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SEPTEMBER 12, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	
	)	Supreme Court No. 20160155
vs.	)	
	)	District Court No. 27-2014-CR-01196
Jacob Colby Webster,	)	
	)	
Defendant and Appellant.	)	

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM GUILTY VERDICT AND CRIMINAL JUDGMENT

MCKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE ROBIN A. SCHMIDT, PRESIDING

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JURISDICTIONAL STATEMENT

[¶1] The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. The appeal was timely under N.D.R.App.P. 4(b), and this Court has jurisdiction under N.D. Const. art. VI, §§ 2, 6, and N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

[¶2] Whether on direct appeal a general verdict of guilty of driving under the influence submitted to the jury on alternative theories must be vacated and the case remanded for a new trial where one of the alternative theories, blood test refusal, was later determined to be unconstitutional.

[¶3] Whether the district court committed reversible error when it refused to instruct a jury in a case charging driving under the influence about the circumstances under which a law enforcement officer may request an onsite screening test.

STATEMENT OF THE CASE

[¶4] Jacob Colby Webster ("Webster") was arrested by a North Dakota Highway Patrol trooper in McKenzie County for driving under the influence, in violation of N.D.C.C. § 39-08-01, on 18 July 2014. The citation issued, which in its original form remained the charging document for the State throughout the case, alleged in the alternative he had violated the statute by being "under the influence" or by "refusal." App. 5. Webster unsuccessfully challenged the constitutionality of his blood test refusal by a motion to dismiss. App. 2.

[¶5] His first trial resulted in a hung jury declared a mistrial by the court below. His second trial resulted in a general verdict of guilty on an instruction for the essential elements of driving under the influence that offered the jury three grounds upon which to convict: 1) under the influence, N.D.C.C. § 39-08-01(1)(b); 2) refusal to submit to screening test, N.D.C.C. § 39-08-01(1)(e)(3); or 3) refusal to submit to chemical test, N.D.C.C. § 39-08-01(1)(e)(1). App. 16-17. In this case the chemical test requested had been a blood test. Webster did not object to this essential elements instruction. He sought an instruction about the grounds on which a law enforcement officer could seek an onsite screening test, but the State objected, and the trial court denied his requested instruction.

[¶6] The jury in Webster's second trial found him guilty in a one-day trial that began and ended 8 April 2016. The trial court entered judgment the same day. He timely appealed his conviction. This appeal was pending when on 23 June 2016 the Supreme Court of the United States handed down its decision in Birchfield v. North Dakota, 136 S.Ct. 2160, which held unconstitutional North Dakota's blood test refusal statutory scheme and reversed State v. Birchfield, 2015 ND 6, 858 N.W.2d 302.

STATEMENT OF THE FACTS

[¶7] The State is satisfied for this appeal with Webster's statement of the facts.

ARGUMENT

1. *This Court should affirm the jury verdict and criminal judgment, because an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.*

[¶8] Webster roughly frames a multi-faceted argument that his conviction should be overturned in light of the new constitutional rule in Birchfield v. North Dakota, 136 S.Ct. 2160, announced while this appeal was pending. Webster suggests that the instruction allowing the jury to convict him on the alternative theory of refusal to submit to a blood test must be considered erroneous in conjunction with the procedural fact that the verdict form did not require the jury to designate under which subsection(s) of the DUI statute they were finding him guilty. Webster objected neither to the inclusion of the blood test refusal in the essential elements of the jury instructions, nor to the verdict form. Because the blood refusal instruction was harmless error the verdict should stand.

[¶9] Webster does not complain of lack of notice the State might try to convict him under alternative subsections of the DUI statute. Cf. State v. Packineau, 2015 ND 180, ¶ 15, 865 N.W.2d 414; City of Grafton v. Wosick, 2013 ND 74, ¶¶ 5-9, 830 N.W.2d 550. Webster does not quite contend a special verdict form should have been used, nor does he contend any of the three alternatives is a lesser-included of the other, although he suggests a verdict form presenting each alternative theory of DUI to the jury and requiring them to find him guilty or not guilty on

each of the three theories. Cf. State v. Carpenter, 2011 ND 20, ¶¶ 11-16, 793 N.W.2d 765; State v. Huber, 555 N.W.2d 791, 796-97 (N.D. 1996); N.D.R.Crim.P. 31(e). Due to the rare procedural history and posture, he fails to make out a compelling or persuasive argument that either the instruction or verdict form was erroneous when they were given. It is only after the fact of the trial and the United States Supreme Court decision that there is a question that needs to be answered, which the State has framed as described in its first issue.

