20140332
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 4, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20140332

State of North Dakota,

Plaintiff and Appellee

- vs -

Dallas Pius Lang,

Defendant and Appellant

APPEAL FROM THE CIVIL JUDGMENT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY CR. NO. 08-2014-CR-00957
THE HONORABLE SONNA ANDERSON PRESIDING

BRIEF

BENJAMIN C. PULKRABEK

ATTORNEY AT LAW
402 - 1ST ST. NW
MANDAN, ND 58554
(701)663-1929
N.D. State Bar ID No. 02908
PULKRABEK@LAWYER.COM

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES
TABLE OF CASES

ABBREVIATIONS

Appendix - App.
Transcript - T.
Sentencing - S.
Page - P.
Line. L.

STATEMENT OF THE ISSUES

[¶1] ISSUE: I. Did the trial court err when it denied Dallas Lang's Motion for a mistrial because of statements made by juror Christopher Pieske during voir dire?

ISSUE: II. Did the trial court err when it failed to instruct the jury about disregarding as evidence any statements made during voir dire?

NATURE OF THE CASE

[¶2] On April 3, 2014 a Criminal Complaint was filed charging Dallas Pius Lang with a class C felony Felonious Restraining.

[¶3] A preliminary hearing and arraignment took place on May 5, 2014. At the conclusion of the preliminary hearing Mr. Lang's case was bound over to the district court. Then an information was filed charging Mr. Lang with felonious restraint.

[¶4] An amended criminal information was filed on July 9, 2014.

[¶5] Mr. Lang's felonious restraint jury trial began on September 12, 2014. That trial ended on September 12, 2014 when the jury found him guilty of crime of felonious restraint.

[¶6] Mr. Lang filed a Notice of Appeal on September 24, 2014.

[¶7] A Clerk's Certificate of Appeal was filed on October 20, 2014.

[¶8] On November 4, 2014 a Clerk's Supplemental Certificate of Appeal was filed.

[¶9] Mr. Lang's sentencing took place on November 10, 2014. The sentence he was given was 30 months at the Department of Corrections and Rehabilitation with 12 months suspended for a period of 3 years of supervised probation following his release to run concurrent with the sentence he is now serving.

[¶10] The Criminal Judgment was filed on November 14, 2014.

[¶11] A Clerk's Supplemental Certificate of Appeal was filed on November 14, 2014.

[¶12] Mr. Lang filed a Notice of Appeal on November 25, 2014.

[¶13] A Notice of Filing the Notice of Appeal was filed on November 25, 2014 along with a Clerk's Supplemental Certificate of Appeal.

[¶14] A Clerk's Supplemental Certificate of Appeal was filed on December 2, 2014.

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

STATEMENT OF FACTS

[¶16] On April 2, 2014 Delah, Galusha, her baby, Wes Bennett and Dallas Lang were at Mr. Lang's trailer house at 544 Sherwood Lane in Bismarck, North Dakota. Mr. Bennett and Mr. Lang were remodeling the bathroom in the trailer house. Mr. Lang started to wrestle with Mr. Bennett. Mr. Bennett didn't want to wrestle and decided to leave Mr. Lang's trailer home.

[¶17] At about 10:44 p.m. on April 2, 2014 Bismarck Police officers Scarlett Vetter and Chad Fetzer were at the Pony Express in South Bismarck to discuss a possible assault. The person they discussed the possible assault was with Wes Bennett. Mr. Bennett had injuries to his face and blood on his face and hands. After Mr. Bennett told them what had happened to him, Officers Vetter and Fetzer decided to conduct a welfare check on the house at 544 Sherwood Lane in Bismarck, North Dakota.

[¶18] When officers Vetter and Fetzer arrived at the trailer house at 544 Sherwood Lane they could hear a male voice yelling. They approached the trailer house and knocked on the door. The yelling stopped, but no one came to the door. After that the officers could hear occasional foot steps. They also saw someone look out the front window of the trailer.

