

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20120164

State of North Dakota

Plaintiff-Appellee

- VS -

Patrick McGeehan,

Defendant-Appellant

APPEAL FROM THE CRIMINAL JUDGMENT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY CR. NO. 08-10-K-2493
THE HONORABLE DAVID E. REICH, PRESIDING

BRIEF

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“But you need to ask yourself if the - - if the question to ask is, did he hit the officer or not? Do you really think that these two officers with 22 combined years of experience, four from Officer Fullerton, 18 for Officer Moritz, are gonna get up there and lie about what happened? What reason do they have to say he hit Officer Fullerton, but he really didn’t? Did you hear one iota of evidence to tell you that it makes sense Officer Fullerton would lie? ¶1, 34

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ABBREVIATIONS

Page - P.

Line - L.

Jury Transcript - JT

STATEMENT OF THE ISSUES

[¶1] ISSUE I: Is the following statement by the prosecutor in his closing argument improper:

“But you need to ask yourself if the - - if the question to ask is, did he hit the officer or not? Do you really think that these two officers with 22 combined years of experience, four from Officer Fullerton, 18 for Officer Moritz, are gonna get up there and lie about what happened? What reason do they have to say he hit Officer Fullerton, but he really didn't? Did you hear one iota of evidence to tell you that it makes sense Officer Fullerton would lie?

[¶2] ISSUE II: Does the above statement prejudicially effect Mr. McGeehan's substantial rights and deprive him of a fair trial?

NATURE OF THE CASE

¶3] Defendant/Appellant, Patrick Connor McGeehan was issued a citation charging him with Simple Assault (Police Officer) on December 14, 2010.

¶4] An Information charging Mr. McGeehan with Simple Assault (Police Officer) was filed on January 10, 2011.

¶5] An Amended Information charging Mr. McGeehan with Simple Assault (Police Officer) was filed on May 31, 2011.

¶6] The jury trial in this case began on February 29, 2010 and ended with a guilty verdict on March 1, 2012.

¶7] Mr. McGeehan was sentenced on March 13, 2012 and the Criminal Judgment was entered on March 16, 2012.

¶8] Mr. McGeehan filed his Notice of Appeal on March 21, 2012. The Notice of Filing the Notice of Appeal was filed on March 21, 2012.

¶9] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶10] This case involves a charge of simple assault on a peace officer. Tr. P.1, L.10-11.

[¶11] There are two stories as to what happened in this case. The States story is told by three Bismarck Police Officers, Matthew Fullerton, Nicole Moritz and Dwight Offerman. The defense's story is told by Patrick McGeehan. In the State's story, Mr. McGeehan is referred to as the man.

[¶12] The States story begins with Bismarck Police Officer Matthew Fullerton (Officer Fullerton) on December 13, 2012 at about 9:40 p.m. getting a call from dispatch to go to lot 32 at a trailer park with a street address of 2520 East Broadway in Bismarck, North Dakota to investigate a possible domestic violence. Tr. P.16, L.10 to P.17, L.18. It is a policy of the Bismarck Police Department to send a minimum of two officers to any domestic disturbance. Tr. P.16, L.10-18. The other police officers who responded to this domestic disturbance call was Bismarck Police Officer Nicole Moritz (Officer Moritz). Tr. P.18, L.11-13. Officer Fullerton and Officer Moritz on December 13, 2010 were driving separate marked Bismarck police vehicles. Officer Fullerton and his vehicle arrived at lot 32 at the trailer park first. Tr. P.18, L.14-17. When Officer Fullerton arrived he exited his vehicle and noticed two subjects in the trailer home. He watched as the two subjects went to the rear of the trailer home. Tr. P.18, L.21-25.

[¶13] Officer Fullerton then walked from his vehicle to a porch approximately four feet by four feet which is located just outside of the front door of the trailer. Tr. P.20, L.1-11. When Officer Fullerton got onto this porch officer Moritz arrived in her vehicle. Tr. P.20, L.12-15.

[¶14] Officer Fullerton knocked three of four times on the front door of the trailer. Then he heard a male voice from inside the trailer telling him to “to get the fuck off my property.” Officer Fullerton responded to the voice by saying we are the Bismarck Police Department and are investigating an alleged domestic violence. Tr. P.21, L.17-21.

