

IN THE SUPREME COURT

20090257

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20090257

State of North Dakota,

Plaintiff-Appellee,

- vs -

Michael Moe,

Defendant-Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
NORTHWEST JUDICIAL DISTRICT
WILLIAMS COUNTY CR. NO. 08-K-404
THE HONORABLE DAVID W. NELSON, PRESIDING

BRIEF AND ADDENDUM

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ABBREVIATIONS

Page - P.

Line - L.

Transcript - T.

STATEMENT OF THE ISSUES

ISSUE: I. Is it reversible error for a District Court Reporter to fail to record jury voir dire?

ISSUE: II. Are the verdicts in this case inconsistent?

NATURE OF THE CASE

Defendant/Appellant Michael Moe (Mr. Moe) was charged on the 24th day of April, 2008 with two offenses: 1). Corruption/Solicitation of a Minor

2) Gross Sexual Imposition

The preliminary hearing on these charges was held on the 27th day of May, 2008.

Probable cause was found to bind the Defendant over for trial.

A jury trial began on August 17, 2009 and ended on August 18, 2009. Mr. Moe was found not guilty of corruption/solicitation of a minor and guilty of gross sexual imposition.

Mr. Moe was sentenced on the 30th day of November, 2009.

The judgment and sentence was appealed on the 21st day of August, 2009.

This case is now before the Supreme Court.

STATEMENT OF FACTS

Mr. Moe was charged with:

- 1) Corruption/Solicitation of a Minor
- 2) Gross Sexual Imposition

According to juvenile hereinafter called Jane Doe the following events occurred:

A. When I got from Bismarck, or Mandan, and Kyle needed money for food and, yeah, standing in front of the couch Mike said that he wanted to touch my boobs and - - -

MR. RUSTAD: Objection, your Honor. Withdraw it.

THE COURT: Okay. You may continue - - go ahead.

MS. WILDER: Go ahead, [Redaction 3].

(The witness continuing.)

A. He said that he wanted to touch my breasts and he'd give Kyle money for food. So we stood in front of the couch and I had my arms at my side. Kyle wrapped his arms around me, and he pulled my shirt down and touched my breasts. I didn't stop him, I let him do this it.

Q. Mr. Moe did this?

A. Yes.

Q. Mr. Moe did this, Kyle did not do this?

A. No. Kyle stood there.

Q. Mr. Moe - - you said he pulled your shirt down and touched your breast. What did he use to touch your breast, [Redaction 3]?

A. Finger.

Q. So his hands, basically. On your bare skin or did you have a bra on?

A. I had a bra on.

Q. He pulled that down as well?

A. Yeah.

Q. Was this some - - do you have any kind of a time frame when that happened,

[Redaction 3]?

A. It was during the night, I don't know I guess.

Q. How about a time of year?

A. It was still Summer, it was around the same time.

Q. So Summer of 2006, is that the right year?

A. Yeah.

Q. Where did this take place at ?

A. At Angie Steven's house.

Q. Okay, and that's here in Williston, too is that right?

T., P. 144, L.6-25, P. 145, L.1-16.

Jane Doe's boyfriend, Kyle Hovey was a witness to what happened to Jane Doe. Mr.

Hovey testified about what occurred:

Q. Do you remember specific information regarding an incident at Angie Stevens' house here in Williston?

A. Yes, I do.

Q. What do you recall telling Det - - Detective Kvande about?

A. That Mike offered her money to touch her - - her breast.

Q. Mike offered who money, Kyle?

A. [Redaction 3]. [Redaction 3] money.

Q. Money to touch her breasts?

A. Yeah.

Q. Who all was present when this happened?

A. Mike, [Redaction 3], and just me.

Q. Do you remember Jazmin Theige being there?

A. No, I don't.

Q. Okay. What happened after Mike offered [Redaction 3] the money to touch her breasts?

A. The first time she - - she let him do it for twenty bucks, and then I got upset about that.

Q. And what happened then?

A. I ended up leaving the room and she followed me.

Q. So where did the twenty dollars go? Did you have it or did she have it?

A. She had it. I believe she had it.

Q. Do you recall whether he actually touched her breasts?

A. Yes.

Q. Tell me what you recall about that, please, Mr. Hovey?

A. Like, he just - - they were just sitting on the couch and - - and he reached out and just touched it, but her clothes were on though.

Q. So this was over her clothes?

A. Yes.

Q. Where his clothes on as well?

A. Yes.

Q. You said something about the first time. Was there more than one incident?

A. Yeah, the second time he tried to offer her money but right away, without any of her clothes on, but she didn't do it.

