

20070156 + 20070157

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

Supreme Court Nos. 20070156
20070157

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

OCT 18 2007

STATE OF NORTH DAKOTA

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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TABLE OF CONTENTS

Table of authorities	ii
Statement of the Issues	¶1
Statement of the Case	¶4
Statement of Facts	¶10
Law and Argument	¶16
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?	¶17
II. Whether there was sufficient evidence to convict Robert Desjarlais of the offenses charged.....	¶25
Conclusion.....	¶32

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Paragraph</u>
<i>State v. McNair</i> , 491 N.W.2d 397, 399 (N.D. 1992).....	¶23
<i>State v. Purdy</i> , 491 N.W.2d 402, 410 (N.D. 1992).....	¶29
 <u>COURT RULES:</u>	
Rule 8(a), North Dakota Rules of Criminal Procedure	¶21
Rule 30(c)(1), North Dakota Rules of Criminal Procedure.....	¶22
Rule 31(b)(2), North Dakota Rules of Criminal Procedure.....	¶24
Rule 31(c), North Dakota Rules of Criminal Procedure	¶24
 <u>NORTH DAKOTA CENTURY CODE:</u>	
§ 12.1-17-03 N.D.C.C.	¶19

1. STATEMENT OF THE ISSUES

2. 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 [sic] the three counts and sentenced for one offense?
3. Whether there was sufficient evidence to convict Robert Desjarlais of the offenses charged.

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 for Reckless Endangerment (Case No. 06-K-1214), the State charged three different counts alleging the Defendant created a substantial risk of serious bodily injury or death to another in a manner manifesting his extreme indifference to the value of human life on three occasions:
7. Count 1: The Defendant hit Officer Alynn Beyer's patrol unit, causing Officer Beyer to lose control of the vehicle and the vehicle to roll onto its side, injuring Officer Beyer.
8. Count 2: The Defendant hit Officer Beyer's patrol unit during a vehicle pursuit.
9. Count 3: The Defendant drove his vehicle on the wrong side of a divided highway, requiring drivers to take evasive actions to avoid a collision with the vehicle the Defendant was driving.

10. STATEMENT OF THE FACTS

11. Mr. David Fite (hereinafter "Fite") testified that prior to October 7th, 2006, he had known Robert Desjarlais (hereinafter "Desjarlais") for just a few weeks and had been remodeling a house with Desjarlais in Alexander. (T. at 102). Fite testified that a

week prior to October 7th, 2006, he and Emily Cantrell went to a guy's house in Trenton or Alexander and bought an eight-ball. (T. at 103). Fite testified that they did not pay the guy right away and that Desjarlais was usually given a cut or something and in this case Desjarlais was not. (Id.) Fite testified that when Desjarlais found out about this drug deal he was really upset about it and told Fite that if Desjarlais didn't get paid, that payment was going to be Fite's car. (Id.). Fite testified that he never agreed to this. (T. at 104). Fite testified that on the early morning hours of October 7th, 2006, he woke up to discover his car missing. (Id.) Fite testified that he went looking for his car and didn't go to the police because at the time he was on probation and didn't want to get into trouble because Fite had been using methamphetamine. (T. at 104-105). Fite testified he saw his car leaving the trailer court by the old Kmart building. (T. 105). Fite testified he saw a police car on the left-hand side doing a building check and noticed that their lights went on and Fite's car took off. (Id.) Fite testified that he suspected Desjarlais of taking his car because of the previous statement Desjarlais had made that he was going to take Fite's car as payment. (T. at 106). Fite testified that he later flagged down a cop and let them know the car they were chasing was stolen. (T. at 107). Fite testified that the officer told him to go to the police department and file papers which he did. (Id.) Fite testified that when being questioned by a couple of sheriff's officers, he did not immediately tell them who he thought had his car. Fite didn't want to be associated with what was going on because of his probation. (Id.) Fite did eventually tell the officer the truth and proceeded to tell the whole story of what happened including the buying of the methamphetamine and Desjarlais's reaction. (T. at 108). Fite testified that he was taken to jail at that point and arrested for consumption, drug paraphernalia, and probation revocation. (Id.) Fite testified that while he was incarcerated, a cop came to see him and stated they found Fite's car and arrested Robert Desjarlais for taking it. Fite testified he was shown a cell phone, a flashlight

and car keys. The items all belonged to Fite and the last time Fite saw the flashlight, cell phone and car keys was in his car. (T. at 110-111). Fite was able to identify Desjarlais from a photo lineup. (T. at 122).

