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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)
)
 Plaintiff/Appellee,)
 vs.)
 Robert Desjarlais,)
 Defendant/Appellant.)

) Supreme Court No. 20070156 & 20070157
) Williams County District Court
) Case No. 06-K-1212 & 06-K-1214

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

Oct.
~~01~~ 02 2007

STATE OF NORTH DAKOTA

Appeal from:
The Criminal Judgments

District Court, Williams County, North Dakota
The Honorable Gerald Rustad, Presiding

BRIEF OF APPELLANT

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TR: Transcript

P: Page

STATEMENT OF ISSUES

ISSUE I: When each of the three counts of reckless endangerment (under circumstances Manifesting extreme indifference to human life) essentially constitute the same offense, should the trial judge have instructed the jury on only one offense or in the alternative at sentencing, emerged the three counts and sentenced for one offense?

ISSUE II: Whether there was sufficient evidence to convict Robert Desjarlais of the offenses charged.

NATURE OF THE CASE

On October 9, 2006, three criminal complaints were issued. The first complaint charged Robert Desjarlais with fleeing or attempting to elude a police officer.

The second complaint charged Robert Desjarlais with Unauthorized Use of a Motor Vehicle.

The third complaint charged Robert Desjarlais with three counts:

Count I: Reckless Endangerment under circumstances manifesting extensive indifference to value of human life.

Count II: Reckless Endangerment under circumstances manifesting extensive indifference to value of human life.

Count III: Reckless Endangerment under circumstances manifesting extensive indifference to value of human life.

A Preliminary Hearing was held on November 6, 2006. At the conclusion of that hearing Robert Desjarlais was bound over for trial on all charges in the above complaints.

Informations were filed on all charges. Robert Desjarlais plead not guilty to all charges.

A jury trial on all the charges began on May 3, 2007. On May 4, 2007, after both sides rested, the jury began deliberation.

The jury found Robert Desjarlais:

1. Guilty of the crime of fleeing or attempting to elude a police officer.
2. Not guilty of the crime of unauthorized use of a motor vehicle.
3. Guilty of the crime of reckless endangerment under circumstances manifesting extreme indifference to value of human life.
4. Guilty of the crime of reckless endangerment under circumstances manifesting extreme indifference to value of human life.
5. Guilty of the crime of reckless endangerment under circumstances manifesting extreme indifference to value of human life.

Judgment and sentence on the four guilty verdicts was pronounced on May 18, 2007.

On May 29, 2007, Robert Desjarlais signed a Pro Se Notice of Appeal. That appeal was filed on June 1, 2007.

STATEMENT OF FACTS

There are two stories about where defendant-Appellant, Robert Desjarlais ("R. Desjarlais") was on the evening of October 6, 2006, and the early morning hours of October 7, 2006. These stories are set out below with R. Desjarlais' first and the States' second.

R. Desjarlais' story was testified to by him at the preliminary hearing and at the trial. At both, he testified that he didn't take Mr. Fite's Lumina in the early morning hours of October 7, 2006, and that he was not involved in any high-speed chase.

ROBERT DESJARLAIS STATEMENT OF FACTS

R. Desjarlais' testimony about where he was on the evening of October 6, 2006, and the early morning of October 7, 2006, begins at a house owned by an individual called the Farmer. TR.P. 270 L 7-12. With him at the Farmer's are David Fite and Jamie Trowbridge.

They came to the Farmer's in their own car. TR.P. 270 L 17-18. The Lumina is

also at the Farmer's house and it is left there. TR.P. 270 L 17-21. While at the Farmer's house, R. Desjarlais gets a phone call from a girl named Lori, who works at the Rivers Edge, asking him to go to a bar in Bainsville, Montana, and gamble. TR.P. 270 L 13-16. Lori comes and drives R. Desjarlais to the bar in Bainsville, Montana, TR.P. 271 L 3-4. Mr. Fite and Ms. Trowbridge drive to the bar in Bainsville, Montana, in their car. TR.P. 271 L 7-12. After gambling a while, Lori leaves. TR.P. 38 L 10-12. Mr. Fite and Ms. Trowbridge want R. Desjarlais to give them money to gamble. R. Desjarlais refuses to give them any money and they get mad and leave the bar. TR.P. 38 L 12-15. The argument and the leaving of R. Desjarlais at the bar in Bainsville, Montana, is confirmed by Mr. Fite. TR.P. 120 L 17-21.

With Lori, Mr. Fite and Ms. Trowbridge gone, R. Desjarlais has no one to give him a ride home. TR.P. 38 L 15-19.

