

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	
)	Petition for Rehearing
vs.)	
)	
Richie Edwin Wilder Jr.,)	
)	
Defendant/Appellant.)	Supreme Court No. 20170187

Appeal from an Amended Criminal Judgment
District Court of Ward County
North Central Judicial District
District Court No. 51-2015-CR-02854
The Honorable Gary H. Lee Presiding

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STATEMENT OF THE ISSUE

I. Whether the Court overlooked and misapprehended law and facts in its harmless error analysis.

[¶1]

STATEMENT OF THE CASE

[¶2] Wilder adopts the Nature of the Case contained in the brief filed in support of his appeal on November 21, 2017 and incorporates it by reference.

[¶3] Oral argument was held on February 27, 2018.

[¶4] On April 10, 2018 this Court issued an Opinion and Judgment

[¶5] Wilder now petitions for rehearing.

[¶6]

STATEMENT OF FACTS

[¶7] Wilder adopts the Statement of Facts contained in the brief he filed on November 21, 2017 and incorporates it by reference.

[¶8]

LAW AND ARGUMENT

[¶9] On appeal Wilder argued his rights to remain silent were violated at trial. Wilder did not raise the issue during trial. State v. Wilder, 2018 ND 93, ¶ 6, --- N.W.2d --- (N.D. 2018). Generally, an issue not first raised at the trial court and properly briefed on appeal will not be addressed on appeal because it was not preserved for review. Family Center Drug Store, Inc. v. North Dakota State Bd. Of Pharmacy, 181 N.W.2d 738, 746 (N.D. 1970); State v. Potter, 452 N.W.2d 71, 72 (N.D. 1990) (citations omitted). But an exception to that general rule is the Court's ability to address obvious error. First Trust Co. of North Dakota v. Scheels Hardwar & Sports Shop, Inc., 429 N.W.2d 5, 15 (N.D. 1988); State v. Miller, 388 N.W.2d 522, 522 (N.D. 1986). An obvious error is an error that affects substantial rights. N.D.R.Crim.P. 52(b). Errors that do not affect substantial rights are considered harmless and disregarded. N.D.R.Crim.P. 52(a).

[¶10] Despite Wilder's failure to object during trial, Wilder could argue on appeal that his right to remain silent was violated because it was a constitutional argument. Wilder,

2018 ND 93, ¶ 6, --- N.W.2d ---. Neither Wilder nor the State argued in briefs whether the comments were harmless or obvious error. Yet the Court still applied the correct standard, a harmless error analysis. Id. at ¶ 9.

[¶11] The Court noted there were five factors that it “*should*” consider in conducting its harmless error analysis:

1. The use to which the prosecution puts the post arrest silence.
2. Who elected to pursue the line of questioning.
3. The quantum of other evidence indicative of guilt.
4. The intensity and frequency of the reference.
5. The availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions.

Id. (emphasis added). However, the Court failed to consider all five factors and, in so doing, overlooked and misapprehended law and facts. If the Court overlooks or misapprehends a point of law or fact, the Court may restore the case to the calendar for resubmission. N.D.R.App.P. 40(a)(2), (a)(4)(B).

[¶12] **I. USE TO WHICH PROSECUTION PUTS POST ARREST SILENCE**

[¶13] This factor weighs against a finding of harmless error if the prosecutor commented on Wilder’s silence in an attempt to imply silence was evidence of guilt. See State v. Janda, 397 N.W.2d 59, 66 (N.D. 1986); State v. Schneider, 270 N.W.2d 787, 793 (N.D. 1978); State v. Carmody, 253 N.W.2d 415, 419 (N.D. 1977). The Court noted that in one of the prosecutor’s comments on Wilder’s silence, the State “speculated that Wilder did not tell police because he committed the act himself.” Wilder, 2018 ND 93, ¶ 8, --- N.W.2d ---. Yet the Court failed to discuss this factor or its significance in its opinion and, consequently, overlooked important law and facts.