Q. Okay. So actually he offered the money more than once?

A. Yeah.

Q. But there was one time when he actually touched her breasts, is that right?

A. Yeah.

Q. That you saw?

A. Yes.

Tr.P.169, L.12-25, P. 170, L. 1-25, P. 171, L.1-10.

The jury found Mr. Moe guilty of Gross Sexual Imposition.

Judgment and sentence was entered on the 30th day of November, 2009. Mr. Moe appealed the judgment.

ARGUMENT

ISSUE I: Is it reversible error for a District Court Reporter to fail to record jury voir dire?

In the "North Dakota Unified Judicial System Classification Description", a copy of this document is heretoaffixed and marked Addendum. In Addendum, under the heading "General Summary or Purpose", the following appears:

"The Court Reporter is responsible for making a verbatim record of district and juvenile court trials, proceedings and other matters using computer-aided transcription, shorthand and/or audio recording equipment, writing court logs, noting appearances and essential

events during proceedings, and providing typewritten transcripts as required. Positions assigned to this classification provide administrative and secretarial support to a district judge and court staff, assist in calendar control and scheduling, and may serve as liaison between the district judge and others in matters handled by the judge.”

Before N.D.C.C. 27-20-03 was Superseded by Personal Policy 103R of the Unified Judicial System, the North Dakota Supreme Court in *State v. Rougemont*, 340 N.W.2D 47 (N.D. 1983) decided that N.D.C.C. 27-20-03 did not require a court reporter to record jury voir dire, the opening statements of counsel and the closing comments of counsel.

Rougemont points out that the language of N.D.C.C. 27-20-03 is significantly different from the federal statute on the duties of court reporters.

The following federal statute on the duties of court reporters appears at Footnote 4 in Rougemont:

4. Section 753 of 28 U.S.C. provides, in part:

“(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceedings. The Judicial Conference shall prescribe the types of

electronic sound recording means which may be used by the reporters.”

When the above language in Section 753 (b) of 28 USC is compared with the language in Addendum under the heading “General Summary or Purpose”, it appears that both give equal emphasis to all aspects of court sessions and require a verbatim record of all court proceedings.

Court reporters in North Dakota claim they aren’t required to transcribe jury voir dire. This claim is based on Rule 10(b)(1)(D) of the North Dakota Rules of Appellate Procedure:

1) Appellate’s duty to order. If an appeal is taken in which an evidentiary hearing the Appellant must order a transcript of the proceedings as follows:

(D) A transcript of any record of jury voir dire is not required, unless specifically requested by a party;

Rule 10(b)(1)(D) of the North Dakota Rules of Appellate Procedure applies to Appeals to the Supreme court and has nothing to do with the rules of procedure of the District Court. According to Rule 10(b)(1)(D) of the North Dakota Rules of Appellate Procedure a district court reporter must provide a transcript of the jury voir dire if requested. Therefore, Rule 10(b)(1)(D) requires the district court reporter to provide a transcript if one is ordered.

The writer of that brief, after he was assigned to write the appeal, has specifically requested an Order for Jury Voir Dire Transcript. A copy of that request can be found in the Appendix.

A question always asked by an appellate court when an objection is made about something missing in a transcript is, “how do you know that the missing transcript contained anything that would even effect the trial?” In this case the trial judge said: “The lawyers have now issued some legal challenges to specific members of the jury, some were granted, some of

those were not” Tr. p. 28, L.19-21. This quote alone shows that the pre-emptory challenges could have involved appealable issues. The problem is without a transcript any error during jury voir dire can’t be appealed.

ISSUE II. Are the verdicts in this case inconsistent?

The following paragraphs in *State vs. Jahner* 2003 ND 36, 657 NW2d 266, state how North Dakota Courts are to apply the Standard of Legal Inconsistency to jury verdicts in criminal cases.

[§17] *Jahner* argues the jury verdict in this case is repugnant. Some courts have attempted to distinguish “inconsistency” from “repugnancy” in verdicts containing multiple counts. See Steven Tr. Wax, *Inconsistent and Repugnant Verdicts in Criminal Trials*, 24 N.Y.L.Sch.L.Rev, 713, 716 (1979). However, this Court’s standard for reconciling a jury verdict is whether the verdict is legally inconsistent. See *State v. Swanson*, 225 N.W.2d 283, 285 (N.D. 1974). Therefore, we will examine *Jahner*’s argument under our standard of legal inconsistency.

