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SUPREME COURT

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court Nos. 20080058, 20080059
	)	
Plaintiff/Appellee.	)	
	)	Morton Co. Nos. 30-07-K-0650, 0651
vs.	)	
	)	
Darrell Huber.	)	
	)	
Defendant/Appellant.	)	

**FILED**  
IN THE OFFICE OF THE  
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MAY 9 2008

\*\*\*\*\***STATE OF NORTH DAKOTA**\*\*\*\*\*  
 BRIEF OF PLAINTIFF-APPELLEE  
 \*\*\*\*\*

Appeal from Order for Judgment  
Dated February 26, 2008  
Honorable David E. Reich, Presiding District Judge

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## STATEMENT OF FACTS

The trial transcript (hereinafter T.T.) reflects that on the morning of trial at approximately 9:20 a.m. on February 26, 2008, the trial judge made introductions to the potential jurors prior to voir dire:

THE COURT: I'd like to take this opportunity to welcome the jury panel today. Again, my name is David Reich. I'm one of the judges of the district court. For many of you, this may be your first time in court or you've had limited experience in court, and that's usually a good thing if you don't spend a lot of time in court. And so before we begin, the first part of the trial process is the jury selection process. And before we get to that, I'd just like to introduce you to some of the people that are going to be in the courtroom today if you're selected as jurors, and maybe familiarize yourself a little bit with who's who and what they do today.

Seated to my right is the deputy clerk of court, Janet Jochim. Ms. Jochim will assist the court in the jury selection process.

Seated to my immediate left is the court reporter, Ronda Colby. Ms. Colby takes notes of everything that's said in the courtroom and if necessary, a transcript can be prepared from those notes at a later date. She'll also be responsible for administering the oath to the witnesses.

To my far left is the bailiff today, Clara Luebke [sic]. It is the responsibility of the bailiffs to keep order in the court and to assist the jurors during the course of the trial.

At this time I would ask the attorneys to introduce themselves. Mr. Nyhus.

MR. NYHUS: Thank you. Good morning. I'm Chris Nyhus. I represent the State. I'm an Assistant State's Attorney here in Morton County.

THE COURT: Ms. Schmidt.

MS. SCHMIDT: Thank you. Good morning. I am Susan Schmidt and I am representing Darrell Huber.

T.T. p 7, line 15 – p. 8, line 21.

Deputy O'Hara adequately identified Mr. Huber in court during direct examination by the State:

Q. Well, we're here on a case entitled the State of North Dakota versus Darrell E. Huber. Do you know Mr. Huber?

A. Yes.

Q. Is he here in the courtroom today?

A. Yes.

Q. Did you have an encounter with Mr. Huber on June 30th of 2007?

A. Yes.

T.T. p. 17. lines 1-8.

Q. What did you see that led up to your encounter with Mr. Huber?

A. I saw an individual driving an S-10 pickup pull up—

Q. Where were you located?

A. I was on Ash Avenue traveling west.

Q. So you weren't stationary but you were driving?

A. Right.

Q. Please tell me about that.

A. The vehicle come up to the edge of the street in-between C Street and B Street. I recognized the individual in the truck to be Darrell.

T. T. p. 17, line 22 – p. 18, line 9.

Q. Do you know where Mr. Huber lives?

A. Yes, I do.

Q. Where?

A. Across the street from me.

Q. In Glen Ullin?

A. Yes.

Q. Where does he live in relationship to this alley?

A. To the alleyway. he would be right in the middle of the alleyway.

Q. So he lives close?

A. Yes.

Q. Can you tell me what happened when you finally approached the vehicle?

A. Well, the vehicle was traveling in reverse. When I got up to it, the individual had gotten out of the vehicle and was walking towards the back door.

Q. Did you make contact with the individual?

A. Yes.

Q. Who was it?

A. It was – Darrell Huber was walking towards the back door. I asked him to stop twice.

T.T. p. 19, line 25. - p. 20. line 14.