[¶14] **II. WHO ELECTED TO PURSUE THE QUESTIONING**

[¶15] The Court failed to discuss this factor in its opinion and therefore overlooked

important law and facts.

[¶16] III. QUANTUM OF OTHER EVIDENCE

[¶17] The Court gave particular consideration to this factor in concluding any error was harmless. Id. at ¶ 13. In so doing, the court misapprehended the law. The quantum of other evidence indicative of guilt is just one of the factors the Court is to consider. The ultimate question is whether comments on Wilder’s constitutional right to remain silent violated Wilder’s rights to due process. See Doyle v. Ohio, 426 U.S. 610, 618 (1976). If the Court focuses on the quantum of evidence indicative of guilt, to the exclusion of all other factors, the Court risks suggesting it is permissible to ignore someone’s constitutional rights so long as there is substantial evidence of guilt. But “life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.” Spano v. New York, 360 U.S. 315, 320-321 (1959). Perhaps that is why “[t]he beneficiary of a constitutional error has the *heavy burden* of proving beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” State v. Rivet, 2008 ND 145, ¶ 10, 752 N.W.2d 611, 616 (N.D. 2008) (citations omitted) (emphasis added).

[¶18] IV. INTENSITY AND FREQUENCY OF THE REFERENCE

[¶19] The State commented on Wilder’s right to remain silent throughout trial.

Beginning during the State’s opening:

You will hear a variety of stories from Mr. Wilder about what happened to Angila Wilder on November 13, 2015.

Tr.Tr. 15, ¶¶ 20-21. Continuing during the State’s direct examination:

Q. Did you interview Collin Decoteau with respect to this investigation?

A. No.

Q. Why not?

A. At no time during any of these interviews at this point in the investigation did someone say Collin Decoteau's name, gave us descriptions, nor any of the evidence was leading to Collin Decoteau. Also, Richie Wilder never told us Colin Decoteau in the March 4th interview. Or an unknown Native American male.

Q. To your knowledge, has Richie Wilder ever come forward to the Minot Police Department or other law enforcement agencies that you know of, with that information?

A. No.

Tr.Tr. 365, ¶¶ 9-22. The State continued:

Q. Did Mr. Wilder ever report to you or any of the other law enforcement agencies that you are aware of that anyone other than Chris Jackson is responsible for this homicide?

A. No.

Q. Did he ever report to you or to law enforcement that Paul Madriles was involved in this homicide?

A. No.

Q. And he never reported Collin Decoteau?

A. No.

Q. Never reported this husky Native American?

A. No.

Q. Never reported a black man with a gun?

A. No.

Tr.Tr. 366, ¶¶ 10-23.

[¶20] During closing argument, the State commented:

He [(presumably referring to Paul Madriles)] told you that Richie Wilder claimed that he was being framed over insurance. Richie Wilder never told the investigators about the insurance.

Tr.Tr. 426, ¶¶ 7-9. The State further commented:

March 4, 2016 he [(referring to Wilder)] didn't say anything to Mattice and Goodman about a husky Native American.

Tr.Tr. 427, ¶¶ 8-9. The State continued:

There is a husky Native American, but Richie Wilder never reported that to law enforcement.

Tr.Tr. 427, ¶¶ 13-15. Finally, the State argued:

He [(referring to Wilder)] told Paul Madriles who it was, he was 100% sure it was that husky Native American that was brought into the jail in February. Why didn't he report that to law enforcement? Why didn't he report to law enforcement that somebody else was there? He tells the Chris Jackson story, they prove him wrong on that. Why didn't he tell law enforcement about the guy coming out of the closet with the knife? Because it didn't happen. There was no guy with a knife. The only guy with a knife was Richie Wilder.

Tr.Tr. 434-435, ¶¶ 21-4.