[¶19] Officers Vetter and Fetzer decided not to do anything further until back up arrived. While they waited they called dispatch to check out the 544 Sherwood address

and the vehicle in the driveway to be sure they belong to Mr. Lang. Dispatch response to their call was that the address and vehicle belonged to Mr. Lang.

[¶20] The back up that arrived included Kevin Hagen who was Mr. Lange's probation officer. One of the conditions of Mr. Lang's probation was that his probation officer Kevin Hagen could search Mr. Lang's trailer house. Therefore after probation officer Hagen arrived Mr. Lang's trailer house could be searched.

[¶21] becaues of the amount of time that had past since officers Vetter and Fetzer had arrived it was apparent that no one was coming to the door. So, the officers decided to use a ram to break open the first door. The second door couldn't be broken open with a ram because it opened outward. Entry of the second door was made by tearing it apart.

[¶22] After the officers got in the trailer house they found:

1. Mr. Lang on the floor of the hallway with two dogs;
2. Ms. Galusha in a bedroom with a baby;
3. Ms. Galusha had a split lip and was nervous and scared; and
4. Mr. Lang denied hitting Ms. Galusha.

[¶23] Because on the totality of the circumstances Mr. Lange was arrested.

[¶24] At Mr. Lang's trial one of the prospective jurors was Christopher Pieske. During the voir dire of Mr. Pieske the following was said: T. P.20, L.3-10.

MR. BORGEN: Your Honor, I am going to move for cause on Mr. Pieske for this reason. Although I think Mr. Pieske could be impartial, the fact of the matter is he works for the State and having one of the witnesses be an obligor or obligee of him on a case that he works could create an illusion of impropriety at the very least if not an impropriety. So I ask for Mr. Pieske to be removed for cause.

[¶25] The court's response: T.P.20., L.17-18.

THE COURT: All right. I'm going to deny the motion for cause.

[¶26] The following was said during voir dire when the prosecutor Dawn Deitz questioned Mr. Pieske was: T.P.28, L.25 to P.31, L.1-15.

Now, Mr. Pieske, I'm going pick on you. You used to intern for the Burleigh County State's Attorney Office?

MR. PIESKE: Briefly, yes.

MS. DEITZ: And prior to that Grand Forks County?

MR. Pieske: Yes, I was an intern in Grand Forks County for a year. I was at Burleigh County just studying for the bar for a couple months.

MS. Deitz: Now, in that experience you, I guess, got to work closely with the attorneys, help them with various cases. In any of that did you come in contact with drug related cases or domestic related cases?

MR. PIESKE: Yes.

MS. DEITZ: And in that do you feel it gave you any sort of extra education if you will?

MR. PIESKE: Just that I had more experience with it than most people.

MS. DEITZ: Do you feel that you possess maybe some specific knowledge with regard to domestic cases?

MR. PIESKE: Probably, yes, because I've had - - in one particular case I had to argue - - I wrote some briefs to try to introduce some expert testimony. I won't go into more detail than that, but I had to do some research involved with that.

MS. DEITZ: In all those cases that you worked on, do all the victims act the same?

MR. PIESKE: No.

MS. DEITZ: Do they all stick to their story the entire time?

MR. PIESKE: No.

MS. DEITZ: Why is that?

MR. PIESKE: There's a lot of different reasons - -

MR. BORGEN: Your Honor, I am going to object here. If we could approach?

THE COURT: You may.

(Sidebar.)

MR. BORGEN: She's turning this into testimony on domestic violence and getting him to poison the jury pool basically on how domestic violence victims are going to change their story, and this is inappropriate voir dire.

THE COURT: I agree.

MS. DEITZ: Okay.

THE COURT: I think you need to stop, and I might even reconsider for cause just because he's apparently done research in this area. And I think that that's - - It may do us best to be - - he indicated he can be fair and impartial with the witnesses and that, but I think if he's got background I may dismiss him for cause.

MR. BORGEN: And additionally he's a former employee of the State's Attorney Office, and based upon that I renew my motion for cause.