R. Desjarlais then calls on the cell phone to his sister, Jackie Rose Desjarlais, to see if she can give him a ride. She can't because her husband has their car. TR.P. 271 L 18-21.

R. Desjarlais then decides to start walking home. He hopes someone will pick him up. No one picks him up. After walking twelve or thirteen hours, he is apprehended by Deputies Sherven and Johnson from the Williams County Sheriff's office. TR.P. 271 L 24-25 and P. 272 L 1-10 and P. 275 L 17-18.

STATE'S STATEMENT OF THE FACTS

According to the State this case began when a drug deal turned bad. TR.P. 72 L 4-5. The drug deal began with David Fite and Emily Cantrell purchasing an eight ball of methamphetamine at a house in Trenton or Alexander. TR.P. 102 L 22-25 and P. 103 L 1-2. The drug deal started to turn bad when R. Desjarlais found out about it, and told Mr. Fite to either pay him for the methamphetamine or he would take Mr. Fite's blue Lumina ("Lumina") TR.P. 103 L 18-25. This threat didn't get Mr. Fite to make any payment to

R. Desjarlais. TR.P. 106 L 16-17.

On the early morning hours of October 7, 2006, Mr. Fite woke up, looked out of his home, and saw that his Lumina was gone. TR.P. 104 L 14-18. He thought about calling the Williston Police, but, decided against it because he was high on methamphetamine and knew if the police saw him in that condition his probation would be revoked. TR.P. 104 L 25 and P. 105 L 1-5. He decided the best thing to do was go look for the Lumina and try to get it back. TR.P. 104 L 22-24.

When the Lumina was taken. Mr. Fite didn't see the person who took it. He did have a suspicion it was R. Desjarlais because of the threat R. Desjarlais made about what would happen if Mr. Fite didn't pay him for the drug deal. TR.P. 106 L 12-15.

At the time the Lumina was taken, Williston Police Officer John Colby was in the area checking buildings. TR.P. 151 L 1-8. Officer Colby was able to get a look at the driver of the Lumina. When the driver of the Lumina that Officer Colby was looking at slumped down and turned away. TR.P. 151 L 11-18. Because of this, Officer Colby decided to follow the Lumina. When the Lumina ran a stop sign, TR.P. 151 L 19-25. Officer Colby turned on his lights and siren and thought this would get the Lumina to stop. TR.P. 152 L 1-4. Instead of stopping the Lumina kept going. TR.P. 152 L 6-7. Officer Colby then started to pursue the Lumina Tr.P. 152 L 6-14. Soon this pursuit turned into a high-speed chase. Two other Williston police cars where involved in this chase. One was driven by Officer Alynn Beyer and the other by Officer Kristin Paseka. TR.P. 152 L 10-25 through P. 163 L 1-11.

During the chase, the Lumina turned south on a road that only allowed northbound traffic. A car that was heading North, in order to avoid a collision, pulled over and let the Lumina go by. TR.P. 154 L 4-18.

Twice during the chase Officer Beyer tried to get his police car beside the Lumina so he could get a good look at the driver. The first time he tried to get his police car

beside the Lumina, the driver of the Lumina drove his car into Officer Beyer's police car. This caused Officer Beyer to momentarily lose control of his police car. When Officer Beyer got control of his police car, he again tried to get beside the Lumina to get a good look at the driver. Again the driver of the Lumina drove the Lumina into Officer Beyer's police car. This time Officer Beyer lost control of his police car and it went into the ditch and rolled on its side. TR.P. 133 L 1-25 and P. 134 L 1-16.

Officers Colby and Paseka stopped their police cars near the place where Officer Beyer had rolled his police car on its side, to see if Officer Beyer was all right. TR.P. 156 L 15-16. The ride-along passenger in Officer Colby's police car, Shanda Shaw, went over to Officer Beyer's patrol car and helped him out. TR.P. 136 L 9-12 and P. 157 L 2-15. When Officer Beyer got out of his patrol car, he said he was all right and waived for Officer Colby and Paseka to continue the chase after the Lumina. TR.P. 136 L 13-15 and P. 137 L 23-24.

Officers Colby and Paseka then went after the Lumina with Officer Colby in the lead. When Officer Colby got over a hill and couldn't see the Lumina's tail lights, he slammed on his brakes. Officer Paseka didn't see Officer Colby's brake lights until she came over the hill. Then it was too late to stop and she rear ended Officer Colby's police car. This rear end collision ended the Williston Police Officers chase of the Lumina. TR.P. 186 L 1-9.