[§19] “(S)trict standards of logical consistency need not be applied to jury verdicts in criminal cases.” *Swanson*, at 285. “Reconciliation of a verdict, therefore, include an examination of both the law of the case and the evidence in order to determine whether the verdict is logical and probable and thus consistent, or whether it is perverse and clearly contrary to the evidence.” *Barta v. Hinds*, 1998 ND 104, ¶6, 578 N.W.2d 553 (internal quotations omitted). Under N.D.C.C. § 12.1-16-02, the required culpability for the offense of manslaughter is recklessly; recklessly is also the culpability required for the offense of reckless endangerment under N.D.C.C. § 12.1-17-03. *State v. Hanson*, 256 N.W.2d 364, 367 (N.D. 1977). In this case, the apparent inconsistency to be reconciled is whether it is legally inconsistent for the jury to

acquitted Jahner of manslaughter and find Jahner guilty of reckless endangerment because both offenses require the same level of culpability. In State v. Moran, 474 N.W.2d 77, 78 (N.D. 1991), we addressed inconsistency in a jury verdict which acquitted the defendant on the charge of aggravated assault but convicted the defendant of unlawful possession of a firearm. The defendant, in Moran, “argue[d] that because the jury, by its verdict of acquittal on the aggravated assault charge, must have determined that he used the gun in self defense, the jury should also have acquitted him of unlawful possession of a firearm on the basis of self defense.” Id. This Court concluded there was substantial evidence showing the defendant knowingly possessed the gun prior to the altercation; therefore, there is no inconsistency in the verdicts. Id.

[§20] Applying the analysis in Moran, we examine each charge separately and analyze if the evidence supports the conviction to determine if the jury returned an inconsistent verdict. In this case, Jahner was charged with manslaughter for the death of Smith and reckless endangerment for endangering the public and the lives of the three other passengers in the vehicle. The level of culpability for an offense is analyzed at the time a person engaged in the conduct which constituted an offense. See N.D.C.C. §§ 12-1-02-01 and 12.1-02-02(1). In this case, the evidence permits the jury to find the culpability level related to the death of one passenger different from the culpability level determined for the period prior to the death when the passengers asked Jahner to slow down. One of the passengers were hollering at Jahner, who was driving the vehicle, to slow down but he would not listen.

[§21] “The tasks of weighing the evidence and judging the credibility of witnesses belong to the jury.” State v. Purdy, 491 N.W.2d 402, 410 (N.D. 1992). We will not second-guess why the jury acquitted Jahner of manslaughter. See Purdy, at 410 (stating “this [C]ourt must assume

that the jury believed the evidence which supports the verdict and disbelieved any contrary evidence.”); see also Dunn v. United States, 284 U.S. 390, 393-94 (1932) (concluding jury verdicts will not be upset by speculation). Even if a jury fails to convict a defendant on a charge having a similar element to a charge on which the defendant is convicted, there is no legal inconsistency if there is substantial evidence to support the charge on which he is convicted. Thus, we conclude, as we did in Moran, there is substantial evidence establishing the defendant committed reckless endangerment, even though the jury found the defendant not guilty of manslaughter which also has the element of recklessness. Because the evidence supports the jury’s finding that Jahner recklessly endangered the lives of the passengers prior to the death of Smith, we conclude the verdict is supported by the evidence and it is not legally inconsistent.

In the case now before the court the testimony of Jane Doe and Kyle Hovey which is set out in the Statement of Facts sets out how the events occurred on the night that Mr. Moe was charged with Corruption/Solicitation of a minor and Gross Sexual Imposition. In order for the Gross Sexual Imposition to occur the Corruption/Solicitation has to occur first. The facts indicate the only reason Jane Doe allowed Mr. Moe to touch her breast is because he agreed to pay her \$20 so her boyfriend Kyle Hovey who was hungry could buy food.

CONCLUSION

For the above and foregoing reasons this case should be remanded to the trial court and;

1. A new trial granted because the District Court Reporter failed to transcribe the jury voir dire.

2. Conviction of the charge of Gross Sexual Imposition should be dismissed because the verdicts are inconsistent.

DATED at Mandan, North Dakota, this ____ day of February, 2010.

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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 February ____, 2010, 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

Marlyce Wilder
Williams County State's Attorney
P.O. Box 2047
Williston, ND 58802-2047

The undersigned further certifies that on February ____, 2010, 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