12. Williston Police Officer John Colby (hereinafter "Colby") testified that he was working on October 7th, 2006. (T. at 150). Colby testified that at approximately 4:30 AM on October 7th, 2006, he was checking one of the businesses by the Schwan's depot, old Kmart area. Colby observed two vehicles pull out of 2600 University up toward 26th Street and University. (T. at 151). Colby testified he observed the driver of the second vehicle put his head down and turn to the side so that Colby couldn't see the face. Colby testified he turned around to check the vehicle and to see whose vehicle it was. (Id.) Colby testified when he turned his patrol unit around, the suspect vehicle turned immediately into the computer's [a computer store] parking lot and drove to UBC in that area. (Id.) Colby testified that as he tried to catch up to the vehicle, it ran a stop sign. (Id.) Colby testified that he started to catch up to the vehicle and activated his overhead lights and siren to initiate a traffic stop. (T. at 152). Colby stated the vehicle started to accelerate through the parking lots and Colby advised dispatch he was attempting to stop the car. (Id.) Colby testified that a chase ensued throughout Williston with the vehicle running stop lights and stop signs. (T. at 153). Colby testified the vehicle then went onto the west by-pass heading southbound in the northbound lane. Another vehicle traveling northbound had to pull over for the vehicle. (T. at 154). Colby testified that the vehicle's speed when it headed towards the motorist going the right way was up around 80-85 mph. (Id.) Colby testified that he shined his spotlight onto the driver of the vehicle at one point and saw that it was a male that he recognized. At that point, Colby didn't know exactly who it was, but knew he had dealt with this person previously. (T. at 155). Colby testified that he saw the driver of the vehicle hit Officer Alynn Beyer's patrol unit twice, with the second hit causing Officer Beyer's

vehicle to skip into the ditch and flip onto its side. (T. at 156). Colby testified that he stopped to check on Officer Beyer and then continued to pursue the vehicle after dropping off his ride-along passenger. (T. at 156-157). Colby testified that during contact with Williston Police Officer Tim Kauchak, Officer Kauchak advised Colby that he had spoke to the owner of the vehicle, Mr. Fite, who had advised Kauchak that the vehicle had been stolen by someone named Rob or Robbie. Upon hearing those names, Officer Colby testified that it clicked in his head as to who the driver of the vehicle was. It was Robert Desjarlais. (T. at 159). Officer Colby testified that he knows from prior dealings that Desjarlais lives at 2600 University, where Colby first saw the vehicle coming from. (T. at 160). Colby testified that there was no doubt in his mind as to who he saw driving the vehicle. It was Desjarlais. (Id.)

13. Williston Police Officer Alynn Beyer (hereinafter "Beyer") testified that on October 7th, 2006, he was on duty. Beyer saw a Williston Police Department vehicle turn on its overheads. Seconds after observing this, he heard Colby come in [on radio] that he was attempting to stop a vehicle. (T. at 128). Beyer testified that he took over as lead vehicle, engaged his overhead lights and siren. The suspect vehicle continued on without stopping. The speeds during this initial chase were ranging from 40-60 mph. (T. at 129). Beyer testified that the subject vehicle was a blue Chevy Lumina. (T. at 130). Beyer testified that his lights and sirens remained engaged the entire time. (Id.) Beyer testified that after the chase through Williston, the vehicle turned onto the west bypass heading southbound in the northbound lane. While traveling on the wrong side of the road, the speeds were again up to 60 mph and even raising higher than that. (T. at 131). Beyer testified that at the time the suspect vehicle met an oncoming vehicle, the speeds were in excess of 65-70 mph. (T. at 132). Beyer testified that he attempted to get up next to the vehicle to identify the driver. When Beyer did this, the driver looked over at Beyer. Beyer knew from memory who it was, but couldn't recall the name. Beyer knew he knew him. (T. at

