IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20090147

State of North Dakota,

Plaintiff-Appellee,

- vs -

Joseph Henry Johnson,

Defendant-Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY CR. NO. 08-08-K-1576
THE HONORABLE DAVID E. REICH, PRESIDING

BRIEF

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STATEMENT OF THE ISSUE

ISSUES:

I. Did the trial judge err and did that error have a significant impact on the verdict when the trial judge failed to instruct the jury on the following Maxim of Jurisprudence 31-11-05(6) one who consents to an act is not wronged by it?

II. Did the trial judge err when he refused Defendant, Appellant's Motion under 29(a) of the NDR of Crim P for a judgment of acquittal?

NATURE OF THE CASE

Defendant, Appellant Joseph Henry Johnson (Mr. Johnson) was charged in Burleigh County, North Dakota with the offense of criminal trespass, a Class C Felony. App. 3.

A twelve person jury trial on that charge began on January 22, 2009. The trial ended January 22, 2009 with a guilty verdict. T.P.1-248.

Judgment and sentence of Mr. Johnson took place on April 29, 2009. T.S.P.1-29.

Mr. Johnson appealed the judgment on May 11, 2009. The transcript was ordered May 11, 2009. App. 11.

This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

The apartment involved in this case 301G is located at 205 Arbor Avenue in Bismarck, North Dakota. 301G was leased by S.T., T.P.108, L.8-19. S.T.'s boy friend and Defendant, Appellant in this case is Joseph Henry Johnson (Mr. Johnson). Mr. Johnson stayed with S.T. at apartment 301G. T.P.109, L.1-20. Mr. Johnson had all his belongings at apartment 301G (hereinafter called her apartment). S.T. didn't consider him living with her, she just said he was there most of the time. T.P.110, L.1-6.

On July 31, 2008 S.T. and Mr. Johnson drank all day. S.T. doesn't remember all the events of that day. T.P.111, L.1-24. After S.T. and Mr. Johnson argued, S.T. decided to call the police, T.P.112, L.3-16. When S.T. called the police, she was not at her apartment, but Mr. Johnson was at her apartment. T.P.114, L.6-17. S.T. after calling the police went to her apartment and told the police she didn't want Mr. Johnson there, T.P.114, L.14-25.

The police then told Mr. Johnson to pack up his stuff and leave. They didn't arrest Mr. Johnson because S.T. had allowed him to live in her apartment, T.P.115, L.2-4. After the police told Mr. Johnson to leave he left her apartment, T.P.115, L.5-12.

Mr. Johnson called S.T. and asked if he could come back to her apartment. S.T.'s answer to Mr. Johnson. was give me an hour. After the call Mr. Johnson went to her apartment. S.T. was okay with Mr. Johnson coming into her apartment, but was mad and said nothing to him. Mr. Johnson after he arrived at her apartment started to make phone calls. T.P.116, L.13-25. P.117, L.1-25, P.118, L.1-5.

S.T. never called the police after Mr. Johnson returned to her apartment. That

phone call was made by Tammie Cashen. T.P.118, L.6-14. Ms. Cashen made the call because she called S.T.'s apartment and Mr. Johnson answered the phone. T.P.118, L.6-14.

S.T. did not support the police taking Mr. Johnson to jail from her apartment and charging him with trespass. T.P.119, L.13-21.

S.T. wrote a letter dated August 1, 2008 to the prosecutor, Lloyd Suhr App. 6 S.T. also wrote a letter to the Honorable Judge of Burleigh County App. 7. Both letters state that Mr. Johnson had S.T.'s permission to be in the apartment, T.P.127, L.7-16, P.129, L.16-25, P.130, L.1-4.

The letter to Prosecutor Suhr is marked Exhibit A and the letter to the judge is marked Exhibit B. Exhibit A was received into evidence, T.P.131, L.3 and Exhibit B was received into evidence, T.P.132, L.6.

Prior to trial, prosecutor Suhr never responded to Exhibit A and he never talked to S.T., T.P.138, L.9-16.

During the trial when S.T. was questioned by Mr. Johnson's attorney, she again admitted Mr. Johnson had permission to be in her apartment the second time. S.T. explained her actions after Mr. Johnson entered her apartment the second time, when she testified that she just wanted to stay away from him and she could have left if she wanted to. T.P.132, L.17-25, P.134, L.18-22.