During that chase, both Officers Colby and Beyer had opportunities to get a look at the driver of the Lumina. TR.P. 133 L 1-8 and P. 155 L 4-14. At first there were identification problems. Early in the chase it was thought the driver of the Lumina was Steve Enno. TR.P. 139 L 14-16. Then, there was a time that Officer Colby thought that the driver of the Lumina had a goatee. TR.P. 166 L 9-10.

By the time the chase ended both Officer Beyer and Officer Colby decided the driver of the Lumina was someone they had seen before but, they couldn't think of the

person's name. TR.P. 133 L 1-8 and P. 155 L 4-14. At a later time on October 7, 2006, Officer Colby heard that Mr. Fite had said that the person who took his Lumina had a name of Rob or Robbie. This information was enough for Officer Colby to realize that person the he saw driving the Lumina was Robert Desjarlais. TR.P. 159 L 13-20.

Officer Beyer at a later time on October 7, 2006, heard the name Robert Desjarlais and when he did he thought about the person he saw driving the Lumina and realized that person was Robert Desjarlais. TR.P. 137 L 3-16.

At 10:20 A.M. on October 7, 2006, a call came into the Williams County Sheriff's Office about a car that was found in a ravine near Buford. TR P. 217 L 22-25 P. 218 L 1-2. Williams County Deputy Sheriff Terry Sherven was sent to investigate this car. TR.P. 218 L 2-6. When he found the car it appeared someone had purposely driven it into the ravine, because in order to get to the ravine, the car had to be driven around trees. Deputy Sherven tried to get into the vehicle, but could not because it's doors were locked. TR.P. 219 L 9-25 and P. 220 L 1-7.

Another Williams County Deputy Sheriff, Patrick Johnson, got a call that R. Desjarlais had been seen on canal road in Buford bottoms and he went to investigate. TR.P. 204 L 11-16. During this investigation Deputy Johnson saw R. Desjarlais in a field and told R. Desjarlais to stop. TR.P. 205 L 1-17, TR.P. 229 L 9-11. R. Desjarlais didn't stop, but ran and a foot chase followed. Whenever Deputy Johnson told R. Desjarlais to stop, he kept running and would say, "What did I do"? TR.P. 275 L 20-24. Then Deputy Sherven got his sheriff's car involved in the foot race and he was able to cut R. Desjarlais off. TR.P. 205 L 18-25.

The place where R. Desjarlais was apprehended was about three miles from where the car in the ravine was located. TR.P. 229 L 15-18. At the time of R. Desjarlais apprehension he had with him a car key, cell phone, charger, and flashlight. TR.P. 207 L 18-25. These items were taken by Deputy Sherven. Deputy Sherven took these items to

the car in the ravine and used the key to unlock it's door. TR.P. 230 L 11-17 and P. 231 L 10-17. Then, he got Mr. Fite to admit all these items belonged to him. TR.P. 232 L 6-18.

Deputy Johnson transported R. Desjarlais to jail. TR.P. 230 L 18-22. TR.P. 129 L 14-16.

ARGUMENT

ISSUE I: When each of the three counts of reckless endangerment (Under Circumstances manifesting extreme indifference to human life: essentially constitute the same offense should the trial judge have instructed the jury on only one offense or in the alternative at sentencing, merged the three counts and sentenced for one offense?

The rule of criminal procedure on instructing a jury and who has the duty to instruct a jury is set out in State v. Kraft, 413 NW2D 303 (N.D. 1978) "Rule 30 of the North Dakota Rules 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.

Kraft then goes on to make the following statement.

"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 NW 2d 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 to the defendant has suffered a serious injustice. State v. Nandu, 397 NW 2d 59, 70 (N.D. 1986); Explanatory Note to Rule 52. N.D.R.Crim.P.: see also State v. Johnson, 379 N.W.2d 291, 293 (N.D. 1986, 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. 788.21. 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 Rule52(B) of the Federal Rules of Criminal Procedure”.

Rule 52(b) of the North Dakota Rules of Criminal Procedure states; “(b) Obvious Error. Obvious error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court”.

In the case now before the court (the case) Appellant Defendant Robert Desjarlais (R. Desjarlais) substantial rights were affected when the trial judge improperly instructed the jury on reckless endangerment (under circumstances manifesting extreme indifference to the value of human life). (See Appendix page 70). The reasons why the judge’s instruction was improper was because the offense involved in the charge arose out of a continuous and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment.

A test used to determine whether the counts charged involve multiplicity or whether there is only one offense can be found in Blockberger v. United States, 284 U.S. 299, 52 S.Ct. 180. 76 L Ed 306 (1932). “that the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not”.

