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APRIL 13, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, -vs- Richard Earl Scott, Defendant/Appellant	)))))))))	Supreme Court No. 20190317 Burleigh County Case No. 08-2018-CR-01476

BRIEF OF PLAINTIFF - APPELLEE
STATE OF NORTH DAKOTA

APPEAL FROM THE CRIMINAL JUDGMENT ENTERED ON OCTOBER 4, 2019

Burleigh County District Court
South Central Judicial District
The Honorable John Grinsteiner, Presiding

ORAL ARGUMENT NOT REQUESTED

Julie Lawyer (ND ID 05693)
Burleigh County State's Attorney
514 E. Thayer Avenue
Bismarck, ND 58501
(701) 222-6672
bc08@nd.gov
Attorney for Plaintiff/Appellee

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NORTH DAKOTA STATUTES AND RULES

STATEMENT OF THE ISSUES

[¶1] The court did not err in finding that former jeopardy did not apply.

[¶2] The court did not err in ruling that a hearing pursuant to N.D. Rules of Evid. 803(24) was not needed.

STATEMENT OF THE CASE

[¶3] On May 11, 2018, the Burleigh County State's Attorney's Office charged the defendant, Richard Earl Scott ("Scott"), with three criminal counts: 1) Solicitation of a Minor, a Class C Felony, in violation of N.D.C.C. §12.1-20-5(2); 2) Indecent Exposure, a Class A Misdemeanor, in violation of N.D.C.C. §12.1-20-12.1(1)(b); and 3) Child Neglect, a Class C Felony, in violation of N.D.C.C. §14-09-22.1(1). Appellant's Appendix pages 10-11 (App App'x at pgs. 10-11).

[¶4] On September 17, 2018, Scott plead guilty to Counts 1 and 2 of the criminal complaint. App App'x at pg. 6. A jury trial was then scheduled for the remaining count, Count 3. On November 2, 2018, Scott filed a motion to withdraw his guilty plea on Counts 1 and 2. App App'x at p. 6 (Index #53) and pg. 41. The State filed a response in objection to that motion on November 20, 2018. App App'x at p. 7 (Index #61) and pgs. 42-45. The district court granted Scott's motion to withdraw the guilty pleas on November 21, 2019 and a jury trial was then set for all Counts. App App'x at p. 7 (Index #63) and p. 49.

[¶5] On May 28, 2019, a two-day jury trial was held. On May 29, 2019, Scott was convicted on Counts 1 and 3. A criminal judgment was entered on October 4, 2019. App App'x at p. 9 (Index #156) and pgs. 85-87. Scott was sentenced to a five (5) years' incarceration with the NDDOCR, first serve thirty (30) months, balance suspended for five (5) years' supervised probation with credit for 424 days' time served on Count 1 and to serve five (5) years' incarceration with the NDDOCR first serve thirty (30) months, balance suspended for three (3) years supervised probation to be served consecutive to Count 1 on Count 3. Id.

[¶6] On October 17, 2019, Scott filed a Notice of Appeal. App App'x at p. 9 (Index #159) and pgs. 88-89.

STATEMENT OF FACTS

[¶7] On March 13, 2018, Jeanette Yoder with Burleigh County Social Services contacted Scott Betz with the Bismarck Police Department regarding a conversation she had with a child, N.A. Trial Transcript I ("Tr. I"), page 128: lines 5-9 ("128:5-9"), 130: 1-5. During this conversation N.A. disclosed that Richard Scott had asked to lick her vagina and exposed his penis to her. Tr. I 74:20 – 25, 76:15 – 77:4.

[¶8] When N.A.'s mother, D.A., was contacted and confronted regarding these allegations she was in disbelief. Tr. I 58:10-16. She did recall that law enforcement told her N.A. had contacted 911 and reported that Scott was telling N.A. scary things and that he was intoxicated and incapable of taking care of her. Tr. I 51:15-20.

[¶9] After going through reports involving Scott and D.A., Detective Betz found that on September 28, 2017, the Bismarck Police Department responded to D.A.'s residence for a domestic in progress. Tr. II 212:5-7, 185:23 – 186:22. During this incident D.A. put N.A. and Scott's daughter S. in a back bedroom. Tr. I 46:2-6. D.A. stated that Scott was saying crazy things and walking around the house with a knife, so she ran to the bedroom where the girls were and barricaded the door shut to try to protect her and the children from Scott. Tr. I 47:13-25. Scott started bashing the bedroom door as the girls were crying and screaming. Tr. I 49:11-13.