[¶21] The Court refused to consider each of the above comments because each comment was not listed in Wilder's brief and the Court "*generally do[es]* not consider arguments raised for the first time at oral argument on appeal." Wilder, 2018 ND 93, ¶ 9, --- N.W.2d --- (emphasis added). In refusing to consider the intensity and frequency of the reference to Wilder's silence the Court misapprehended the law and overlooked essential facts.

[¶22] In conducting a harmless error analysis, the Court "*must consider the entire record and the probable effect of the actions alleged to be error in light of all the evidence.*" Rivet, 2008 ND 145, ¶ 10, 752 N.W.2d at 616 (citations omitted) (emphasis added). See also Carmody, 253 N.W.2d at 419 (appellate court has a duty to review the entire trial, not just the points at which error is claimed).

[¶23] Wilder made sure a copy of the trial transcript was included in the record. See N.D.R.App.P 10(a), (b). During oral argument Wilder attempted to highlight various comments in the transcript. By refusing to consider the intensity and frequency with which the State referenced Wilder's silence because each instance was not listed in the brief, despite the fact that these comments appear on the record, the Court misapprehended the law and raised the bar an appellant must meet beyond what is capable within the confines of N.D.R.App.P. 32(a)(8) and N.D.R.App.P. 34(b).

[¶24] The Court has declined to review an *entire issue*, not just one factor necessary to determine the issue, if the *record* on appeal does not allow for a meaningful and intelligent review of the claimed error. State v. Williams, 2015 ND 297, ¶ 10, 873 N.W.2d 13, 15 (N.D. 2015). However, as far as Wilder is aware, the Court has never refused to consider one of the factors in a multi-factor analysis because each of the facts necessary to analyze that factor were not extrapolated in a brief. The Court determined Wilder was not barred from raising the violation of his right to remain silent on appeal despite his failure to raise the issue during trial. The Court was not operating under the general rule barring review of unpreserved issues. It was looking for obvious error. Wilder raised the ultimate issue of the violation of his right to remain silent in his appellate brief. What was not addressed in Wilder's brief was every single inappropriate comment. Neither Wilder nor the State analyzed any of the factors in their briefs. Yet the State's failure to analyze the quantum of other evidence indicative of guilt in its brief did not stop the Court from analyzing that factor in its ultimate opinion because the Court had an obligation to consider *each* of the harmless error factors. State v. Aguero, 2010 ND 210, ¶ 31, 791 N.W.2d 1, 11 (N.D. 2010).

[¶25] V. OPPORTUNITY TO GRANT MISTRIAL OR GIVE CURATIVE INSTRUCTION

[¶26] The Court overlooked or misapprehended the law when it determined the trial judge did not have an opportunity to give a curative instruction or declare a mistrial because Wilder failed to request a curative instruction or move for a mistrial. Wilder, 2018 ND 93, ¶ 11, --- N.W.2d ---. The explanatory note to N.D.R.Crim.P. 52 makes it clear that a trial court has the authority to recognize obvious error without a request being

made. See also N.D.R.Ev. 103(e). The harmless error analysis only comes into play when an error is made *by the trial court*. Schneider, 270 N.W.2d at 792. Ultimately, it is the court's responsibility to ensure a trial is conducted fairly and keep inadmissible evidence from the jury. N.D.R.Ev. 103(d). See also State v. Thill, 473 N.W.2d 451, 453 (N.D. 1991) (citations omitted) (control of opening and closing arguments is left to discretion of trial court). And it is the court's duty to correct errors affecting substantial rights, even if they are not obvious. N.D.R.Ev. 103(d), explanatory note. The same way this Court determined the State's comments were improper, the trial court could have determined comments were improper and given a *sua sponte* curative instruction.

[¶27]

CONCLUSION

[¶28] The Court should restore Wilder's appeal to the calendar for the parties to resubmit briefs analyzing the five harmless error factors so the Court can make an informed decision on whether the State proved beyond a reasonable doubt that its comments on Wilder's right to remain silent did not contribute to the ultimate verdict.

Respectfully submitted,

April 23, 2018

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