On cross-examination, the Defendant's attorney asked the following questions of

Deputy O'Hara:

Q. Did Mr. Huber tell you what he was doing in his vehicle?

A. Yes.

Q. What did he say he was doing?

A. He said he was turning around.

T.T. p. 34. line 22 – p. 35 line 1.

Q. And what time was it that you said you saw Mr. Huber driving?

A. 10:27.

Q. Is that when you saw him or when you actually stopped in his yard?

A. It was when I actually first made contact with him.

T. T. p. 37, lines 11 – 16.

The following exchange took place in chambers after the State rested its case in chief:

MS. SCHMIDT: I'm just not positive whether or not my client is going to testify. if we can come back after the break and then I will make that decision.

THE COURT: Sure. And if he's not going to testify, you have any – have you had an opportunity to review the jury instructions?

MS. SCHMIDT: Yes, and I have no corrections or objections.

THE COURT: No objections? Mr. Nyhus.

MR. NYHUS: Your Honor. I haven't reviewed the closing instructions. I will over the break.

THE COURT. Okay. Very well. I just thought if you would do that in the event the defendant elects to not testify then we can proceed rather than sending the jury back out to discuss the jury instructions. So if you're prepared to give me a response when we come back from break, that would be fine.

T.T. p. 46, lines 2 – 19.

After going back on the record in the presence of the jury, the defense rested without calling any witnesses, including the Defendant himself. The court then stated:

THE COURT: Very well. The defense has rested. And since the defense has not presented testimony today, the State does not have an opportunity for rebuttal. So we will proceed then with our closing arguments. Before I do that. have the parties had an opportunity to review the closing jury instructions?

MS. SCHMIDT: Yes, your Honor. No objection.

MR. NYHUS: The same. no objections.

THE COURT: Okay. Very well.

TT. p. 47, lines 7 – 15.

## **STATEMENT OF THE ISSUES**

**I: Whether the Trial Court Erred When it Denied the Defendant's Rule 29 Motion for a Judgment of Acquittal?**

**II: Whether the Trial Court Erred When it Failed to Instruct the Jury That the Defendant, Darrell Huber Did Not Have to Testify at Trial?**



## LAW AND ARGUMENT

### **I: The Trial Court Did Not Err When it Denied the Defendant's Rule 29 Motion for a Judgment of Acquittal.**

Based on the following court rules and case law, the trial court did not err when it denied the Defendant's Rule 29 Motion For A Judgment Of Acquittal.

"After the prosecution closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." N.D.R.Crim.P. 29.

Our standard of review for challenges to sufficiency of the evidence is well established:

In an appeal challenging the sufficiency of the evidence, we look only to the evidence and reasonable inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt. In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses. A verdict based on circumstantial evidence carries the same presumption of correctness as other verdicts. A conviction may be justified on circumstantial evidence alone if the circumstantial evidence has such probative force as to enable the trier of fact to find the defendant guilty beyond a reasonable doubt. Moreover, a jury may find a defendant guilty even though evidence exists which, if believed, could lead to a not guilty verdict.

State v. Sabo, 2007 ND 193, ¶14, 742 N.W.2d 812.

According to Rule 43 of the North Dakota Rule of Criminal Procedure, the Defendant's presence is required at every trial stage, including jury impanelment, unless the charged offense is a misdemeanor and the defendant's written request to be absent has been granted. N.D.R.Crim.P. 43(a)(2) & (b)(1). The Register of Actions in this case

does not show any Rule 43 motion or order granting the Defendant permission to be absent on the day of trial. Appendix 1.