[¶15] A male then answered the door. This male was wearing shorts, no shirt and had his right hand wrapped in a towel that was soaked with blood. Tr. P.22, L.2-13. This male was angry and again told the officers to get off his property. The male then slammed the door. Officer Fullerton grabbed the door handle to prevent the door from locking. The door then was opened again and the same man was in the door way. This man was still angry and again asked the officers to leave. Officer Fullerton told the man again that the officers were investigating a domestic violence altercation. The man then slammed the door shut. Again officer Fullerton grabbed the handle to prevent the door from locking.

[¶16] A short time later the door opens and the same man appears in the door way. He charges Officer Fullerton. Tr. P.24, L.16-20. The man then starts throwing punches at Officer Fullerton. Tr. P.25, L.8-10. The man hits the right side of Officer Fullerton’s face and the top of Officer Fullerton’s head. Tr. P.25, L.16-20. Officer Moritz then gets behind the man and tries to pull him away from Officer Fullerton.

[¶17] The man continues to be physically combative. Officer Fullerton decides to use his taser on the man. Tr. P.27, L.12-17. A taser is an electronic restraint device that can help gain compliance and incapacitate. Tr. P.27, L.20-25. The current in a taser is 50,000 volts. Tr. P.28., L.2-5.

[¶18] Officer Fullerton aimed the taser at the man’s chest. The man had no shirt

on. Tr. P.30, L.4-18. Officer Fullerton deployed the taser and the proper sound was heard. Even though both barbs from the taser penetrated the mans chest, the taser had little effect on him. Tr. P.30, L.19 to P.31, L.19.

[¶19] Officer Fullerton took the cartridge out of the taser so he could drive-stun the man. This drive stunning was done by Officer Fullerton pulling the trigger of the taser and deploying the taser to the small of the man's back. The drive-stun was effective because the man immediately placed his arms behind his back. Then Officer Fullerton and Officer Moritz got the man to the floor of the deck and put hand cuffs on him. Tr. P.33, L.1-16.

[¶20] Sargent Dwight Offerman arrived about the same time that Officer Fullerton and Moritz got the man onto the floor of the 4 x 4 deck. Tr. P.33, L.17-23. The man was still agitated and said he mother was a lawyer, he had cameras outside his residence and he was going to sue the police. Tr. P.35, L.6-14.

[¶21] Officer Moritz's story about what went on, on the deck of the trailer on December 13, 2010 is similar to Officer Fullerton's. Tr. P.56, L.8 to P.66, L.25.

[¶22] The man was placed in Sargent Offerman's vehicle. Tr. P.67, L.5-10. Sargent Offerman talked to the man while he was in Offerman's vehicle and got the man's side of the story. Tr. P.80, L.12-15.

[¶23] Sergeant Offerman transferred custody of the man over to Bismarck Police Officers West and Dollinger. Tr. P.85, L.16-21.

[¶24] The following is Mr. McGeehan's story.

[¶25] Mr. McGeehan on December 13, 2010 lived in a trailer located at Lot 32 with a street address of 2520 East Broadway, Bismarck, North Dakota. Living with him

was Misty Marie Bauman. Tr. P.96, L.19-24.

[¶26] On December 13, 2010 Ms. Bauman and Mr. McGeehan were arguing because he had lost his job and she had miscarried their child. Ms. Bauman was blaming Mr. McGeehan for everything. Tr. P.100, L.15-24.

[¶27] Prior to the police appearing on December 13, 2010, Mr. McGeehan and Ms. Bauman's mother, Linda Boom argued in the trailer at lot 32. Mr. McGeehan had told Ms. Boom to leave. Ms. Boom left. When she got to her trailer she called the Bismarck Police about a domestic at Mr. McGeehan's trailer. Tr. P.106, L.9-16. After that call Bismarck Police Officers Fullerton and Moritz went to the trailer at lot 32 and knocked on the door. Ms. Bauman didn't want Mr. McGeehan to open the door. Mr. McGeehan decided to open the door and tell the police to get off his property. Tr. P.104, L.4 to P. 105, L. 24. Mr. McGeehan then shut the door but was unable to lock it. Tr. P.105, L.25 to P.107, L.4. Officer Fullerton was pushing on the door. Mr. McGeehan was on the other side of the door. The door came open again and Mr. McGeehan told police to leave. He then shut the door and thought he locked it. Tr. P.107, L.11-17.