MS. DEITZ: I still think he can be impartial and unbiased. A number of people know people involved from law enforcement and our office and they're able to remain impartial. Again, he isn't - - he's working for child support which isn't directly related.

THE COURT: All right. I'm going to reverse myself and grant the challenge for cause based upon his former employment with the State's Attorney Office.

MS. DEITZ: Okay. Are you going to release him right now?

THE COURT: I don't think I will. I think at this point we'll continue on, and I'll just remove him. You don't have to use a challenge.

MS. DEITZ: So you're not going to fill another seat?

THE COURT: I am going to wait.

(End of sidebar.)

[¶27] Mr. Lang moved for a mistrial and the trial judge denial is found at: T. P.50, L.20 to P.51, L1-15

MR. BORGEN: After the jury was selected, I didn't have an opportunity to make a motion because the way the breaks went. But I would make a motion for mistrial for improper jury voir dire by the State. You can't unring the bell, so basically the State provided testimony through one of the perspective jurors. An objection was made. We approached. But you can't unring the bell. If the Court denies it, I would ask for a curative instruction for the Court to inform the jury that anything said during voir dire was not evidence. It should not be considered by the jury.

THE COURT: Ms. Deitz?

MS. DEITZ: State would resisted the motion. They're already going to receive

an instruction about the evidence that is presented in court today. So I think it's already been remedied essentially.

THE COURT: All right. And just so that I'm clear, you're referring the questions of Mr. Pieske?

MR. BORGEN: Yes.

THE COURT: All right. I'm going to deny the motion at this time. We'll address whether there's a need for a curative instruction at one of the breaks.

[¶28] Mr. Lang again moved for a mistrial and the trial judge denial is found at: T. P.120, L.9-19.

MR. BORGEN: Yes, two matters. I need to renew my Rule 29 motion for directed verdict notwithstanding the verdict of the jury, and the second thing was renew my objection to find the mistrial based on the voir dire.

THE COURT: All right. And Ms. Deitz?

MS. DEITZ: State resists based upon the previously relayed argument.

THE COURT: And my decisions on those prior motions will stand, but they are noted for the record for purposes of appeal, and will stand and be denied then. All right. Thank you. we are adjourned.

[¶29] At the sentencing on November 10, 2014 and the trial judge's denial of Mr. Lang's Motions are found at: S.T. P.2, L.19 to P.4, L.1-13.

MR. BORGEN: We have, your Honor. But before we get into that, I did want to renew for the record the motion for the mistrial that was made. In reviewing everything before court, I would note that California vs. Chapman the U.S. Supreme court's case lays out that before a court can deal with a constitutional error and render it harmless, it must

first be able to declare that that harmless error was beyond a reasonable doubt. And what I'm talking about in this case, if the Court will remember, during jury voir dire the defense objected and ultimately made a motion for a mistrial based on the State's voir dire of Mr. Pieske, who's an attorney who used to be a law clerk for Grand Forks county and tried to get into some expert testimony trying to elicit expert testimony during voir dire. So we would ask the Court to again declare a mistrial based on that, there was error. Obviously there was error and the Court stopped the State from any further questioning along that line, had Mr. Pieske wait as to not dismiss him in front of the rest of the jury, but no longer asked any questions on that line because there was error in doing that.

We would ask the Court to rule that that error cannot be held beyond a reasonable doubt to have been held harmless against the Defendant and declare a mistrial and reset this for a new trial.

THE COURT: Ms. Deitz.

MS. DEITZ: Your Honor, the State believes the Court ruled appropriately at the time of trial. There was a point in which the Court indicated that if it felt it was necessary, it would give a corrective instruction if you will. And there was no need ever found for that either. As soon as the objection was made, the questioning was immediately stopped. So I don't believe there was any error. And the Court ruled appropriately at that time.

THE COURT: My recollection was then after we moved on from that there wasn't - - the issue wasn't really addressed any further. It wasn't brought up by the defense for the corrective instruction and I didn't recall providing it. I don't believe the State asked for it. I do recall the inquiry. And I agree it was inappropriate for the State to make those inquiries of Mr. Pieske in voir dire. But I think the action the Court took - - by

dismissing Mr. Pieske and ceasing the questioning and we moved on. I am going to find that it did not result in a constitutional violation and that it would not result in a mistrial. So I'm going to deny the motion.