A similar test is found in United States v. Walker, 380 F.3d 391 (8th Cr 2004).

According to Walker: “ The test for duplicative charges is whether each charge requires proof of an element the other does not.”

A more detailed test is found in the State of Minnesota in court of appeals C2-98-1072 State of Minnesota v. Penny Marie Campeau, (unpublished opinion) a copy of which is attached to this brief.

The following language in Campeau sets out that test:

“The Johnson court devised a test for examining whether the charged violations arose from a single behavioral incident. Id. at 404, 141 N.W.2d at 524. This test requires the sentencing court to determine whether the two incidents occurred in “substantially the same time and place” and whether they arose out of a “continuous uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment.” Id. at 405, 141 N.W.2d at 524. Utilizing this test, the question of whether multiple offenses arose out of the same behavioral incident necessarily “depends on the facts and circumstances of the particular case.” State v. Bookwalter, 541 N.W.2d 290, 294 (Minn. 1995). Notably, the Supreme Court has declared that multiple sentences may not be used for two offenses if the defendant substantially contemporaneously committed the second offense in order to avoid apprehension for the first offense.”

The elements of the offense of reckless endangerment (under circumstances manifesting extreme indifference to the value of human life) in the case are found in the Final Jury Instruction, see appendix at page 70. These elements are:

1. On or about October 7, 2006, in Williams County, North Dakota, the Defendant, Robert Desjarlais, created a substantial risk of serious bodily injury or death to Officer Alynn Beyer and/or others:
2. That the Defendant created the risk under circumstances manifesting extreme indifference to the value of human life; and

3. That the Defendant engaged in the conduct recklessly.

The above elements are the same for each count except in 1 where the following language appears: "created a substantial risk of serious bodily injury or death to Officer Alynn Beyer and/or others.

Even with the difference in 1, the three counts charged are essentially the same and are all part of one continuous offense.

The other crime charged in this case was fleeing a police officer. (See appendix page 64. That crime involved the criminal offense of fleeing from a police officer. The facts regarding this crime involve the fleeing from three Williston, North Dakota, police officers driving three different police cars. One criminal charge, not three counts were charged for fleeing. On the charge of fleeing the state treated that offense as a continuous and uninterrupted course of conduct manifesting an indivisible state of mind or coincident errors of judgment. The charges of reckless endangerment (under circumstances manifesting extreme indifference to human life) should also have been charged as one offense.

According to corpus Juris Secundum, Criminal Law § 2092. Where the offenses charged constitute in reality but one continuous offense instead of separate and distinct offenses, the court should not impose a sentence for more than one offense. Convictions merged for the purpose of sentencing are not extinguished. The doctrine of merger only serves to prevent an accused who has committed one offense from being punished as if for two.

ISUE II: Whether there was sufficient evidence to convict Robert Desjarlais of the offenses charged?

In the case, during the trial, after the State rested Robert Desjarlais made a Rule 29 Motion for acquittal based on insufficiency of the evidence. TR.P. 248 L 1-25 P. 249 L 1-2.

When defense council made this motion he said: "I am at a loss for words, but a motion to dismiss because there is no evidence to support the charges of reckless endangerment count one or count two or count three of the same - - or the charge of fleeing or attempting to elude a police officer. There has been no proper identification of Mr. Desjarlais having done this. and therefore it is our position that the matter be dismissed." TR.P. 248 L 17-24.

In order to successfully challenge the sufficiency of the evidence on appeal, the defendant 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 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 offenses charged. State v. Ohnstad, 359 N.W.2d 827 (N.D.1987).

CONCLUSION

The offenses charged in three counts of Reckless Endangerment (under circumstances manifesting extreme indifference to value of human life) all occurred:

1. During the Williston Police Officers chase of the Lumina.
2. Out of a continuous uninterrupted course of conduct manifesting an indivisible state of mind or coincident errors of judgment.
3. During a single behavioral incident.

The jury should have only been instructed to find R. Desjarlais guilty of one crime of reckless endangerment (under circumstances manifesting extreme indifference to value of human life) or the court at sentencing should have merged the three counts and sentenced on only one.

The evidence is insufficient to find R. Desjarlais guilty of three counts of reckless

endangerment (under circumstances manifesting extreme indifference to value of human life).

Dated this 2 day of October 2007.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and Appendix was mailed on the 2 day of October 2007 to Nicole Foster, Attorney at Law, P.O. Box 2047, Williston, ND 58802.

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