[¶10] The standard of review is de novo on the constitutional question raised. State v. Moran, 2006 ND 62, ¶ 8, 711 N.W.2d 915. The court below did not have the occasion to entertain the question as it might in deciding whether to grant a new trial as neither party moved for a new trial and given the late arrival of the constitutional issue on the scene of this appeal a motion for new trial likely would have been untimely. See N.D.R.Crim.P. 33. But this Court should not pause to analyze the question and send it back to the court below, because even if that court had addressed this question the Court would review it anew. The analysis this Court needs to conduct in its de novo review is complex and bears lengthy quotation from the most thoroughgoing exposition the State has found.

[¶11] The Eighth Circuit Court of Appeals, in Becht v. United States, 403 F.3d 541, 546–49 (8th Cir. 2005), outlined the theory of analysis the State relies upon:

> There are two lines of decisions from the Supreme Court that bear on whether the faulty jury instruction in Becht's trial may be considered harmless error. One series of cases, beginning with Stromberg v.

California, 283 U.S. 359 (1931), addresses the situation in which a jury returns a general verdict of guilty after a case is submitted on alternative theories, and one of the theories is later determined to be unconstitutional. Because a reviewing court cannot know whether the jury convicted based on a constitutional theory or an unconstitutional theory, the Supreme Court has held in several such cases that a general verdict of guilty cannot stand. "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." Sandstrom v. Montana, 442 U.S. 510, 526 (1979) (quoting Leary v. United States, 395 U.S. 6, 31–32 (1969)). Most recently, in Griffin v. United States, 502 U.S. 46 (1991), the Court explained that Stromberg does "not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." Id. at 53.

[¶12] The Eighth Circuit continued:

[¶13] Although the Supreme Court has not discussed Stromberg in the specific context of harmless-error analysis, some appellate decisions have read Stromberg to circumscribe harmless-error review. The Eleventh Circuit has concluded that in a Stromberg-type case, the reviewing court may not consider whether the strength of the evidence on the valid theory submitted to the jury is sufficient to render harmless the error of instructing the jury on an alternative theory that is unconstitutional: "Stromberg does not suggest a harmless error standard based on overwhelming evidence of guilt under the valid portion of the jury charge. Rather, Stromberg states simply that if it is 'impossible' to say on which ground the verdict rests, the conviction must be reversed." Adams v. Wainwright, 764 F.2d 1356, 1362 (11th Cir. 1985). See also Parker v. Sec'y, Dep't of Corr., 331 F.3d 764, 778 (11th Cir. 2003) ("An error with regard to one independent basis for the jury's verdict cannot be rendered harmless solely because of the availability of the other independent basis.").

[¶14] A second line of Supreme Court decisions, however, has emphasized that most constitutional errors are subject to review for harmlessness. The Court has "'repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.'" Rose v. Clark, 478 U.S. 570, 576 (1986) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)). A narrow

class of errors—defects "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself"—are considered "structural" errors that require automatic reversal. Neder v. United States, 527 U.S. 1, 8 (1999) (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). In its most comprehensive discussion of "structural" errors, the Court identified a list of errors that defy harmless error review: the complete denial of counsel, a biased judge, racial discrimination in jury composition, denial of a public trial, and a defective jury instruction on the reasonable-doubt standard of proof. Neder, 527 U.S. at 8. By contrast, harmless-error review may be conducted with respect to a trial court's failure to instruct on an essential element of a crime, id. at 13–15, and to an instructional error on an element of a crime that renders the resulting conviction unconstitutional. Rose, 478 U.S. at 576–82; Pope v. Illinois, 481 U.S. 497, 501–02 (1987).

[¶15] The Eighth Circuit opined further:

[¶16] "[A] constitutional error is either structural or it is not," Neder, 527 U.S. at 14, and we believe the flawed instruction in Becht's case is a trial error that belongs in the category that may be reviewed for harmlessness. The Supreme Court's decision in Pope provides particularly useful guidance. There, the defendants were convicted in separate cases of selling obscene materials. In light of an Illinois obscenity statute that permitted the admission of evidence concerning "[t]he degree, if any, of public acceptance of material *in this State,*" Ill.Rev.Stat., ch. 38, ¶ 11–20 (1983) (emphasis added), the trial court instructed the juries to determine whether the material was obscene based on "how it would be viewed by ordinary adults in the whole State of Illinois." 481 U.S. at 499.

[¶17] This instruction was constitutional error, because the First Amendment required the jury to measure the value of the allegedly obscene material according to a national "reasonable person" standard, rather than a narrower community standard. As a result, "there was necessarily a 'gap' between what the jury did find (that the allegedly obscene material lacked value under 'community standards') and what it was required to find to convict (that the material lacked value under a national 'reasonable person' standard)." Neder, 527 U.S. at 13–14. Despite that gap, the Court remanded the case for harmless-error analysis. Pope, 481 U.S. at 504. The Court explained that "in the absence of error that renders a trial fundamentally unfair, such as a denial of the right to counsel or trial before a financially interested judge, a conviction should be affirmed

'[w]here a reviewing court can find that the record developed at trial established guilt beyond a reasonable doubt' " under the correct legal and constitutional standard. Id. at 502–03 (quoting Rose, 478 U.S. at 579).

[¶18] The Eighth Circuit then applied its analysis to its case at bar:

[¶19] In Becht's case, there is a similar gap: If the jury convicted Becht under the "appears to be" language, there is a gap between the findings necessary to support such a conviction and the findings required to support a conviction for possession of images depicting actual children. As Pope and Neder explain, however, this gap does not preclude harmless error review. Even had an objection to the "appears to be" instruction been raised on direct appeal, Becht's conviction would have been affirmed if the trial record established guilt beyond a reasonable doubt under the alternative theory that Becht possessed images of actual children—just as the Supreme Court directed the Illinois courts to consider whether the error in Pope was harmless after replacing the erroneous "contemporary community" standards with the constitutionally-acceptable "national 'reasonable person' standard."

[¶20] In light of Pope, Neder, and Rose, we believe that if Becht's jury had been instructed *only* on the erroneous theory that Becht possessed images of what "appeared to be" children, then the error would have been subject to harmless-error review. If the trial record established that any reasonable jury would have found guilt beyond a reasonable doubt under the correct constitutional standard—that Becht possessed images of *actual* minors—then the reviewing court could conclude that the instructional error was harmless. It would be anomalous to read Stromberg to preclude harmless-error review in Becht's case because the jury *also* was given the option to convict based on a constitutionally *valid* theory that Becht possessed images of actual children. As the First Circuit remarked, this assertion "reduces to the strange claim that, because the jury here received both a 'good' charge and a 'bad' charge on the issue, the error was somehow more pernicious than in Rose—where the *only* charge on the critical issue was a mistaken one. That assertion cannot possibly be right, so it is plainly wrong." Quigley v. Vose, 834 F.2d 14, 16 (1st Cir.1987) (per curiam).

[¶21] In view of the Court's recent decisions concerning harmless-error review, we think the Stromberg line of cases is best read as an exception to the common law rule that where a general verdict of guilty rested upon both a "good" charge and a "bad" charge, it was presumed that the jury's verdict

> attached to the "good" one. See Griffin, 502 U.S. at 49–50. Where a general verdict may have rested on a ground that is forbidden by the Constitution, Stromberg prevents a reviewing court from presuming that the jury convicted on an alternative theory permitted by the Constitution, merely because the evidence was *sufficient* to support the constitutional ground. Stromberg thus establishes that there is "error" in such a case; it does not speak to whether the error may be harmless. The Court in Neder made no mention of the Stromberg line of cases when it catalogued those "structural errors" that defy harmless-error review, and for the reasons discussed, we believe that a Stromberg-type instructional error is an error in the trial process itself that may be reviewed for harmlessness. Indeed, we have held that a jury instruction using the erroneous "appears to be" language from the CPPA was not "plain error" warranting relief, United States v. Wolk, 337 F.3d 997, 1004 (8th Cir. 2003), and that holding "cuts against the argument" that the flawed instruction will always render a trial unfair. See Neder, 527 U.S. at 9.
>
> [¶22] We conclude, therefore, that the unconstitutional jury instruction would have been reviewed for harmless error if Becht had raised the issue on appeal. On direct appeal, the government would have borne the burden of establishing that the error was harmless beyond a reasonable doubt.

Becht v. United States, 403 F.3d 541, 546–49 (8th Cir. 2005).