Two police officers testified in this case. The first officer was Jeremy Curtis, his testimony is found in the transcript starting at page 135, line 17 and ends at page 180, line 14. The second officer was Loren Grensteiner and his testimony is found in the

transcript from P.182, Line 1 to page 212, line 17.

Officer Curtis in his testimony said the reason he didn't arrest Mr. Johnson the first time he was at her apartment was because S.T. had given Mr. Johnson permission to come and go. T.P.172, L.9-7.

Officer Jeremy Curtis during his testimony about being at her apartment the second time admitted he never asked S.T. if Mr. Johnson had her permission to be in her apartment and that he heard no one else asked S.T. if Mr. Johnson could be in her apartment. T.P.170, L.10-25, P.171, L.1-2.

Officer Loren Grensteiner testified the first time he came to her apartment:

(1) that Mr. Johnson told him S.T. and he were dating and he stayed there from time to time, T.P. 186, L.25, P.187, L.1-8;

(2) that S.T. said she wanted Mr. Johnson removed from her apartment ;

(3) that he told Mr. Johnson to leave her apartment T.P.189, L.3-4;

(4) that Mr. Johnson left her apartment T.P.182, L.12-13.

Officer Grenstiener in his testimony about the second time he came to the apartment admitted he never asked S.T. if she gave Mr. Johnson permission to return to the apartment T.P.206, L.5-14.

ARGUMENT

ISSUE I. Did the trial judge err and did that error have a significant impact on the verdict when the trial judge failed to instruct the jury on the following Maxim of Jurisprudence 31-11-05(6) one who consents to an act is not wronged by it?

In the case now before the Court. Mr. Johnson's attorney never requested a jury

instruction on Maxim of Jurisprudence. NDCC 31-22-05(6).

31.11.05(6). Maxims of Jurisprudence - One who consents to an act is not wronged by it.

Therefore, the rule of criminal procedure involved in this issue on appeal is Rule 52. Rule 52 of the North Dakota Rules of Criminal Procedure.

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Obvious Error. Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

According to State v. Kraft 413 N.W.2d 303 (N.D. 1987)

"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, (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 Note 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 Kraft, supra the trial court failed to instruct the jury on the defense available to the Defendant in the Uniform Commercial Code. This failure to instruct effected a substantial right of the Defendant.

In the case now before the court, Mr. Johnson believes the trial court has failed to instruct the jury on:

(1) an essential question of law;

(2) a theory of the defense.

The particular instruction that Mr. Johnson believes that the trial court failed to include in the jury instructions is Maxim of Jurisprudence N.D.C.C. 31-11-05(6) one who consents to an act is not wronged by it.

According to Maxim of Jurisprudence these maxims are not intended to qualify any of the provisions of the laws of the State, but to aid in their just application. Mr. Johnson believes an instruction on NDCC 31-11-05(6) would at his trial have aided in the just application of the law on trespass.

In the case now before the court, Mr. Johnson in the amended information is charged.

"That on or about the 31st day of July, 2008, in Burleigh County, North Dakota, the defendant Joseph Henry Johnson, knowing that he was not licensed or privileged to do so, entered or remained in a dwelling or in a highly secured premises, specifically the defendant entered the dwelling of S.T., Bismarck, North Dakota." (Emphasis added)

Mr. Johnson's defense is he had permission from S.T. to return to her apartment after the police made him leave. This permission can be found in the transcript in S.T.'s testimony T.P.132. L.17-25, P134, L18-22 and in the letter to the prosecutor (Exhibit #A) and letter to the judge (Exhibit #B). Since Mr. Johnson's theory of defense is based on S.T.'s permission to be in her apartment, he is entitled to an instruction on NDCC 30-11-05(6).

When the court fails to instruct on essential question of law and the Defendant's theory of defense it effects substantial right of the Defendant Kraft, 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 of 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).

In this instance, the trial court could take notice of the omission of an instruction to the jury on a defense based on the Uniform nonconstitutional error in failing to instruct where there was no objection, our task is to determine whether the error had a significant

impact upon the verdict. After reviewing the record, we conclude that the error in not giving an instruction to the jury as to the defense or area of defense based on the Uniform Commercial Code had a significant impact upon the verdict and, therefore, constituted obvious error."

In the case now before the court the trial court's failure to instruct the jury on 31-11-05(6) had a significant impact on the jury verdict.