In State v. Olson, 244 N.W.2d 718, 721 (ND 1976) the court addressed whether there was sufficient identifying evidence to sustain a verdict of guilty and in doing so, incorporated the analysis used in a Pennsylvania case, Commonwealth v. Middleton, which states:

As bearing on the weight of proof of identify of name. the courts. including our own, have adopted the principle that where there is no contrary proof offered by the party concerned or by the defendant in a criminal cause, a comparatively small amount of proof in addition to identity of name constitutes sufficient evidence to submit to a jury to whose good judgment the decision is entrusted. The minimum required must necessarily depend on the facts of each case and the general law applicable to the criminal causes.

Id. (citing Middleton, 134 Pa.Super. 573, 4 A.2d 533, 536 (1939).

The Olson court determined that there was sufficient evidence to support a conviction after examining the identifying facts of the case including (1) the name of the Defendant as stated in the Complaint; (2) the context of the testimony given by the State's witnesses during direct and cross-examination, and (3) the "inference of identity arising from the same name and Olson's appearance with counsel." Id. The court further explained its holding: "This is not one of those instances 'where there are no other connecting or corroborating facts or circumstances (tending to establish the defendant's identity. so that) the (in-court) identification becomes critical.'" Olson at 21 (citing United States v. Musquiz, 445 F.2d 963, 965 (5<sup>th</sup> Cir. 1971)).

In the case at bar, the Defendant's identification was sufficiently established on the record according to the Olson factors. The name of the Defendant in the Uniform Traffic Summons and Complaint is "Darrell Edward Huber" and the Amended Complaint

charged “Darrell E. Huber” with a fourth offense DUI. (Appendix p. 6). The context of Deputy O’Hara’s testimony consistently shows that the proper person was identified in the courtroom on the day of trial. Deputy O’Hara testified that he knew Darrell E. Huber; that the deputy lived across the street from him; the same person who was in the courtroom while Deputy O’Hara was testifying; the same person whom Deputy O’Hara encountered on June 30th of 2007; and the same person Deputy O’Hara identified as the driver of the car in the alley in Glen Ullin.

It is also appropriate to infer that the Defendant was sufficiently identified in court because the Defendant’s attorney told the jury pool that she represented “Darrell Huber.” Olson allows the trial court to draw an “inference of identity arising from the same name and Olson’s appearance with counsel.” Olson at 21. Furthermore, the Defendant’s trial attorney did not argue to the court that there was any confusion over the identification of the Defendant during trial.

Coupling the standard of review under Olson and N.D.R.Crim.P. 43, as well as the introduction given by the Defendant’s attorney and Deputy O’Hara’s testimony identifying the Defendant in the courtroom, the inference most favorable to the verdict is that the trial judge correctly denied the Defendant’s motion for a judgment of acquittal because there was sufficient evidence to sustain a rational verdict.

## **II: The Trial Court Did Not Err When it Failed to Instruct the Jury That the Defendant, Darrell Huber Did Not Have to Testify at Trial.**

The trial court did not err when it failed to instruct the jury that the Defendant didn’t have to testify because the Defendant, through his attorney, waived any claim of error on appeal by failing to object. Furthermore, no comment was made by either party

during closing arguments inferring that the Defendant should have testified, or that his failure to testify should be held against him. State v. Mathre, 2004 ND 149. ¶12, 683 N.W.2d 918 supports this contention:

Under N.D.R.Crim.P. 30(c), failure to object at trial to jury instructions when there was an opportunity to do so operates as a waiver of the right on appeal to complain of instructions that either were or were not given. *Woehlhoff v. State*, 531 N.W.2d 566, 568 (N.D.1995).

The trial transcript clearly shows that the trial judge gave the Defendant the opportunity to object to the current jury instructions and have alternate ones given. TT. p. 47, lines 7 – 15. The court may presume that the election not to offer alternate instruction was part of the Defendant's trial strategy.

#### CONCLUSION

For the foregoing reasons, the State urges the Court to find that there was sufficient evidence to sustain the jury verdict that the trial court did not err in the issuance of the jury instructions.

Respectfully submitted this 9<sup>th</sup> day of May, 2008.

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