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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20100002

State of North Dakota,

FILED
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Plaintiff-Appellee,

MAR 17 2010

- vs -

STATE OF NORTH DAKOTA

Troy Lehman,

Defendant-Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CASE NO. 09-08-K-04778
THE HONORABLE STEVEN L. MARQUART, PRESIDING

APPELLANT'S BRIEF

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ABBREVIATIONS

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STATEMENT OF THE ISSUES

- ISSUE:
- I. Did the trial court err when it denied Defendant/Appellant Troy Lehman's motion for acquittal on the charge of Kidnaping?
 - II. Whether or not the trial court erred when it failed to instruct the jury on a private person's right to make an arrest?
 - III. Is the guilty verdict for Kidnaping an inconsistent verdict that must be set aside because the jury found Defendant/Appellant Troy Lehman not guilty of Attempt to Commit Theft by Deception?

NATURE OF THE CASE

On December 9, 2008 an affidavit of probable cause was made. This affidavit was in support of an Information that charged Defendant/Appellant Troy Lehman (Mr. Lehman) with two felony criminal offenses. These offenses were Kidnaping, a class B felony and Attempt to Commit Theft by Deception, a class C felony.

A motion was then made on May 6, 2008 to amend the information to include the offense of Terrorizing. That motion was granted on June 10, 2008.

Mr. Lehman was arraigned on these three felony charges on December 19, 2008.

The preliminary hearing on the three felonies was held on January 1, 2009. At the conclusion of that hearing the court found probable cause to bind Mr. Lehman over for trial on all three felonies.

Trial on the three felonies began on September 22, 2009.

The trial ended on the September 24, 2009 with the jury finding Mr. Lehman not guilty of Attempted to Commit Theft by Deception and guilty of Kidnaping and Terrorizing.

Mr. Lehman sent to the trial court a handwritten Notice of Appeal dated October 22, 2009, a Notice of Filing of the Notice of Appeal was filed, dated and filed on October 21, 2009.

A Motion for Judgment of Acquittal and/or new trial was filed on October 29, 2009.

On November 2, 2009 the trial court entered an order denying Defendant's

Motion for Acquittal or in the alternative a Motion for a new trial.

The Criminal Judgment was dated and entered on December 29, 2009.

On December 29, 2009 Defendant's attorney Steven D. Mottinger filed a Notice of Appeal.

The Notice of Filing the Notice of Appeal was dated and filed on December 31, 2009.

The trial court denied the judgment of acquittal and for new trial in a Memorandum dated February 20, 2010.

This matter is now on appeal before the North Dakota Supreme Court.

STATEMENT OF THE FACTS

Prior to November 7, 2008 Defendant/Appellant Troy Lehman (Mr. Lehman) had worked for Stubstad Insurance and Bonding as an informer. Mr. Lehman's job as an informer was to find out the whereabouts of individuals who had been bonded out of jail on Stubstad Bonds and then jumped bond because they missed court appearances. After Mr. Lehman found out the whereabouts of Stubstad bond jumpers, he reported their whereabouts to Mike Studstad who is the Bondsman for Studstad Insurance and Bonding. Mr. Stubstad would then go out and apprehend the bond jumpers or contact a county hunter to do the apprehension. Tr.2, P.301, L.4 to P.302, L.5.

Informants in North Dakota don't have to be licensed or have any training. All anyone has to do who wants to be an informant is find someone who will contract with him for information on bond jumpers. Tr. 2, P.303, L8-11.

Bounty hunters in North Dakota are not required to be licensed or have any training. All anyone who wants to be a bounty hunter has to do is contract with a bonding company to be paid for apprehending that bonding company's bond jumpers. Tr. 2, P.303, L.12-16.

Kurt Schienbien is a bondsman for A-Affordable Bail Bonds. Tr. 2, P.369, L. 14-18. It is his bonding company that bonded Daniel Flyinghawk out of jail. Mr. Lehman found out about that bond and the fact that Mr. Flyinghawk was a bond jumper because he failed to make a court appearance. Tr. 2, P.274, L.1 to P.275, L.22.

On November 7, 2008 Mr. Lehman called Bondsman Schienbein and told him

he knew where Mr. Flyinghawk was and could apprehend him. Tr. 2, P. 277, L.5-9. During that call Bondsman Schienbien orally contracted with Mr. Lehman to apprehend Mr. Flyinghawk for \$500.00. Tr. 2, P.286, L.21 to P.287, L. 5. Bondsman Schienbien also called an agent of an A-Affordable Bail Bonds Sherri Mitchell and told her to take \$500.00 to Fargo, North Dakota to pay Mr. Lehman after he brought in Mr. Flyinghawk to the jail. Tr. 2, P.244, L.21 to P.245, L.11.

During this case there was different testimony about papers that are needed to pick up a bond jumper. Bondsman Schienbien testified such papers aren't required to take a bond jumper to jail and that the jail doesn't require any papers. Tr. 2, P.285, L.1-6.

After Mr. Lehman had contacted with Bondsman Schienbien and A-Affordable Bail Bonds to be a bounty hunter he went to apprehend Mr. Flyinghawk. Mr. Flyinghawk was living at 713 30th St. North in Fargo, North Dakota. The person who was renting that address on November 7, 2008 was Sandra Tweeten. Mr. Flyinghawk is Sandra Tweeten's nephew. It was Ms. Tweeten who responded to Mr. Lehman's knock on the door and allowed Mr. Lehman to come in. Ms. Tweeten thought Mr. Lehman was a bondsman and that he had come for Mr. Flyinghawk. Tr. 1, P.29, L.1 to P.32, L.5.

When Mr. Lehman started to apprehend Mr. Flyinghawk a scuffle broke out. During that scuffle Mr. Lehman got Mr. Flyinghawk face down on the couch and tied him up with a rope from Mr. Flyinghawk's hoodie.. Mr. Lehman then took Mr. Flyinghawk outside and placed him in the front seat of a car. Mr. Lehman then got in

the back seat. Tr. 1, P.33, L.9 to P. 36, L.6. The driver of that car was Camille Lorenzen. Ms. Lorenzen then started to drive around the city of Fargo, North Dakota. During that drive both Mr. Lehman and Mr. Flyinghawk used Mr. Lehman's cell phone to call several different people. Tr. 2. P. 124, L.2-20.

What occurred during that drive is described by the testimony of Ms. Lorenzen and Mr. Flyinghawk. Tr. 2. P.147, L.16 to P.234, L.1, P.308, L.10 to P.373, L.25. Their two stories contain many differences.

One thing everyone agrees on is that Ms. Lorenzen did drive back to 713 30th St. North in Fargo, North Dakota. The testimony of Flyinghawk claims the return was to exchange him for \$800.00 or two eight balls of meth. Tr. 2, P.321, L.16-25, P.334, L.12-25. According to Ms. Lorenzen she never heard Troy say "if you give me money I will let you go" Tr. V2, P.219, L9-11. Also Ms. Lorenzen said Mr. Flyinghawk said to Mr. Lehman "would you take a couple of eight balls?" Tr. V2, P.220, L9-11. Ms. Lorenzen never heard a direct answer by Mr. Lehman to that question. Tr. 2, P.230, L.6-10.

When Ms. Lorenzen drove the car back to 713 30th St. North in Fargo, North Dakota a number of people approached the car. Mr. Lehman got out of the car. A bondsman named Armando Amaya was one of the people who approached the car. Mr. Amaya asked Mr. Lehman a questions about his credentials. Mr. Lehman didn't answer. He just got back into the car. Ms. Lorenzen then drove the car into Mr. Amaya. Mr. Amaya pulled out his pistol and shot one of the car's tires as Ms. Lorenzen drove away. Tr. 1, P.120, L.5 to P.125, L.13.

Mr. Lehman never took Mr. Flyinghawk to the Cass County Jail. He had Ms. Lorenzen to do it. On Ms. Lorenzen's way to the Cass County Jail with Mr. Flyinghawk, she was followed by Mr. Lehman in another vehicle. Before Ms. Lorenzen got to the jail she met Ms. Mitchell an agent for A-Affordable Bond. Then Ms. Lorenzen and Ms. Mitchell took Mr. Flyinghawk to the Cass County Jail. Once Mr. Flyinghawk was taken into custody by a Cass County jailer, Ms. Mitchell gave Ms. Lorenzen the \$500.00. Tr. 2, P.202, L.10 to P.208, L.10.

The jury found Mr. Lehman not guilty of Attempt to Commit Theft by Deception and guilty of Kidnaping and Terrorizing.

ARGUMENT

ISSUE I. Did the trial court err when it denied Defendant/Appellant Troy Lehman's motion for acquittal on the charge of Kidnaping?

The court in deciding a Motion for Acquittal must review the evidence in the case most favorable to the prosecution State vs. Kingsley 383 NW2d 828 (N.D. 1986). The following is such a review of the evidence.

Prior to November 7, 2008 Mr. Flyinghawk had taken out a \$5,000.00 bail bond with A-Affordable Bonds. In that bond Mr. Flyinghawk had personally and expressly authorized his apprehension by A-Affordable Bond if he missed a court appearance. The fact that Mr. Flyinghawk had missed a court appearance is found in the following testimony of Mr. Flyinghawk:

- obviously, you were at her house. You were not in custody. Were you aware of any warrants for your arrest at that point?

A. yes, I was.

Q. And had you made any efforts to deal with that?

A. I had contacted the bond company that I was on bond with to let them know that I was working out of town and that I would be in town. I didn't know what date exactly I would be back in town, but I would contact them when I was in town, and that I would take care of it then. And the bondsman - - I don't remember the bondsman's name.

Q. Here's what we'll do. You're a little quiet, interestingly. But can you move up, or can you pull that microphone just a little bit closer so we can hear you.

A. Sure.

Q. Okay. Thank you. And so you said that you contacted the bondsman and told him what?

A. I told him that I was working out of town, and that I would contact him when I got in town. I didn't know the exact date that I would be in town. And he told me that was fine, just to contact him when I got back in town so that way the cops wouldn't pick me up and he wouldn't lose the bond, I believe, or the money that he had posted. So that way he could bring me in himself, and that way it would be - - he would take me as a walk-in. Tr. 2, P. 309. L.2 to P.310, L5.

A-Affordable Bail Bondsman Kurt Schienbeins hiring of Mr. Lehman as a bounty hunter is found in the following testimony:

Q. And it would be fair to say that during your phone conversation with Mr. Lehman, you basically authorized him to pick Flyinghawk up for you, and

subsequently made arrangements for him to meet with Ms. Lorenzen - - excuse me - - Ms. Mitchell at the county jail?

A. That's the way it went down. That isn't exactly the way it happened. I did not authorize the five hundred dollars to be given to the young lady that got the money, but she had already done it. Tr. 2, P.286. L.21 - 25 P. 287, L.1 - 5.

The jury was instructed on bounty hunters as follows:

An unlicensed bail recovery agent, or bounty hunter, has the power to lawfully make an arrest if the agent is acting on a bail bond surety's behalf where the person arrested personally and expressly authorized his apprehension by the surety. Tr. 3, P.396, L.15-21.

The trial court's comments on Kidnaping and Mr. Lehman's right as a bounty hunter to apprehend Mr. Flyinghawk were:

THE COURT: Well, of course the elements of Kidnaping was an abduction, which everyone agrees, that he could do that if he was a bounty hunter. T.of.P., P.5, L.20-22.

THE COURT: - - and it's too bad - - I mean. if Mr. Lehman had taken him and taken him to the jail right away, I don't think there would have been a case here, but there were all the shenanigans that were going - - and I think that's probably what troubled the jury too, that this might have had good intentions when it started, but it ended up in a different way, you know. T.of P., P.6, L.16-21.

The jury instruction given to the jury in this case on Kidnaping says that the Essential Elements of the Offense are:

The State's burden of proof is satisfied if the evidence shows beyond a reasonable doubt, the following essential elements:

First on or about November 7, 2008, in Cass County, North Dakota, the Defendant, Troy Terrance Lehman, having abducted, continued to restrain Daniel Flyinghawk: and (emphasis added)

And secondly the Defendant did so intending to hold Daniel Flyinghawk for ransom and reward. Tr.3, P.396, L.8-16

According to 1) above abducted is an essential element of Kidnaping. It is Mr. Lehman's contention that he never abducted Mr. Flyinghawk, because on November 7, 2008 when he went to 713 30th St. North in Fargo, North Dakota and apprehended Mr. Flyinghawk, he was acting as a bounty hunter and agent for A-Affordable Bail Bonds.

The State never presented any evidence to dispute the fact that Mr. Lehman had been hired as a bounty hunter by Bondsman Schienbein of A-Affordable Bonds or the fact that at the time Mr. Lehman apprehended Mr. Flyinghawk, Mr. Lehman was a bounty hunter.

In this case about two hours elapsed from the time Mr. Flyinghawk was lawfully apprehended and the time he was delivered to the Cass County jail. Therefore a question could arise as to whether or not the restraining of Mr. Flyinghawk for two hours after his lawful apprehension was an unlawful restraint. If there is a question about what occurred during the two hours after Mr. Flyinghawk was apprehended the charge that should have been brought against Mr. Lehman was unlawful restraint.

Crimes involving unlawful restrain are found in NDCC 12.1-18-03.

12.1-18-03. Unlawful imprisonment.

1. A person is guilty of a class A misdemeanor if he knowingly subjects another to unlawful restraint.
2. It is a defense to a prosecution under this section that the actor is a parent or person in equivalent relation to the person restrained and that the person restrained is a minor.

Restrain is defined in NDCC 12.1-18-04(2)

2. "Restrain" means to restrict the movement of a person unlawfully and without consent so as to interfere substantially with his liberty by removing him from his place of residence or business, by moving him a substantial distance from one place to another, or by confining him for a substantial period. Restraint is "without consent" if it is accomplished by: a. force, intimidation, or deception; or b. any means, including acquiescence of the victim, if he is a child less than fourteen years old or an incompetent person, and if the parent, guardian, or person or institution responsible for the general supervision of his welfare has not acquiesced in the movement or confinement.

The State could argue that Mr. Flyinghawk was abducted according to the definition of abduction NDCC 12.1-18-04(1).

12.1-18-04. Definitions. In this chapter:

1. "Abduct" means to restrain a person with intent to prevent his liberation by:
 - a. Secreting or holding him in a place where he is not likely to be

found; or

b. Endangering or threatening to endanger the safety of any human being.

The problem with this argument is that Mr. Lehman according to the testimony and the jury instruction on bounty hunting was acting as bounty hunter when he apprehended Mr. Flyinghawk. Driving Mr. Flyinghawk around Fargo and letting him use Mr. Lehman's cell phone is not secreting or holding Mr. Flyinghawk in a place he isn't likely to be found. Mr. Flyinghawk's getting out of the car was never prevented by threatening to endanger his safety or anyone else's. The threats made by Mr. Lehman to Mr. Flyinghawk in this case were made after the tire on the car was shot and because Mr. Lehman believed Mr. Flyinghawk had while using Lehman's cell phone arranged the shooting of the tire. For these threats Mr. Lehman was properly charged with terrorizing.

Then there is the problem that the trial court never instructed the jury on the definition of abduct. The word abduct appears in the following jury instructions:

1) A person who abducts another, or having abducted another, continues to restrain the other person with intent to hold the victim for ransom or reward, is guilty of Kidnaping. Tr. 3, P.396, L.1-7.

2) The State's burden of proof is satisfied if the evidence shows, beyond a reasonable doubt, the following essential elements:

First, on or about November 7, 2008, in Cass County, North Dakota, the Defendant, Troy Terrance Lehman, having abducted, continued to restrain, Daniel

Flyinghawk. Tr.3. P.396, L.4-14.

The following language in State vs. Kraft 413 NW2d 303 (N.D. 1978) indicates the trial judge should have given such an instruction on abduct even if the State and/or the Defendant didn't request it.

“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 an 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”.

The Defendant's Motion for acquittal should have been granted because a review of the evidence most favorable to the prosecution shows that there isn't sufficient evidence to support a guilty verdict for Kidnaping.

ISSUE II. Whether or not the trial court erred when it failed to instruct the jury on a private person's right to make an arrest?

In North Dakota a private person may make an arrest. The right to make such arrest are set out in NDCC 29-06-20.

29-06-20. When private person may arrest. A private person may arrest another:

1. For a public offense committed or attempted in the arresting person's presence.

2. When the person arrested has committed a felony, although not in the arresting person's presence.
3. When a felony has been in fact committed, and the arresting person has reasonable grounds to believe the person arrested to have committed it.

Since Mr. Flyinghawk was charged with a crime and had jumped bond, Mr. Lehman could have apprehended Mr. Flyinghawk either as a bounty hunter or as a private citizen.

Should the jury have decided Mr. Lehman wasn't a bounty hunter they could have decided his apprehension of Mr. Flyinghawk could still have been made under a private persons right to make an arrest.

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 (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. 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.942, 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 Rule 52(B) of the Federal Rules of Criminal Procedure”.

In the case now before the court Mr. Lehman believes the trial judge's failure to instruct on a private person's right to make an arrest infringes on his substantial rights because in a criminal case the trial court is required to instruct the jury on all essential questions of law involved in the case.

ISSUE III. Is the guilty verdict for Kidnaping an inconsistent verdict that must be set aside because the jury found Mr. Lehman not guilty of

Attempt to Commit Theft by Deception?

In North Dakota according to State v. McClary 2004ND98, 679 NW2d 455 a defendant will get no relief on a claim of inconsistent verdicts unless he can also show that the inconsistent verdicts can't be rationally explained by the evidence and the courts instructions.

Mr. Lehman's claim of inconsistent verdicts includes not only a claim the verdicts are inconsistent but a claim that the verdicts can't be rationally explained by the evidence and jury instructions.

The verdicts in his case that Mr. Lehman claims are inconsistent are the not guilty verdict of Attempted Theft by Deception and the guilty verdict for Kidnaping. The not guilty verdict for Attempted Theft by Deception shows that the jury found that Mr. Lehman didn't attempt to get any money from Mr. Flyinghawk. One of the elements required to be found by the jury before Mr. Lehman can be convicted of Kidnaping is that he attempted to get money by asking for a reward or ransom. Since Mr. Lehman was found not guilty of Attempted Theft by Deception that verdict should have eliminated the element of getting money by reward or ransom in Kidnaping and Mr. Lehman should have been found not guilty of Kidnaping. Because Mr. Lehman was found guilty of Kidnaping and not guilty of Attempted Theft by Deception these verdicts are inconsistent.

As to the charge of Kidnaping the evidence in this case shows:

1. That Mr. Lehman was a bounty hunter on November 7, 2008 when he apprehended Mr. Flyinghawk at 713 30th St. North in Fargo, North Dakota. (See

testimony of Bondsman Schienbein Tr. 2. P.286, L.21 to P.287, L.1-5)

2. That Mr. Flyinghawk had purchased a bail bond from A-Affordable Bail Bonds on November 7, 2008 he was a bail jumper on that bond because he failed to make a court appearance (See testimony of Mr. Flyinghawk Tr. 2, P.309, L.2 to P.310, L.5)

3. That during the trial the State produced no testimony or evidence to prove that on November 7, 2008 Mr. Lehman wasn't a bounty hunter and that Mr. Flyinghawk was a bond jumper.

As to the jury instructions:

1. The jury was instructed on bounty hunters: Tr. 3, P.396, L.15-21

2. On the essential elements of Kidnaping the jury was instructed: Tr. 3, P.396, L.4-14.

Added to the above evidence and jury instructions is a summary of the trial judge's comments:

1. If Mr. Lehman was a bounty hunter could apprehend Mr. Flyinghawk - See T. of P., P.5, L.20-22.

2. If Mr. Lehman had taken Mr. Flyinghawk to jail right after he was apprehended there would be no case - See T. of P., P.6, L.16-21.

The above evidence, jury instructions, and trial judges comments make clear that Mr. Lehman had a right as a bounty hunter to apprehend Mr. Flyinghawk for bond jumping. Therefore Mr. Lehman couldn't abduct Mr. Flyinghawk the charge of Kidnaping should have been dismissed because the verdicts of not guilty on Attempted

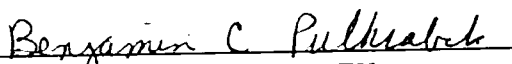
Theft by Deception and guilty of Kidnaping are inconsistent and their inconsistencies can't be explained by the evidence and jury instruction.

CONCLUSION

Because of the above and foregoing on issues I and III this case should be remanded to the trial court and the charges of Kidnaping should be dismissed.

On issue II the case should be remanded to the trial court for a new trial.

DATED at Mandan, North Dakota, this 17 day of March, 2010.


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