[¶28] Mr. McGeehan started walking toward the back bedroom. Then he heard something and turned around and saw Officer Fullerton about 2 feet into the trailer. Mr. McGeehan then told Officer Fullerton he was breaking and entering in violation of Mr. McGeehan's civil rights. Tr. P.107., L.18 to P.108, L.5. Mr. McGeehan then lifted his left hand in a scolding manner and told Officer Fullerton to leave. Officer Fullerton then walked out onto the 4 x 4 deck. Mr. McGeehan then stepped out on the trailer's deck and said "get the F off my property right now. Officer Fullerton then tased him. Tr. P.108, L.21 to P.109, L.25. Both police officers then slammed Mr. McGeehan against the

railing and told him to stop resisting. Officer Moritz then tried to hand cuff him and Officer Fullerton drive-stunned him with the taser. Tr. P.110, L.16-25.

[¶29] After being drive-stunned Mr. McGeehan told the officer his mother was a lawyer and his place had surveillance. Mr. McGeehan in his testimony before the jury admitted that he lied about his mother being a lawyer and that his house didn't have surveillance.

[¶30] In the States closing argument the prosecutor vouched for the honesty of Bismarck Police Officers Fullerton and Moritz when he said: "But you need to ask yourself if the - - if the question to ask is, did he hit the officer or not? Do you really think that these two officers with 22 combined years of experience, four from Officer Fullerton, 18 for Officer Moritz, are gonna get up there and lie about what happened? What reason do they have to say he hit Officer Fullerton, but he really didn't? Did you hear one iota of evidence to tell you that it makes sense Officer Fullerton would lie? That it makes sense Officer Moritz would lie? No. He hit him. Tr. P.144, L.24 to P.145, L.7

[¶31] During the trial the defense made no objection to the above statement by the prosecutor.

[¶32] The jury in this case began deliberating at 4:33 pm on February 29, 2012. Tr. P.167, L.9. The jury sent three questions to the court. One question requested audio testimony. The court played the requested audio testimony to the jury. All proceedings for that day adjourned at 9:10 p.m. Tr. P.167, L.9 to P.185, L.9.

[¶33] On March 1, 2012 at 8:14 a.m. the trial judge, Defendant and counsel without the jury had a hearing in the courtroom. The jury was then brought into the

courtroom at approximately 8:15.a.m. and more audio testimony requested by the jury was played. A recess was taken from 9:28 to 9:38 a.m. Then more audio testimony requested by the jury was played. The jury then resumed deliberations at 10:19.a.m the jury returned a verdict, at 10:59 a.m. the jury returned a verdict. Tr. (Day 2) P.186, L.2, P.192, L.3-4.

ISSUES

[¶34] ISSUE I: Is the following statement by the prosecutor in his closing argument improper:

“But you need to ask yourself if the - - if the question to ask is, did he hit the officer or not? Do you really think that these two officers with 22 combined years of experience, four from Officer Fullerton, 18 for Officer Moritz, are gonna get up there and lie about what happened? What reason do they have to say he hit Officer Fullerton, but he really didn't? Did you hear one iota of evidence to tell you that it makes sense Officer Fullerton would lie?

[¶35] ISSUE II: Does the above statement prejudicially effect Mr. McGeehan's substantial rights and deprive him of a fair trial?

ARGUMENT

[¶36] In this case the defense believes the prosecutor in his closing argument made improper comments to the jury when he told the jury to believe police officers Fullerton and Moritz's testimony instead of Defendant, McGeehan because:

1. Fullerton and Moritz had 22 years of experience between them as police officers;
2. Police officers aren't going to lie about what happened;
3. Police officers don't have any reason to say Mr. McGeehan hit Officer Fullerton if Mr. McGeehan hadn't hit Office Fullerton;

4. There is not one iota of evidence that Officer Fullerton lied;
5. There is not one iota of evidence that Officer Moritz lied.