[¶10] Another incident that was found was on February 20, 2018. Tr. II 212:9-10. During this incident Bismarck Police Department responded to D.A's residence for a report of an intoxicated male. Tr. I 102:21 – 103:8. The individual who called 911 was N.A. Tr. I 98:19-24. Officers described the scene as Scott having difficulty unlocking the front door and that there was a strong odor of alcohol coming from Scott. Tr. I 103:4 –

104:5. Officers made contact with D.A. who found a neighbor, who took N.A. for the night. Tr. I 105:7-11.

LAW AND ARGUMENT

I. The Court did not Err in Finding that Double Jeopardy did not Apply.

[¶11] The double jeopardy clause found in the Fifth Amendment of the United States Constitution, protects against successive prosecutions and punishments for the same criminal offense. State v. Foley, 2000 ND 91, ¶6, 610 N.W.2d 49. The State of North Dakota, in N.D. Const. art. 1 §12, also commands protection against double jeopardy. This Court has stated that it "use[s] the same interpretation of punishment for purposes of double jeopardy analysis under North Dakota statutory and constitutional law and federal constitutional law." State v. Kelly, 2001 ND 135, ¶11, 631 N.W.2d 167.

[¶12] The double jeopardy clause protects against three types of violations:

1. Prosecuting a defendant again for the same conduct following an acquittal;
2. Prosecuting a defendant for the same crime after a conviction; and
3. Subjecting a defendant to multiple criminal punishments for the same conduct.

Scott is claiming that Count 3 charged against him, violated the second type of violation. The issue was raised before the trial in chambers and the trial judge ruled that double jeopardy did not apply in Scott's case. In chambers, Scott claimed that since he had pled guilty to terrorizing for an incident that happened in September of 2017 that the State is now trying to bring that back using a different name for it, child abuse and neglect. Trial Transcript I ("Tr. I"), page 5: line 22 ("5:22") – page 6: line 3 ("6:3).

[¶13] The State argued that someone's conduct can violate more than one law. Tr. I 6:14. The terrorizing charge that Scott already was plead guilty to has different essential elements than that of the child abuse/neglect charge. It stems from the same conduct but a different charge. The State had argued: "They have separate essential elements. They are not the

same charge. Double jeopardy is not trying the same person for the same crime twice. This isn't the same crime. It's the same conduct, but that conduct violated two different provisions of the law and we are bringing that all together with several instances that occurred within the household involving Mr. Scott and the child and so double jeopardy doesn't apply." Tr. I 7:1-8. Based on the arguments provided by both parties the trial judge disagreed with Scott that double jeopardy applied. Tr. I 10:7-8.

[¶14] The Supreme Court of the United States in Blockburger v. United States, stated that, "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306.

[¶15] The Supreme Court in Gravieres v. United States, 220 U.S. 338, 342, 31 S.Ct. 421, 55L.Ed. 489, quoted and adapted the language of the Supreme Court in Massachusetts in Morey v. Commonwealth, 108 Mass. 433:

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. Compare Albrecht v. United States, 273 U.S. 1, 11, 12, 47 S.Ct. 250, 71 L.Ed. 505, and cases there cited. Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed.

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306. In the case at hand it is a similar issue. The terrorizing and the child abuse/neglect charge stemmed from the same incident, two different offenses were committed.

[¶16] The two offenses have different essential elements. The Child Neglect charge from the jury instructions, App App'x at p. 8 (Index #132), reads as follows:

1. On or about September 28, 2017 through February 20, 2018, in Burleigh County, North Dakota;
2. The defendant, Richard Earl Scott;
3. As an adult household member or other custodian of a minor child;
4. Willfully failed to provide proper care or control necessary for the child's physical, mental, or emotional health or morals by engaging in violent behavior to the child's mother in the presence of the child or was too intoxicated to care for the child.

The essential elements of the terrorizing charge are as follows:

1. On or about September 28, 2017 in Burleigh County, North Dakota;
2. The defendant, Richard Earl Scott;
3. With the intent to place Dawn Alkhafaji, in fear for that person's or another's safety or in reckless disregard of the risk causing such terror; and
4. Threatened to commit any crime of violence or act dangerous to human life.

[¶17] Based on the two separate essential elements it is clear that that the child neglect charge requires proof of fact in which the terrorizing charge does not and that the trial judge did not err in ruling that double jeopardy did not apply and did not have to instruct the jury on jeopardy in this case.

II. THE COURT DID NOT ERR IN RULING THAT A HEARING PURSUANT TO N.D. RULES OF EVID. 803(24) WAS NOT NEEDED

[¶18] This Court previously ruled in State v. Krogstad, 2020 ND 78, ¶11, 2020 WL 167 1617:

> We review a district court's evidentiary decisions for an abuse of discretion and we will not reverse a decision unless it is arbitrary, capricious, or

unreasonable, or a misinterpretation or misapplication of the law. State v. Wegley, 2008 ND 4, ¶12, 744 N.W.2d 284

[¶19] In Krogstad, the State intended to introduce the forensic interview video. In the case at hand, no forensic interview was offered or admitted. In the chambers before trial Scott's trial attorneys raised the issue:

Tr. I 4:11 – 5:16

Mr. Rose: I also would not that I have not received notice of any intent to use child hearsay by the officer, the forensic scientist. Under statute that is required to give notice and there has to be a hearing, so any statements made by any witnesses today I'm going to object inr elation to anything that the child said. Under 803(24) we have to have that in order to have that is my understanding.