[¶23] Applying this line of cases and reasoning to Webster's case, the inclusion of an alternative theory of DUI, later held unconstitutional, is not a structural constitutional error requiring the conviction be vacated. Instead, if the trial record shows beyond a reasonable doubt that any reasonable jury would have found Webster guilty of one or the other of the two valid alternative theories, then any error was harmless. Here, the trial record is clear that Webster refused to submit to an onsite screening test. The trial record in question is the second trial, not the first, and it is irrelevant to the analysis of the trial record that a previous jury trial resulted in a hung jury. His conviction should be upheld.

2. *This Court should affirm the jury verdict and criminal judgment, because the instructions, read as a whole, fairly and adequately advised the jury of the applicable law and properly omitted an instruction on a question of law, not fact.*

[¶24] Webster contends the trial court erred by refusing to include a jury instruction he requested about when a law enforcement officer may request an onsite screening test under N.D.C.C. § 39-20-14. The court properly declined to give that instruction. The basis for the arresting trooper to request the onsite screening test was was not an essential element of the case. The instruction would have improperly submitted to the jury a question of law.

[¶25] When reviewing jury instructions, this Court has stated it reviews them "as a whole to determine whether they fairly and adequately advise the jury of the applicable law." State v. Ness, 2009 ND 182, ¶ 13, 774 N.W.2d 254. The trial court "is not required to instruct the jury in the exact language sought by a party if the instructions are not misleading or confusing, and if they fairly advise the jury of the law on the essential issues of the case." State v. Zajac, 2009 ND 119, ¶ 12, 767 N.W.2d 825 (internal citation omitted). This Court reviews the evidence in a light most favorable to the defendant to determine whether there is sufficient evidence to support a jury instruction. Ness, 2009 ND 182, ¶ 13. "An error in a jury instruction is grounds for reversal when the instruction, read as a whole, is erroneous, relates to a subject central to the case, and affects the substantial rights of the defendant." State v. Sorenson, 2009 ND 147, ¶ 22, 770 N.W.2d 701 (internal citation omitted).

[¶26] Even assuming for the sake of argument that the instruction Webster proposed pertains to a subject central to the case and affects his substantial rights, this Court should find it was not error to omit it. Indeed, the contrary is correct. To have included it would have been error. For, even reviewing the evidence in a light most favorable to Webster, this Court has cautioned repeatedly against including questions of law, such as probable cause or formulation of an opinion that a driver's body contained alcohol, in the instructions given to a jury. "The jury does not resolve questions of law and, therefore, whether the officers were acting lawfully is not a jury question." State v. Ritter, 472 N.W.2d 444, 453 (N.D. 1991) (internal citation omitted); Cf. City of Langdon v. Delvo, 390 N.W.2d 51, 53 (N.D. 1986) ("probable cause is legal question to be determined by court").

[¶27] And at least two members of the Court have been wary of this very type of requested instruction another time before today, State v. Guttormson, 2015 ND 235, ¶¶ 28-29, 869 N.W.2d 737:

> But, I am not convinced that by the mere reference to N.D.C.C. § 39-20-14… within the actual charge for refusal under N.D.C.C. § 39-08-01(1)(e)(3), makes it essential to show the reason for the stop or than in the officer's opinion the individual's body contains alcohol. An officer would have to follow the requirements under N.D.C.C. § 39-20-14 to legally stop and request an on-site screening test for any driving under the influence charge or the evidence may be suppressed. However, the lawfulness of the stop is not an element of the crime for the jury to consider in a driving under the influence charge in violation of the same subsection…."

(McEvers, J., concurring). Thus, not giving the proposed instruction was the correct decision for the trial court to have made, and it cannot be said that the instructions, read as a whole, did not fairly advise the jury on the essential issues.

CONCLUSION

[¶28] This Court should find harmless any error in instructing the jury on the alternative theory of blood test refusal. If it was not harmless error, then this Court should vacate the conviction and remand for a new trial where the State can proceed at its discretion on the subsections of the driving under the influence statute that remain valid law. Otherwise, the Court should hold the instruction on refusing a blood test given at the time of the trial was not obvious error, and that the court below properly refused to give the instruction regarding the circumstances under which a law enforcement officer may request an onsite screening test.

[¶29] Respectfully submitted this 12th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify I made service of the foregoing **Brief of Plaintiff-Appellee, Request for Waiver of Oral Argument, Substitution of Counsel,** and **Certificate of Service** upon Benjamin C. Pulkrabek, Attorney for Defendant-Appellant, by emailing a true and correct copy of the same to pulkrabek@lawyer.com, this 12th day of September, 2016.

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