133). The vehicle then struck Beyer's patrol unit by coming over into Beyer's lane. Beyer fell back to regain control. Once regaining control, Beyer attempted again to get a full facial look to see if he could remember who it was, get the name. (Id.) Beyer testified that when he got just forward of the vehicle, the suspect vehicle again struck Beyer in the back passenger side, back quarter panel. Beyer's unit spun around and lost control. Beyer's unit was sliding backwards the same way that they were traveling. Beyer could see Officers Colby and Paseka coming straight at him. (T. at 133-134). Beyer looked at his speedometer and it read 105 mph. Beyer braced for impact and could hear the grass going under his vehicle and sliding. The patrol unit impacted and it flipped up onto its side. When it came to a stop, Beyer noticed his right hip hurt. It was intense pain. Due to the smoke smell, Beyer knew he had to get out of the vehicle quickly. (T. at 135). Beyer was transported to the hospital by ambulance. (T. at 136). Beyer testified that he later heard a name and instantaneously put the name with the person, that being Robert Desjarlais. Beyer had seen Desjarlais in the past and there was no doubt in Beyer's mind that the person Beyer saw driving the vehicle that struck him was Desjarlais. (T. at 137).

14. Williston Police Officer Kristin Paseka (hereinafter "Paseka") testified that she had been working on October 7th, 2006. Paseka became involved in the pursuit as well, actually taking over as lead vehicle for a time. Paseka testified that the vehicle they were following was a blue, four-door Chevy. (T. at 184). Paseka testified that when she came upon the vehicle, it was on the wrong side of the road on the bypass. (Id.) Paseka testified that there was a vehicle coming towards the suspect vehicle and the vehicle had to swerve to get out away from the suspect vehicle. (T. at 185). Paseka testified that Beyer took over as lead vehicle and Paseka fell in behind Colby. Paseka testified that she observed the suspect vehicle strike Beyer's car. Paseka testified that she observed the suspect vehicle again strike Beyer's car, however, this time Beyer lost control. (Id.)

15. Williston Police Officer Tim Kauchak (hereinafter “Kauchak”) testified that he was not on duty on October 7th, 2006. Kauchak testified that he was at home and heard on the radio that officers were in a pursuit. Kauchak stated that the pursuit was coming near his house and he could hear the sirens. (T. at 190). Kauchak testified he grabbed some equipment and went out in case they needed any assistance or back up. (Id.) Kauchak testified that while he was pulled over in a median, a person by the name of David Fite pulled up behind Kauchak and yelled something like “Get out of the way. That is my car.” Kauchak testified that he identified himself as a police officer and spoke with Fite. Fite told Kauchak that the cops were chasing his car. Fite indicated to Kauchak that it was stolen by somebody named Rob or Robbie. (T. at 192). Kauchak told Fite to go to the police department and make an official report. Kauchak then called dispatch on his cell phone to let them know he had received a report that the vehicle was stolen. (Id.). Kauchak continued to monitor the pursuit and upon hearing that Beyer was injured, went to assist Beyer. (T. at 193). Kauchak also had contact with Colby and while they had been talking about the pursuit, Kauchak mentioned his conversation with Fite. Kauchak testified he wasn’t sure which one of them said it, but they both said is it Robert Desjarlais? Kauchak testified that Colby stated to Kauchak: “I think this is the guy. Because I recognize him. I just couldn’t think of his name.”

16. **LAW AND ARGUMENT**

17. 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?

18. The State is unclear as to what exactly Desjarlais's first issue means. Is he saying that the jury should disregard two of the three counts or that they should all be lumped together into one charge? If someone killed three individuals during a shooting spree, would you not have three counts of murder? And, upon a finding of guilt, would you not sentence the person accordingly for three counts of murder?
19. Desjarlais was charged with three counts of Reckless Endangerment under N.D.C.C. § 12.1-17-03, which reads: "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."
20. Desjarlais states his conduct was a continuous course of conduct and therefore only one charge is appropriate. The State disagrees. There is no requirement in the offense of Reckless Endangerment that it be a continuous course of conduct. Desjarlais committed three different acts of Reckless Endangerment. Two of the acts, fortunately, didn't result in injury. However, a third act did cause injury to a Williston Police Officer.
21. The State is entitled to charge each of these incidents as a separate count pursuant to Rule 8(a) of the N.D.R.Crim.P.: "*Joinder of offenses*: The indictment, information, or complaint may charge a defendant in separate counts with two or more offenses if the offenses charged – whether felonies, misdemeanors, or infractions – are of the same or similar character or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan."
22. Upon its review of the trial transcript, the State does not find that Desjarlais objected to the jury instructions that were provided. Rule 30(c)(1) of the N.D.R.Crim.P. states: "a party who objects to an instruction or the failure to give an

instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.” That did not happen in the present case. Furthermore, although the State does not have a transcript of the sentencing proceeding, it does not recall any objection by Desjarlais regarding the three counts of Reckless Endangerment. Additionally, Desjarlais did not forward any motions to the trial Court after the initial charges (3 counts) were filed arguing the State’s charging decision.

23. 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).”
24. In the present case, the State would argue that the trial court committed no error, certainly no obvious error. Therefore, the substantial rights of Desjarlais were not affected. The jury was given an instruction covering Reckless Endangerment (Under Circumstances Manifesting Extreme Indifference to Value of Human Life) and also a jury instruction covering the lesser included offense of Reckless Endangerment. They were given individual verdict forms (guilty and not guilty) for each Count (1, 2, and 3). These procedures followed Rule 31 of the North Dakota Rules of Criminal Procedure. Rule 31(b)(2) N.D.R.Crim.P. states: “*Multiple counts*: If the jury cannot agree on all counts for any defendant, the jury may return a verdict on those counts on which it has agreed.” Rule 31(c) N.D.R.Crim.P. states: “*Lesser offense*: A defendant may be found guilty of an offense necessarily included in the offense charged.”

25. WHETHER THERE WAS SUFFICIENT EVIDENCE TO CONVICT ROBERT DESJARLAIS OF THE OFFENSES CHARGED.
26. The Defendant states the evidence is insufficient to find Desjarlais guilty of three counts of reckless endangerment. The State strongly disagrees. The jury heard the testimony of the Williston Police Officers involved in the pursuit. The officers may not have been able to put a name to the face at the time the events were unfolding, but they did identify Desjarlais with certainty.
27. Desjarlais made three conscious decisions to create Reckless Endangerment (under circumstances manifesting an extreme indifference to the value of human life). The first incident came when Desjarlais decided to drive the wrong way on a divided highway. This reckless act endangered the lives of the people traveling the right way on that highway. The second incident was when Desjarlais decided to hit Officer Beyer's patrol unit while Officer Beyer was in pursuit of Desjarlais. And finally, the third incident occurred when Desjarlais again decided to hit Officer Beyer's patrol unit causing Officer Beyer to lose control and the vehicle to roll onto its side. injuring Officer Beyer. Again, these incidents of Reckless Endangerment occurred based upon three discretionary decisions of Desjarlais. Desjarlais could have put an end to this dangerous situation at any time.
28. Although Desjarlais does not raise any issues with the Fleeing or Attempting to Elude a Peace Officer conviction, the State will address it. At approximately 4:30 AM. Officer Colby tried to initially stop Desjarlais for running through stop sign(s). A chase throughout the City of Williston and onto the west bypass ensued. This pursuit involved numerous police officers with their lights and sirens engaged.

29. 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)).”
30. The only thing Desjarlais refers to in his argument regarding this issue is that when presenting the trial court with its Rule 29 motion, counsel stated there had “been no proper identification of Mr. Desjarlais having done this, and therefore it is our position that the matter be dismissed.” (T. at 248) The trial court subsequently denied this motion request.
31. Desjarlais does not provide any specific evidence in his argument that could infer his innocence. The State submits that based upon the evidence presented at trial there is evidence to prove the elements of the three counts of Reckless Endangerment (under circumstances manifesting an extreme indifference to the value of human life) and the charge of Fleeing or Attempting to Elude a Peace Officer, and sustain the subsequent jury verdicts of Guilty.

32. CONCLUSION

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

Dated this 18th day of October, 2007.

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AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA

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

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

That on the 18th day of October, 2007, at approximately 4:00 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 Robert Desjarlais

Date this 18th day of October, 2007.

NICOLE E. FOSTER

SUBSCRIBED AND SWORN TO Before me this 18th day of October, 2007.

Shari L. Erdman
Notary Public
Williams County, North Dakota