ISSUES

[¶30] **ISSUE I. Did the trial court err when it denied Dallas Lang's Motion for a mistrial because of statements made by juror Christopher Pieske during voir dire?**

ARGUMENT

[¶31] In this case Defendant and Appellant, Dallas Lang is alleging a constitutional error occurred during the voir dire of juror Christopher Pieske. The standard of review for a constitutional error according to State vs Nagel 2014 ND 224 is de novo. Before a federal constitutional error during a trial can be held harmless, the court must conclude beyond a reasonable doubt the error did not contribute to the verdict. State vs Schneider 270 NW2d 787 (ND 1978).

[¶32] In this case during voir dire prosecutor Dawn Deitz questioned prospective juror Christopher Pieske about his expertise of domestic violence victims. Federal constitutional error occurred when Mr. Pieske responded and gave his expert opinion on how domestic violence victims act and don't stick to their stories. This federal constitutional error is found in T. P.29, L.16 to P. 30, L.3.

MS. DEITZ: Do you feel that you possess maybe some specific knowledge with regard to domestic cases?

MR. PIESKE: Probably, yes, because I've had - - in one particular case I had to argue - - I wrote some briefs to try to introduce some expert testimony. I won't go into more detail than that, but I had to do some research involved with that.

MS. DEITZ: In all those cases that you worked on, do all the victims act the same?

MR. PIESKE: No.

MS. DEITZ: Do they stick to their story the entire time?

MR. PIESKE: No.

[¶33] Because of the above questions during voir dire by Prosecutor Deitz and the answers given by Mr. Pieske, the prosecutor was able to and get before the jurors an expert opinion on how victims in domestic case act and how victims in domestic cases change their stories in.

[¶34] The V and VI amendments to the United States Constitution give all defendants certain rights. Mr. Lang believes some of his rights in these amendments were violated during voir dire of Mr. Pieske.

V Amendment

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

VI Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state an district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

[¶35] The XIV Amendment to the United States Constitution makes the V and VI amendment applicable to all of the States.

[¶36] Chapman vs. California 386 US 18 (1967) is a case where the Defendant were denied their constitutional rights during this trial because of comments made by the prosecutor on the Defendants constitutional right to remain silent.

[¶37] Chapman Supra states: "But the error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the "independent" federal courts would be the :"guardians of those rights." [4] Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of

these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent - expressly created by the Federal Constitution itself - is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule."

[¶38] In the case now before the court, Mr. Lang is claiming federal constitutional error occurred during voir dire when prospective juror Pieske gave expert opinion answers about how domestic violence victims act and tell different stories.

[¶39] The test to be made of Mr. Lang's claim is found in Chapman Supra: "We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. Connecticut, 375 U.S. 85. There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id., at 86-87. Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, [8] this statement in Fahy itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "effect substantial rights" of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless.

[¶40] Defendants in jury trials have a VI amendment right to cross examine witness against them. There is no such right when a juror during voir dire becomes a witness against a Defendant. In this case when prospective juror Pieske during voir dire became a witness against Mr. Lang and gave an expert opinion on domestic violence

victims, all Mr. Lang could do was object to such testimony, asked to have Mr. Pieske excused for cause, and ask that the jury be instructed to not consider Mr. Pieske's answers as evidence in his case.

[¶41] Mr. Lang did do all of the above. The federal constitution error continued because of the way the judge handled Mr. Lang's objections. Instead of immediately granting Mr. Lang's challenge for cause and removing Mr. Pieske the judge decided to allow Mr. Pieske to remain with the other prospective jurors until some of the other were removed by peremptory challenges. As far as Mr. Lang's request for a jury instruction on not considering Mr. Pieske's statement as evidence the judge decided to wait until later in the trial to decide.

