

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20120164

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

State of North Dakota,)
)
Plaintiff-Appellee,)
)
-vs-)
)
Patrick Cannon McGeehan II,)
)
Defendant-Appellant,)
.....)

AUG 10 2012

STATE OF NORTH DAKOTA

Supreme Ct. No. 20120164

District Ct. No. 08-10-K-2493

SA File No. F757-10-12

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM THE CRIMINAL JUDGMENT

Burleigh County District Court
South Central Judicial District
The Honorable David E. Reich, Presiding

Lloyd C. Suhr
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STATEMENT OF THE ISSUE

Whether the State's closing argument gave rise to obvious error?

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STATEMENT OF FACTS

While the Statement of Facts presented by the Appellant (McGeehan) is substantially accurate, it does not reference certain specific portions of the trial transcript necessary to develop the State's argument. Accordingly, the State supplements McGeehan's Statement of Facts.

Bismarck Police Officer Matt Fullerton (Fullerton) testified that at the time of trial he had been a police officer for four years. [Trans. p. 15, lines 20-21]. He was dispatched to a Bismarck address, (later determined to be McGeehan's) along with officer Nicole Moritz (Moritz) for a possible domestic violence call. Id. at p. 16, lines 10-25; p. 17; p. 18, lines 1-13.

While Fullerton was standing on the porch to McGeehan's residence, McGeehan jumped out towards him throwing punches and assaulted him. Id. at p. 25, lines 5-10; p. 43, lines 7-8. There were no pictures or audio or video recordings of the resulting injuries. Id. at p. 43, lines 9-12.

Moritz testified that she had been an officer with the Bismarck Police Department for eighteen years. Id. at p. 55, lines 4-8. She testified that McGeehan came flying out of the trailer at Fullerton swinging his arms at him and attacking him. Id. at p. 61, lines 8-9. Moritz testified that neither she nor Fullerton had gone inside of the trailer. Id. at p. 62, lines 3-5.

McGeehan testified that Fullerton had entered his residence. Id. at p. 107, lines 24-25. He denied that he assaulted either Fullerton or Moritz. Id. at p. 117, lines 23-25; p. 125, lines 4-13. McGeehan opined that he was arrested and detained for assault on a police officer not because he actually assaulted

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Fullerton, but because of his disrespect shown towards the officers and because he advised them that he was going to pursue action against them. Id. at p. 125, lines 18-23. McGeehan admitted that he lied to the officers by telling them that his mother was a lawyer. Id. at p. 125, lines 24-25; p. 126, lines 1, 21-23.

During closing argument the State made the following argument, which was not objected to:

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.

[Trans. p. 144, lines 24-25; p. 145, lines 1-7].

The trial court gave the jury an instruction on weight and credibility. [Reg. of Actions, Doc ID # 70 (Jury Instructions) at p. 13]. Specifically, the instruction provided that in deciding credibility the jury could consider the age, intelligence and experience of a witness, and the reasonableness or unreasonableness of their testimony, among other factors. Id. at p. 13, lines 5-11.

The trial court also gave the jury an instruction providing that the arguments of counsel were not evidence. [Reg. of Actions, Doc ID # 70, (Jury Instructions) p. 18, line 7]. The instruction provided that if counsel had made

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statements or offered opinions not supported by the evidence, then they were
to be disregarded. Id. at p. 18, lines 8-12.

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ARGUMENT

McGeehan did not object to any portion of the State's closing argument. Accordingly, this Court will not reverse the conviction unless the argument amounts to obvious error affecting McGeehan's substantial rights. State v. Rivet, 2008 ND 145, ¶ 6, 752 N.W.2d 611 (citing Hawes v. N.D.Dept. of Transp., 2007 ND 177, ¶10, 741 N.W.2d 202); N.D.R.Crim.P. 52. This Court will notice a claimed error not brought to the trial court's attention if there was an error that is plain and effects substantial rights. Id.

In deciding if there is obvious error, the probable effect of any improper comments on the jury's ability to decide the evidence fairly are considered. Id. The objective is to determine whether an error was so prejudicial in nature that substantial injury occurred and a different result would have occurred but for the error. State v. Schimmel, 409 N.W.2d 335, 339 (N.D. 1987) (citing State v. Micko, 393 N.W.2d 741, 746 (N.D. 1986). If no such prejudice resulted the error is considered harmless. Id.