ISSUE II. Did the trial judge err when he refused Defendant, Appellant's Motion under 29(a) of the NDR of Crim P for a judgment of acquittal?

Mr. Johnson's attorney at the end of the State's case made a Rule 29 Motion for acquittal. T.P.213, L.19-23. The trial judge reserved ruling on the Rule 29 Motion. T.P.216, L.13-14, P.217, L.19-22. After the jury verdict Rule 29 Motion was still under advisement. T.P.244, L.18-22. The trial judge denied the Rule 29 Motion at the sentencing hearing on January 29, 2009. T.S.H., P.1, L.16-21.

According to State v. Maki, 2009 ND 123 (2009)

[¶7] "To grant a judgment of acquittal, 'a trial court must find the evidence is insufficient to sustain a conviction of the offenses charged.' "State v. Kautzman, 2007 ND 133, ¶10, 738 N.W.2d 1 (quoting State v. Delaney, 1999 ND 189, ¶4, 601 N.W.2d 573. "When considering the sufficiency of the evidence on appeal, this Court views the evidence and all reasonable inferences in the light most favorable to the prosecution and then determines whether a rational fact finder could have found guilt beyond a reasonable doubt. "Kautzman, at ¶10. "In reviewing a question of sufficiency of the evidence under N.D.R.Crim.P. 29(a), we do not resolve conflicts in the evidence or reweigh the

credibility of witnesses. "State v. Weaver, 202 ND 4, ¶10, 638 N.W.2d 30. "On appeal, we determine only whether there is evidence which could have allowed the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction." Id.

In the transcript he trial judge's reasons for denying Mr. Johnson's Rule 29 Motion are:

The evidence in this case was that after the defendant was arrested, the witness submitted a letter indicating that the defendant had consent to be in the apartment. She testified at trial that he had consent to be there. However, if you look at the facts that were presented at trial. clearly when law enforcement was at the apartment at approximately 4 o'clock a.m., that the witness, in this case, S.T. clearly did not want the defendant there, did not give him consent to be there, asked that he be removed, did not want him arrested at that time.

At approximately 5:30 when law enforcement returned to the apartment, there was no indication by Ms. S.T. or by the defendant, for that matter, that the defendant had consent or permission to be in the apartment. Ms. S.T.'s actions, as testified to by the officer in that case, indicated the contrary, the she appeared to be frightened, that she ran to law enforcement, that she gestured where Mr. Johnson was hiding in the apartment or was located in the apartment. So, her actions as observed and testified by a law enforcement officer indicated that - - at least presented facts from which a jury could conclude that the defendant did not have consent or permission to be in the residence at the time that he was arrested.

And I think the pertinent issue is whether there was consent at the time he was

arrested and at the time of the offense. So, the letters certainly were written at a later time. And again, Ms. S.T.'s actions at the time Mr. Johnson was arrested certainly could indicate to a jury she had not given her consent at that time. T.S.H., P.1, L.22-25. P.2.,L.1-25, P.3., L.1-2.

So for those reasons the Rule 29 motion is denied.

Mr. Johnson believes that the above facts relied on by the trial judge in denying the defenses Rule 29 Motion are circumstantial evidence.

The North Dakota Criminal Pattern Jury Instructions on Direct and Circumstantial Evidence K-516 appears in the T.P.238, l.4-21.

Direct and Circumstantial Evidence and Sufficiency of Evidence. A fact can be proved by direct evidence or circumstantial evidence or by both. If an eyewitness testifies about what the witness saw then that is example of direct evidence. If the ground is bare but covered with a blanket of snow when you awake. that is circumstantial evidence that it snowed while you are asleep.

Violations of law can be proved by circumstantial evidence as well as direct evidence, but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant and inconsistent with any reasonable theory of the defendant's innocence. If the circumstantial evidence is of such character as to exclude every reasonable conclusion other than that the defendant is guilty, it is entitled to the same weight as direct evidence. (Emphasis added).

In this case the police officers are testifying as to their opinions as to why S.T. was afraid. They are basing these opinions on what happened during their first visit to the

apartment and assuming that the same situation exists when they make their second appearance at S.T.'s apartment.

The fact that the same situation doesn't exist is clearly established by S.T.'s testimony at trial, T.P.118, L.2-5, P.132, L.17-25 and the letters S.T. wrote to the prosecutor and judge prior to trial (Exhibits A and B in App. 6 and 7).

The fact that officer Curtis assumed that S.T. had not given Mr. Johnson permission to return the second time can be found in Officer Curtis's testimony: T. P.170, L.19-25, P.171, L.1-2. The fact that officer Grenstiener made the same assumption can be found in his testimony: T.P.206, L.5-14.

When officer Curtis and Grensteiner made their first appearance at the apartment they asked questions of both Mr. Johnson and S.T. to determine if Mr. Johnson had permission to be there. Why officers Curtis and Grensteiner, the second time they went to S.T.'s apartment, failed to ask S.T. if she gave permission to Mr. Johnson to return to the apartment or Mr. Johnson if he had permission from S.T. to return is known only by the officers. Both officers know when you investigate a trespass crime, one of the first questions is, "did the person accused of trespass have permission to go onto the property?"

The state would like to blame both S.T. and Mr. Johnson for not telling the police officers, S.T. had given her permission to Mr. Johnson to return to the apartment. Mr. Johnson has a constitutional right not to speak. This right is found in Article 5 of the United States Constitution and Article 1§ 12 of the Constitution of North Dakota. S.T. could have said something about giving Mr. Johnson permission to be in the apartment if

she wanted to. The fact that she didn't speak doesn't mean she didn't or couldn't give Mr. Johnson permission to return to the apartment.

The second time the police were called, S.T. didn't make the call and she never told Tammie Cashen or anyone to make that call. T.P.118, L.9-16. The fact the call was made by someone other than S.T. is set out in officer Curtis's testimony: T.P.158, L.22-25, P.159, L.1-4 —T.P.173, L.11-14.

After S.T. gave permission to Mr. Johnson to return to the apartment, if she wanted him out she knew how to call the police. S.T. left the apartment the first time and called the police. If she wanted the police called the second time there is no reason she couldn't have left the apartment and called the police. T.P.132, L.19-25.

Even if S.T. was afraid of Mr. Johnson she could still give him permission to return to her apartment. The testimony and evidence established S.T. gave Mr. Johnson permission to return to the apartment.

In the case now before the Court, S.T. made statements to the police, the first time they came to her apartment about Mr. Johnson having permission to be in her apartment and how at that time she wanted him removed from the apartment. None of these statements were made under oath.

The second time the police were at her apartment, the police never asked S.T. if she had given Mr. Johnson permission to be in her apartment and S.T. made no statement as to whether or not Mr. Johnson had permission to be in her apartment.

Prior to trial, S.T. sent letters to the prosecutor and judge stating Mr. Johnson had permission to be in her apartment the second time the police came to her apartment . See

Exhibit A, App. 6 and Exhibit B, App. 7.

At trial after S.T. testified Mr. Johnson had permission to be in her apartment the state tried to impeach her with the prior inconsistent statements she made to the police during their first visit to her apartment. Prior inconsistent statements of a witness not made under oath can only be used for impeachment purposes and not as evidence in criminal prosecutions. State v. Allery, 322 N.W.2d 228 (ND 1982) State v. Demery, 331 N.W.2d 7 (ND 1983) State v. Fehl-Haber, 2007 ND 99, 734 N.W.2d 770 (2007).

Therefore the statements S.T. made to the police the first time they came to her apartment can only be used for impeachment purposes and not as substantive evidence.

Mr. Johnson's Rule 29 Motion should have been granted.

CONCLUSION

The trial judge didn't properly instruct the jury. This failure to instruct violated a substantial right of Mr. Johnson and had a substantial impact on the verdict. Therefore this case should be remanded to the trial court for a new trial.

Mr. Johnson's Rule 29 Motion should have been granted. Therefore, this case should be remanded to the trial court with an order that the trial court grant Mr. Johnson's Rule 29 Motion.

DATED at Mandan, North Dakota, this 23 day of July, 2009.

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CERTIFICATE OF SERVICE BY MAIL

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 July 24th, 2009, she served, by mail, a copy of the following:

APPELLANT'S BRIEF

by placing a true and correct copy thereof in an envelope and depositing the same, with

Mr. Lloyd C. Suhr
Assistant State's Attorney
514 E. Thayer Ave.
Bismarck, ND 58501

The undersigned further certifies that on July 24th, 2009, 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.

Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek