

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,

Plaintiff and Appellee,

v.

Joshua James Roberts,

Defendant and Appellant.

Supreme Court File No.

20210161

Grand Forks County District Court No.

18-2021-CR-00565

APPELLANT BRIEF

BRIEF OF APPELLANT, JOSHUA JAMES ROBERTS

Appeal from the Criminal Judgment

Entered on the 6th day of May, 2021.

In District Court, Grand Forks County, State of North Dakota

The Honorable Jason McCarthy Presiding

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶1] ISSUE I: Should the trial court have granted Defendant Joshua Robert's Rule 29 Motion because there was not any testimony or evidence in this case to corroborate the testimony of accomplice, Josiah Roberts?

ISSUE II: Did the trial court err in not giving jury instructions that the jury decide whether or not there was evidence and/or testimony to corroborate an accomplice's testimony?

NATURE OF THE CASE

[¶2] The charge in this case is Conspiracy to Deliver a Controlled Substance, Fentanyl.

[¶3] This case began with the filing of an information and affidavit of probable cause on 3/16/2021.

[¶4] The initial appearance was held on 03/18/2021.

[¶5] A demand for a speedy trial, waiver of preliminary hearing, and entry of not guilty plea by Joshua Roberts was entered on 03/23/2021.

[¶6] A scheduling order was entered on 3/24/2021 setting the felony jury trial for 05/4/2021.

[¶7] The Plaintiff's Requested Jury Instructions were filed on 03/30/2021.

[¶8] The Defendant's Proposed Jury Instructions were filed on 04/25/2021.

Also on 04/25/2021 a notice of alibi defense was filed by the defendant. The State entered a response on 04/27/2021. In the State's response to defense alibi, it notes that, due to the unavailability of the lab analyst, this case was dismissed on March 15, 2021 and recharged on March 16, 2021.

[¶9] An amended information and notice of state's amended exhibit list was filed on 05/03/2021.

[¶10] Charges to the jury (court jury instructions) were entered on 05/04/2021.

[¶11] The jury trial began on 05/04/2021 and ended on 05/06/2021 with the jury finding Joshua Roberts guilty of Conspiracy to Deliver a Controlled Substance.

[¶12] A second amended information was entered on 05/06/2021.

[¶13] The criminal judgment was entered on 05/06/2021.

[¶14] The notice of appeal, order for transcript, and notice of filing the notice of appeal were entered on 06/04/2021.

[¶15] The clerk's certificate on appeal was filed on 06/30/2021.

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

STATEMENT OF FACTS

[¶17] In Grand Forks, North Dakota, on August 2, 2020 there was a juvenile boy (hereinafter called John Doe) who had been using drugs to keep himself awake for 14 days. The drugs he had been using to keep himself awake had run out and he wanted to get more drugs that would keep him awake.

[¶18] To help John Doe get the drugs he called his juvenile girlfriend, hereinafter called Jane Doe, to see if she would give him a ride in her car to an apartment house in Grand Forks with a street address of 1808 Continental Drive Grand Forks, North Dakota. Jane Doe agreed to and did give John Doe a ride to that apartment. On August 2, 2020 Jane Doe had smoked marijuana and done three lines of cocaine.

[¶19] Jane Doe when she arrived at the apartment at 1808 Continental Drive Grand Forks, ND, parked her car in that apartment's parking lot. John Doe then left Jane

Doe in her car in the parking lot and went to the apartment rented by Joshua Roberts. John Doe about 45 minutes later returned to Jane Doe's car with Joshua Roberts. The three had a short conversation and then all three went into Joshua Roberts' apartment.

[¶20] Joshua Roberts' sister, Josiah Roberts was in his apartment. She testified at the trial that she was the one who went and got the pills for John Doe. She got these pills from Grant Parks. Since this case involves a conspiracy to sell drugs Josiah Roberts' getting of the pills makes her a conspirator and an accomplice in the conspiracy.

[¶21] Because of drug usage prior to going to the apartment at 1808 Continental Drive Grand Forks, North Dakota neither John Doe or Jane Doe recall anything about a drug conspiracy at the apartment.

[¶22] Josiah Roberts testified at Joshua Roberts' trial about the drug transaction at the apartment at 1808 Continental Drive Grand Forks, North Dakota. What she testified to indicated Joshua Roberts could have been involved in the drug transaction. However, since this case involves a conspiracy to sell drugs and Josiah Roberts is an accomplice in the drug transaction her testimony must be corroborated.

[¶23] Detective Nicolas Fugazzi interviewed Joshua Roberts about the drug transaction that went on in the apartment #303 at 1808 Continental Drive Grand Forks, ND. According to Detective Fugazzi Josiah Roberts told him her brother Joshua was involved in the transaction. However, because this information came from Josiah Roberts who is an accomplice to the conspiracy to sell drugs it has to be corroborated by evidence and/or someone else's testimony.

[¶24] The apartment at 1808 Continental Drive Grand Forks, North Dakota has surveillance cameras so what occurred in this case outside of Joshua Roberts' apartment

on August 2, 2020 is recorded and that record was put into evidence at Joshua Roberts' trial.

[¶25] John Doe and Jane Doe left Joshua Roberts' apartment on August 2, 2020 in Jane Doe's car. Jane Doe was the driver and she drove to an apartment in Grand Forks, North Dakota with a street address of 1115 18th Avenue South. John Doe and Jane Doe then went into a unit in that that apartment.

[¶26] John Doe got one of the pills he got while at the apartment at 1808 Continental Drive Grand Forks, ND, crushed it, and ingested it. That pill contained fentanyl. The fentanyl resulted in an overdose that caused John Doe to pass out. Jane Doe called 911. Grand Forks police officers answered the call. When they answered they saw the condition John Doe was in and gave him Narcan which stopped the effects that John Doe was suffering because of the fentanyl.

[¶27] Medical personnel from Altru hospital arrived and started treating John Doe for his overdose. John Doe was then taken to Altru hospital.

[¶28] Grand Forks law officers started investigating this case. Their investigation involves investigations at the apartment at 1808 Continental Drive Grand Forks, North Dakota, the apartment at 1115 18th Avenue South Grand Forks, and interviewing the people that were involved. During the investigation of this case Grand Forks police officers wore body cameras which recorded what the officers did during this investigation. These recordings were received into evidence at the trial.

[¶29] The Grand Forks County States Attorney, because of the law enforcement officer's investigative reports charged Joshua Roberts with conspiracy to sell drugs.

[¶30] At the trial at the end of the state’s case Defendant Joshua Roberts’ attorney said at Tr. p. 192 L. 2 to L. 9:

“MS. NELSON: Yes. Your Honor, at this time we would move a Motion for a Judgment of Acquittal. I do not believe the State has provided any testimony that Mr. Roberts willfully agreed with one or more persons for a mere second that Ms. Roberts said that they discussed or thought about selling pills to another person. Whether or not that’s a conspiratorial agreement, I do not agree with. Therefore, we would ask at this time for the case to be dismissed.”

[¶31] The courts’ response was at Tr. p. 192 L. 11 to L 20 was:

“THE COURT: Thank you. The Motion -- I reviewed the evidence and sat through the testimony. The Motion is denied. There was testimony both through the interview to law enforcement of Ms. Roberts and then her direct testimony that her and the defendant talked about it and agreed to deliver the pills to the two individuals. There was testimony he was hoping to get a finder’s fee or something out of it, and there was testimony that the victim had asked the defendant for the pills by phone, and that’s when the defendant and his sister had that discussion.”

STANDARD OF REVIEW

[¶32] According to State v. Reddig, 876 N.W.2d 34 (N.D. 2016) an error derived from a statute is not of constitutional magnitude. In this case the errors are derived from a statute. Therefore, the standard of review is to determine whether or not the error had significant impact on the verdict but that error does not have to be beyond a reasonable doubt.

ARGUMENT

ISSUE I: Should the trial court have granted Defendant Joshua Robert’s Rule 29 Motion because there was not any testimony or evidence in this case to corroborate the testimony of accomplice, Josiah Roberts?

[¶33] According to N.D.C.C. § 29-21-14 corroboration is required with the testimony of accomplice; “A conviction cannot be had upon the testimony of an accomplice unless the accomplice is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.”

[¶34] According to State v. Reddig, 2016 ND 39: “The purpose of corroborative evidence is to show that a testifying accomplice is a reliable witness and worthy of credit.” State v. Gaede, 2007 ND 125, ¶ 11, 736 N.W.2d 418 (quoting State v. Zimmerman, 524 N.W.2d 111, 114 (N.D. 1994).

[¶35] In State v. Haugen, 448 N.W.2d 191, 194-95 (N.D. 1989) the following was addressed:

[U]nder Section 29-21-14 it is not necessary to corroborate every fact testified to by an accomplice. All that is required is that the evidence, circumstantial or otherwise, corroborate the testimony of an accomplice as to some material fact or facts, and tends to connect the defendant with the commission of the crime. It is not necessary that the corroborating evidence be sufficient, in itself, to warrant a conviction or establish a prima facie case. Furthermore, the State need not point to a single isolated fact which is sufficient corroboration, as it is the combined and cumulative weight of the evidence other than the testimony of the accomplice witness which satisfies the statute. In cases involving the use of corroborative evidence, it is incumbent upon the trial court to first determine, as a matter of law, whether or not there is any evidence corroborating the testimony of the accomplice, and only after the court has found such corroborative evidence is it allowed to leave the question of the sufficiency of the corroborative evidence to the jury.

[¶36] In the case before the Court there is testimony from Josiah Roberts who is an accomplice in the conspiracy that Joshua Roberts was involved in. However, in North Dakota the testimony of Josiah Roberts that Joshua Roberts was involved in is not enough to convict Joshua Roberts of being part of a conspiracy. The additional evidence needed to

convict Joshua Roberts in addition to Josiah Roberts testimony is corroboration. Testimony about Joshua Roberts' involvement in the conspiracy must be corroborated.

[¶37] The state's problem with this case is there is no evidence that corroborates Josiah Roberts' testimony. All the other testimony and evidence at trial shows is that Joshua Roberts:

- a. rents the apartment;
- b. uses drugs;
- c. was in the apartment where John Doe and Jane Doe entered on August 2, 2020;
- d. gets along well with his sister.

[¶38] Because there is no evidence to corroborate Josiah Roberts' testimony, Joshua Roberts' conviction must be set aside.

ISSUE II.: Did the trial court err in not giving jury instructions that the jury decide whether or not there was evidence and/or testimony to corroborate an accomplice's testimony?

[¶39] Juries in North Dakota jury trials decide the facts and the trial judge decides the law that applies to the case being tried. One of the facts that should have been but wasn't decided in this case by the jury is: "Whether or not there was sufficient testimony and/or evidence to corroborate Josiah Roberts' (accomplice) testimony about Joshua Roberts being involved in the conspiracy?"

[¶40] In North Dakota there is a standard jury instruction which informs the jury that they are the ones that decide whether or not the testimony of an accomplice is corroborated. That standard jury instruction is N.D.J.I Crim. No. K – 2.25 Testimony of Accomplice Must Be Corroborated, N.D.C.C. §12.1-03-01; 29-21-14:

“K - 2.25. Testimony of Accomplice Must Be Corroborated 2010

A Defendant cannot be found guilty based on the testimony of an accomplice unless that testimony is corroborated by other evidence tending to connect the Defendant with the commission of the offense. Corroboration is not sufficient if it merely shows the offense was committed or the circumstances of committing the offense.

You must be satisfied that there is some evidence, either direct or circumstantial, aside from the testimony of the accomplice, from which you may infer not only that the crime charged was committed, but that the Defendant was implicated in it. The corroborating evidence need not extend to every material point of the accomplice's testimony nor be sufficient in itself to support a conviction.

The sufficiency of the corroborating evidence is for you to determine. If the testimony of an accomplice is corroborated, you have a right to consider all of that testimony the same as any other testimony in the case.”

[¶41] Defendant Joshua Roberts’ attorney never requested in the case now before the court that N.D.J.I. Crim. No. K – 2.25 be given to the jury.

[¶42] State v. Kraft, 413 N.W. 2d 303 (N.D. 1987) is a North Dakota case that involved a failure to include a jury instruction.

[¶43] According to Kraft

“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.Ed.2d 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 Sec. 580); State v. Thiel, 411 N.W.2d 66 (N.D.1987); see also 75 Am.Jur.2d, Trial Secs. 575, 652 (1974).

“In this instance, the trial court could take notice of the omission of an instruction to the jury on a defense based on the Uniform Commercial Code because it affected a substantial right of the defendant. In State v. Janda, supra, we stated that in cases of nonconstitutional error in failing to instruct where there was no objection, our task is to determine whether the error had a significant impact upon the verdict. After reviewing the record, we conclude that the error in not giving an instruction to the jury as to the defense or area of defense based on the Uniform Commercial Code had a significant impact upon the verdict and, therefore, constituted obvious error.” (Emphasis added)

“In State v. Janda, supra, we stated that in cases of nonconstitutional error in failing to instruct where there was no objection, our task is to determine whether the error had a significant impact upon the verdict. After reviewing the record, we conclude that the error in not giving an instruction to the jury as to the defense or area of defense based on the Uniform Commercial Code had a significant impact upon the verdict and, therefore, constituted obvious error” (Emphasis Added)

[¶44] In the case now before the Court the standard of review involved is

“Whether or not the trial judge’s failure to give a jury instruction on corroboration had a significant impact on the verdict?” The answer is it had to have a significant impact because without it the jury could convict Joshua Roberts without deciding if Josiah Roberts’ testimony was corroborated. (Emphasis added)

CONCLUSION

[¶45] This case must be remanded to the district court. If the North Dakota Supreme Court determines there wasn’t sufficient evidence to prove corroboration of Josiah Roberts’ testimony the charge of conspiracy to sell drugs must be dismissed. However, if the North Dakota Supreme Court determines that Josiah Roberts’ testimony was corroborated the district judge will then be required to give Joshua Roberts a new trial that will include N.D.J.I. Crim. No. K – 2.25.

Dated this 31st day of August, 2021.

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Supreme Court File No.
20210161
Grand Forks County District Court No.
18-2021-CR-00565
**CERTIFICATE OF
COMPLIANCE**

[¶1] This appellant's brief and appendix complies with the page limit of 38 for the brief and 100 pages for the appendix set forth in N.D. R. App. P. 32(a)(8)(A). The brief in this matter consists of 13 pages and appendix consists of 53 pages.

Dated this 1st day of September, 2021.

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IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Joshua James Roberts, Defendant and Appellant.	Supreme Court File No. 20210161 Grand Forks County District Court No. 18-2021-CR-00565 CERTIFICATE OF SERVICE
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[¶1] I certify that a true and correct copy of the following, specifically:

1. Appellant Appendix
2. Appellant Brief
3. Certificate of Compliance
4. Certificate of Service

by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

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Dated this 1st day of September, 2021.

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