The control of closing arguments is largely within the trial court's discretion, although counsel's arguments must be confined to facts in evidence and reasonable inferences that flow from them. Rivet, at ¶ 3 (citing City of Williston v. Hegstad, 1997 ND 56, ¶ 8, 562 N.W.2d 91). A prosecutor's closing argument may properly draw reasonable conclusions and inferences therefrom, but a prosecutor may

1 not create evidence by argument or by injecting their own personal
2 beliefs. Id. at ¶ 5 (citing State v. Clark, 2004 ND 85, ¶ 9, 678 N.W.2d
3 765). An attorney has a right to argue the credibility of witnesses to
4 the jury as long as the argument is confined to the evidence and fair
5 inferences arising therefrom. Hegstad, at ¶ 12.
6

7 Here, all of the evidence came from testimony. Accordingly,
8 the credibility of the witnesses was an extremely important factor for
9 the jury. McGeehan's version of events was fundamentally and
10 materially different than the officers' versions. The officers' versions
11 of the events in question were consistent with each other. In order for
12 the jury to accept McGeehan's version of events, they would have to
13 accept that the officers' testimony lacked credibility.
14

15 The State's closing argument did not inject personal beliefs or
16 create evidence about the officers' credibility. The argument was
17 premised upon: 1) the lack of evidence that Fullerton and Moritz,
18 experienced officers, lied about what happened; 2) the consistency of
19 their testimony; and 3) the fact that McGeehan himself had lied to the
20 officers about his mother being an attorney, drawing his own
21 credibility into question. This record provided the State with a
22 reasonable evidentiary basis upon which to make a fair argument as to
23 the officers' credibility versus that of McGeehan. That is what the
24 State's closing argument properly did.
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1 The propriety of the State's argument is also supported by the
2 trial court's instruction to the jury on weight and credibility. [Reg. of
3 Actions, Doc ID # 70 (Jury Instructions) at p. 13]. Specifically, the
4 instruction provided that the jury could consider the age, intelligence
5 and experience of a witness, and the reasonableness or
6 unreasonableness of their testimony, among other factors. Id. at p. 13,
7 lines 5-11. Fullerton and Moritz were both experienced officers, who
8 gave consistent testimony that McGeehan had assaulted Fullerton.
9 McGeehan on the other hand implied in his testimony that his arrest
10 for assaulting Fullerton stemmed not from an actual assault, but rather
11 as an extreme response to his disrespect and claim that he would take
12 further action against the officers. The State's argument was a proper
13 response thereto, premised on the experience of the officers, the
14 consistency of their testimony, and the reasonableness or
15 unreasonableness of McGeehan's claim. All of these components to
16 the State's argument were appropriate factors under the trial court's
17 instructions.
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21 Even if this Court were to find that the argument was improper,
22 any error does not rise to the level of being obvious error. The State
23 asserts two supporting reasons.
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25 First, the challenged comment was made once. It was but one
26 argument of several made during the course of the State's closing
27 argument.

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Second, the trial court’s instructions to the jury also made it clear that the arguments of counsel were not evidence. [Reg. of Actions, Doc ID # 70, (Jury Instructions) p. 18, line 7]. The instructions provided that if counsel made statements or offered opinions not supported by the evidence, they were to be disregarded. Id. at p. 18, lines 8-12. This Court has previously held that such an instruction minimized any prejudice created by an alleged improper closing argument, precluding a finding of obvious error. Rivet, at ¶¶5-7; Clark, at ¶ 11.

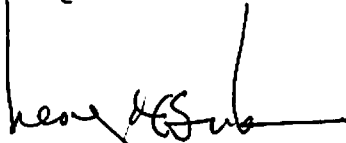
Given the importance of witness credibility in the case, the State’s commentary in closing arguments about the evidentiary basis supporting the officers’ testimony as compared to that of the contradictory testimony from McGeehan was an appropriate argument. However even if it was deemed to be error, this single statement was not so prejudicial in nature that a substantial injury occurred and a different result would have resulted but for the error. McGeehan’s arguments should be rejected.

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CONCLUSION

Based upon the foregoing, the State respectfully requests that the Criminal Judgment be affirmed in its entirety.

Dated this 10th day of August, 2012.



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STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

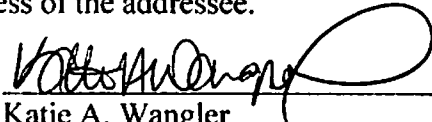
Katie A. Wangler, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 10th day of August, 2012, I deposited in a sealed envelope a true copy of the attached:

- 1. Brief of Plaintiff-Appellee
- 2. Affidavit of Mailing

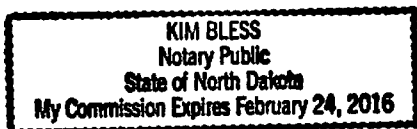
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

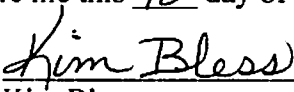
BENJAMIN PULKRABEK
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MANDAN, ND 58554

which address is the last known address of the addressee.


Katie A. Wangler

Subscribed and sworn to before me this 10th day of August, 2012.




Kim Bless
Burleigh County, North Dakota
Notary expires: 02/24/2016