[¶37] According to *State vs Evans* 1999 ND 70, 593 NW2d 336 [10]. The United States Supreme Court has addressed improper prosecutor comments in argument to the jury:

[S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. 1, 18-19 (1985). See also *Williston v. Hegstad*, 1997 ND 56, ¶8, 562 N.W.2d 91.

[¶38] The problem with the defense's argument about the State's improper statements in the State's closing argument is that the defense didn't object when the prosecution in his closing argument commented about:

1. The police officers' experience;
2. Police officers not lying;
3. Police officers not having any reason to say something happened if it didn't;
4. There not being an iota of evidence to indicate that the officers lie.

[¶39] A failure to object makes it more difficult but Defendants can still prevail on appeal according to *Evans* Supra ... [9] When there has been no objection to a prosecutor's argument, we do not reverse unless the challenged remarks constitute

obvious error affecting a defendant's substantial rights. State v. Harmon, 1997 ND 233, ¶26, 575 N.W.2d 635; State v. Barnett, 543 N.W.2d 774, 779 (N.D. 1996). We exercise our authority to notice obvious error cautiously and only in exceptional circumstances in which the defendant has suffered serious injustice. State v. Olander, 1998 ND 50, ¶11, 575 N.W.2d 658; State v. McClean, 1998 ND 21, ¶9, 575 N.W.2d 200. In deciding if there was obvious error, we consider the probable effect of the prosecutor's improper comments on the jury's ability to judge the evidence fairly. State v. Weatherspoon, 1998 ND 148, ¶23, 583 N.W.2d 391.

[¶40] Evans Supra says ...[¶14] In determining if a prosecutor's improper remarks in jury argument prejudicially affected the defendant's substantial rights, so as to deprive the defendant of a fair trial, a reviewing court considers “(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of [Defendants'] guilty; and (3) the curative actions taken by the trial court.” United States v. Eldridge, 984 F.2d 943, 946-47 (8th Cir. 1993).” United States v. Cannon, 88 F.3d 1495, 1502 (8th Cir. 1996).

[¶41] As to the cumulative effect of the prosecutor's misconduct:

- a) it was done during State's closing argument and not in response to anything the defense had done;
- b) it invaded the province of the jury to determine whether or not law officers who testified told the truth;
- c) it bolstered the officers testimony and artificially increased its probative strength to the jury;
- d) this case presented only one issue for the jury and that was which of the two

stories to believe and the States improper closing argument put the governments thumb on the seal of justice and may well tipped the balance in its favor.

[¶42] Therefore the prosecutors statements in a, b, c & d above during his closing argument are improper statements that contributed to the guilty verdict in this case.

[¶43] As to the properly admitted testimonies and evidence of defendants guilt:

a. There was two stories, one that would support a not guilty verdict and one that would support a guilty verdict so the jury verdict could have gone either way;

b. Questions sent out by the jury after start of deliberations showed the jury was divided as to guilty and innocense of Mr. McGeehan;

c. The fact that the jury asked to have and the court allowed the testimony of the witnesses be given to them a second time;

d. The length of time the jury deliberated.

[¶44] a, b, c and d above wouldn't have happened if the jury hadn't had serious questions about whether or not the defendant was guilty or innocent.

[¶45] As to the curative action by the trial court, there was no objection by the defense to the States improper statements during the States closing argument. Therefore there was no curative action taken.

CONCLUSION

[¶46] The State made improper statements in its closing argument vouching for the truth of its police officers. These statements prejudicially affected Mr. McGeehans substantial rights and deprived him of a fair trial.

[¶47] This case should be remanded to the trial court and direct the trial court to grant Mr. McGeehan a new trial.

Dated this 18th day of July, 2012.

/s/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek

[¶48] **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 18, 2012, she served, by e-mail, a copy of the following:

APPELLANT'S BRIEF AND APPENDIX

to:

Lloyd Suhr
Burleigh County Assistant State's Attorney
lsuhr@nd.gov

By mail to:

Patrick McGeehan
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on July 18, 2012, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S BRIEF and APPENDIX.

/s/ Sharon Renfrow
Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek