvious errors in the case at hand. In *State v. McNair*, 491 N.W.2d 397, 399 (N.D. 1992), the North Dakota Supreme Court addressed this issue: "Under these circumstances, our inquiry is limited to determining whether the alleged error constitutes obvious error affecting substantial rights of the defendant under Rule 52(b), N.D.R.Crim.P. *State v. Potter*, 452 N.W.2d 71, 72 (N.D. 1990). Our power to notice obvious error is exercised cautiously and only in exceptional situations where the defendant has suffered serious injustice. *State v. Heintze*, 482 N.W.2d 590, 593 (N.D. 1992)."

31. Additionally, Rule 31(c) of the N.D. Rules of Criminal Procedure states: “A defendant may be found guilty of an offense necessarily included in the offense charged.” The jury was given the option to consider the lesser-included offense of Reckless Endangerment if they found Carlsen not guilty of Reckless Endangerment Under Circumstances Manifesting Extreme Indifference to the Value of Human Life.
32. In the present case, the State would argue that the trial court committed no error, certainly no obvious error. Therefore, the substantial rights of Carlsen were not affected.
33. 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)?
34. Carlsen questions whether the evidence was sufficient to find Carlsen guilty of reckless endangerment under circumstances manifesting his extreme indifference to the value of human life. The State asserts there was.
35. Carlsen was charged with Reckless Endangerment under N.D.C.C. § 12.1-17-03, which states:
36. “A person is guilty of an offense if he creates a substantial risk of serious bodily injury or death to another. The offense is a class C felony if the circumstances manifest his extreme indifference to the value of human life. Otherwise it is a class A misdemeanor. There is risk within the meaning of this section if the potential for harm exists, whether or not a particular person’s safety is actually jeopardized.”
37. “Serious bodily injury” is defined in N.D.C.C. § 12.1-01-04: “means 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.”

38. The jury heard the testimony of the officers involved in the pursuit. The officers testified that Carlsen, while driving at speeds of approximately 60 miles per hour, narrowly missed the semi. The semi driver could have been seriously injured or possibly killed. Trooper Huschka testified that Carlsen attempted to hit his vehicle twice and Trooper Huschka was able to swerve out of the way. While attempting to end the pursuit with a box maneuver, Carlsen did hit Trooper Huschka’s vehicle. Trooper Huschka could have been seriously injured or possibly killed.

39. Carlsen could have pulled over in Culbertson, Montana, before crossing the Montana/North Dakota state line and avoided this entire situation. Carlsen could have ended the chase at any time. It didn’t have to go to the extreme that it did – endangering people’s lives. Carlsen chose to continue his reckless behavior until the vehicle he was driving finally gave out.

40. Carlsen made the conscious decisions to create Reckless Endangerment (under circumstances manifesting an extreme indifference to the value of human life). The first incident came when Carlsen decided to speed towards the semi parked across the highway in front of him. The semi driver had to move out of the way to avoid being hit. Carlsen missed the semi by inches. This reckless act endangered the life of the semi driver. The second incident was when Carlsen decided to hit Trooper Huschka’s patrol unit while attempting a box maneuver on Carlsen’s vehicle. Again, these incidents of Reckless Endangerment occurred based upon the discretionary decisions of Carlsen. Carlsen alone determined how far this situation would go.

41. The Court has made clear that in order to challenge the sufficiency of the evidence of criminal trial on appeal, “a defendant must convince us that the evidence, when viewed in the light most favorable to the verdict permits no reasonable inference of guilt. *State v. Purdy*, 491 N.W.2d 402, 410 (N.D. 1992) (citing *State v. Raulston*, 475 N.W.2d 127, 128 (N.D. 1991)). The Court has stated, “The tasks of weighing the evidence and judging the credibility of witnesses belong to the jury.” *Id.* (citing *State v. Lovejoy*, 464 N.W.2d 386, 388 (N.D. 1990)). When a case is before the Court on appeal, the Court “must assume that the jury believed the evidence which supports the verdict and disbelieved any contrary evidence.” *Id.* (citing *State v. Manke*, 328 N.W.2d 799, 806 (N.D. 1982)).”
42. The only thing Carlsen refers to in his argument regarding this issue is that a motion for acquittal was made based on the insufficiency of the evidence. Accordingly, the trial court denied this motion.
43. Carlsen does not provide any evidence in his argument that could infer his innocence. The State submits that based upon the evidence presented at trial there is substantial evidence to prove the elements of the charge of Reckless Endangerment (under circumstances manifesting an extreme indifference to the value of human life) and sustain the subsequent jury verdict of Guilty.

44. **CONCLUSION**

45. The State would respectfully request that this Court uphold all the decisions made by the trial court in this case, the verdict that was returned by the jury, and find that if any errors did occur, they were harmless errors.

Dated this 20th day of November, 2007.

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IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

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 Cody G. Carlsen,)
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 Defendant – Appellant.)

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
 :ss.
 COUNTY OF WILLIAMS)

Nicole E. Foster, being first duly sworn, deposes and states:

That on the 20th day of November, 2007, at approximately 2:40 PM, the **APPELLEE’S BRIEF** in the above-entitled matter was served upon counsel for the Appellant via e-mail at the following address:

pulkrabek@lawyer.com

That the above e-mail address is the one assigned to:

Benjamin C. Pulkrabek
Attorney on Appeal for Cody G. Carlsen

Date this 20th day of November, 2007.

NICOLE E. FOSTER

SUBSCRIBED AND SWORN TO Before me this 20th day of November,
2007.

Shari L. Erdman
Notary Public
Williams County, North Dakota