[¶42] Because the following occurred during voir dire and later on during Mr. Lang's trial there is a reasonable possibility that juror Pieske's expert opinion might have contributed to Mr. Lang's conviction:

1. Prospective juror Pieske's expert opinion given during voir dire informed all prospective jurors how domestic violence victims act and tell stories;

2. Perspective jurors are always sworn in before they are questioned;

3. Mr. Lang's case involved domestic violence;

4. The judge didn't give the jury any instruction on whether or not they could consider what prospective juror Pieske said as evidence in Mr. Lang's case;

5. The way the judge allowed prospective juror Pieske to be excused made it appear there was nothing wrong with his expert opinion and that he was excused for cause like all the other jurors.

[¶43] One instruction the judge did give about disregarding statements is found in the App. at page 19. This instruction tells the jury to not consider statements of the judge and attorneys as evidence. It makes no mention of statements by prospective juror Pieske.

[¶44] **ISSUE II. Did the trial court err when it failed to instruct the jury about disregarding as evidence any statements made during voir dire?**

[¶45] In this case after the jury was selected Mr. Lang again objected to the statements Mr. Pieske made on voir dire: T.P.50, L.20 to P.51, L.15.

MR. BORGEN: After the jury was selected, I didn't have an opportunity to make a motion because the way the breaks went. But I would make a motion for mistrial for improper jury voir dire by the State. You can't unring the bell, so basically the State provided testimony through one of the perspective jurors. An objection was made. We approached. But you can't unring the bell. If the Court denies it, I would ask for a curative instruction fro the Court to inform the jury that anything said during voir dire was not evidence. It should not be considered by the jury.

THE COURT: Ms. Deitz?

MS. DEITZ: State would resist the motion. They're already going to receive an instruction about the evidence that is presented in court today. So I think it's already been remedied essentially.

THE COURT: All right. And just so that I'm clear, you're referring the questions of Mr. Pieske?

MR. BORGEN: Yes.

THE COURT: All right. I'm going to deny the motion at this time. We'll address whether there's a need for a curative instruction at one of the breaks.

[¶46] According to the above language an objection was made and the court agreed to address whether there was a need for a curative instruction at one of the breaks. After that the transcript makes no mention of Mr. Lang's requesting a curative instruction.

[¶47] Therefore from the record it appears that Mr. Lang gave up his request for a curative instruction but NDR of Evidence 52(b) could still apply.

[¶48] NDRule of Evidence 52(b).

Rule 52. Harmless and obvious error. (b) Obvious error. An obvious error or defect that affects substantial rights may be considered even though it was not brought to the court's attention.

[¶49] If ND Rule of Evidence 52(b) is applicable to the case now before the court, the following language in State vs Kraft, 413 NW2d 303 (ND 1987) will apply and will be the standard of review:

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, 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 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.Ed2d 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.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. Theil, 411 N.W.2d 66 (N.D. 1987); see also 75 Am. Jur. 2d, Trial §§ 575, 652 (1974).

[¶50] According to the above quote from Kraft it is the responsibility of the trial court to instruct the jury on all essential questions of law involved in the case whether requested or not. The judge in this case now before the court was aware of the problems caused by perspective juror Pieske's expert testimony about domestic violence victims. Therefore the trial court should have given an instruction informing the jury anything that what was is said by perspective juror Pieske during voir dire should not be considered as evidence.

CONCLUSION

[¶51] For the above and foregoing reasons this case should be remanded to the trial court for a new trial.

DATED this 4 day of February, 2015.

Benjamin C. Pulkrabek

Benjamin C. Pulkrabek, ID #02908

CERTIFICATE OF SERVICE BY MAIL

[¶52] 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 4th, 2015, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: Dawn Deitz
Burleigh County State's Attorney
Dmdeitz@nd.gov
Bc08@nd.gov

Mailed to: Dallas P. Lang
JRCC
2521 Circle Dr.
Jamestown, ND 58401

The undersigned further certifies that on February 4th, 2014, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX AND BRIEF.

Sharon Renfrow

Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office