The Court: I assume the State just intended to call the alleged victim.

Ms. Lawyer: Correct. The child will be testifying, Your Honor.

Mr. Rose: And I guess I would also say, you know, as far as hearsay goes and my understanding, any evidentiary audio recordings those all have to be discussed at that hearing, the corroboration, the reliability, and we didn't have that hearing, Your Honor, so I'm going to just put on the record today that I believe all those will be objected to as hearsay.

The Court: Normally that would only be an issue if we had had that hearing and the child either couldn't testify or refused to testify or, my terms, locked up on the stand, that's when those secondary hearsay evidence would be admissible under 803(24), but the State has indicated your intention is just to call the child to testify; correct?

Ms. Lawyer: Correct, Your Honor. And the only audio that we intend to play is the 911 call the child made and in that vein we have the child testifying and we have the 911 operator testifying as well to establish foundation for that call. We're not intending to play the CAC interview or any of the other recorded interview of the child.

The Court: Seems to address that issue then.

[¶20] In State v. Krull, 2005 ND 63, ¶¶9-11, 693 N.W.2d 631 this Court held that:

> The trial court abused its discretion and committed plain error in admitting the hearsay statements without making 'specific findings of the facts relevant to reliability and trustworthiness' and by not explaining 'how these facts support the conclusion of admissibility.' We concluded that while we "believe the district court committed plain error,…we cannot conclude this error affected the defendant's substantial rights. Id at ¶10. We further held that "[e]ven if the district court excluded the hearsay statements, we do not believe the ultimate outcome of the trial would have changed. Id. In Krull, at ¶11, we concluded "the [victims] took the stand and were subjected to extensive cross-examination regarding their prior statements," which, "counter[ed] any contention that Krull suffered a serious constitutional injustice warranting our rectification." Id. State v. Poulor, 2019 ND 215, ¶20, 932 N.W.2d 534.

This case is similar to that of Krull. Even if there had been a hearing held on under the N.D. Rules of Evid. 803(24), Scott has not established that the outcome at his trial would have changed. The victim testified at trial and was subjected to cross-examination by defense, no recordings were offered or entered into evidence, and the forensic interviewer only answered questions regarding how the interviews are conducted and the protocols that they follow.

CONCLUSION

[¶21] For these reasons, the State respectfully requests that this Court affirm the district court's Judgment.

RESPECTFULLY SUBMITTED:

Dated this 13th day of April, 2020.

/s *Julie Lawyer*
Julie Lawyer (ND ID 05693)
Burleigh County State's Attorney
514 E Thayer Ave.
Bismarck, ND 58501
(701) 222-6672
bc08@nd.gov
Attorney for Plaintiff-Appellee

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Richard Earl Scott,	)	
	)	
Defendant/Appellant	)	

CERTIFICATE OF COMPLIANCE

[¶ 1] COMES NOW Julie Lawyer of Bismarck, North Dakota, and hereby certifies that the attached Brief of the Appellee is in compliance with Rule 32(a)(8)(A), North Dakota Rules of Appellate Procedure.

[¶ 2] The number of pages in the principal Brief, excluding any addenda, is thirteen (13) pages, according to the page count of the filed electronic document.

Dated this 13th day of April, 2020.

/s *Julie Lawyer*
Julie Lawyer (ND ID 05693)
Burleigh County State's Attorney
514 E Thayer Ave.
Bismarck, ND 58501
(701) 222-6672
bc08@nd.gov
Attorney for Plaintiff-Appellee

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Richard Earl Scott,	)	
	)	
Defendant/Appellant.	)	

STATE OF NORTH DAKOTA	)
	) ss
COUNTY OF BURLEIGH	)

I, Katie A Wangler, declare that I am a United States citizen over 21 years of age, and on the 13th day of April, 2020, I served the following:

1. Brief of Plaintiff/Appellee
2. Certificate of Compliance
3. Unsworn Declaration of Service by Electronic Filing

via electronic service through Odyssey to the following:

Benjamin Pulkrabek
Attorney at Law
pulkrabek@lawyer.com

Which is the last reasonable ascertainable email address of the addressee.

I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 13th day of April, 2020 at Bismarck, North Dakota.

/s/ Katie A. Wangler
Katie A Wangler