20210301

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 30, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Maxwell Dean Hultberg, Defendant and Appellant.	Supreme Court File No. 20210301 Morton County District Court No. 30-2020-CR-00964 **APPELLANT BRIEF**

BRIEF OF APPELLANT, MAXWELL DEAN HULTBERG

Appeal from the Criminal Judgment

Entered on the 4th day of October, 2021.

In District Court, Morton County, State of North Dakota

The Honorable Cynthia Feland Presiding

ORAL ARGUMENT REQUESTED

Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
Office: 701-663-1929
Pulkrabek@lawyer.com
Attorney for the Appellant

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STATEMENT OF THE ISSUES

[¶1] **ISSUE I.: In this case did the trial judge err when she gave the jury a general jury verdict form?**

NATURE OF THE CASE

[¶2] The charge in this case is Indecent Exposure.

[¶3] This case began with the filing of a complaint and affidavit of probable cause on September 14, 2020.

[¶4] The initial appearance was held on September 14, 2020 and a scheduling order was entered.

[¶5] A Change of Plea hearing was held on February 3, 2021.

[¶6] A Pre-Sentence Investigation was ordered on February 4, 2021.

[¶7] A Pre-Sentence Investigation was entered on May 28, 2021.

[¶8] A sentencing hearing was held on June 14, 2021.

[¶9] The trial judge rejected the plea agreement.

[¶10] The Jury Instructions were filed on August 25, 2021.

[¶11] The Final Dispositional Conference was held on August 23, 2021.

[¶12] The jury trial began and ended on August 24, 2021 with the jury finding Maxwell Dean Hultberg guilty of Indecent Exposure.

[¶13] The criminal judgment was entered on October 4, 2021.

[¶14] The notice of appeal, order for transcript, and notice of filing the notice of appeal were entered on October 27, 2021.

[¶15] The clerk's certificate on appeal was filed on November 22, 2021.

[¶16] The clerk's supplemental certificate on appeal was filed on November 23, 2021.

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

STATEMENT OF FACTS

[¶18] In the City of Mandan, North Dakota, on or about September 14, 2020, at 7:00 p.m. Taylor Reamann, was driving her car in Mandan, North Dakota when she saw a man sitting on a bike on the Sitting Bull bridge near a dog park making motions towards his crotch area as if he was masturbating. In order to be sure of what she saw she turned her car around and took a second look at that man. After her second look she called 911 and reported what she saw.

[¶19] Because of Ms. Reamann's 911 call, Officer Both Kohler was dispatched to the Sitting Bull bridge on Highway 1806 in Mandan, North Dakota to investigate. Upon Officer Kohler's arrival at the bridge, she saw a man sitting on a bicycle on the Sitting Bull bridge.

[¶20] When Officer Kohler first saw this man, she observed his pants zipper to be open and the tip of his penis sticking out. Then after Ms. Kohler introduced herself, this man covered himself with his jacket and appeared to be adjusting himself. He then told Officer Kohler he was having a problem because his pants zipper wasn't working.

[¶21] This man was later identified as Maxwell Dean Hultberg (Mr. Hultberg). At trial Mr. Hultberg testified that he was unable to figure out how to zip up his pants because he was severely under the influence of narcotics.

STANDARD OF REVIEW

[¶22] 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.

ISSUE I: **In this case did the trial judge err when she gave the jury a general jury verdict form?**

ARGUMENT

[¶23] According to N.D.C.C. §12.1-20-12.1 Indecent exposure is:

"An individual, with intent to arouse, appeal to, or gratify that individual's lust, passions, or sexual desires, is guilty of a class A misdemeanor if that individual:
a. Masturbates in a public place or in the presence of a minor;
b. Exposes the individual's penis, vulva, or anus in a public place or to a minor in a public or private place;
c. Exposes the individual's penis, vulva, or anus by unsolicited electronic means; or
d. Exposes the individual's penis, vulva, or anus by any electronic means to a minor."

[¶24] Prior to trial the following discussion took place at Jury Trial Tr. p. 8 L. 11 – p. 11 L. 17:

"THE COURT: Can you enlighten me as to what change you wanted and on which page?

MR. ROLLER: Well, I can just go through it. I'll just read the e-mail on the record. The e-mail was, upon further review the defense does have a slight issue with the section of the requirement of a unanimous verdict, specifically page 12, line 12 through 17. It's currently drafted as you must unanimously agree on the alternative methods of the commission of the charge, end quote, and omit the intent element of indecent exposure.

I'm concerned that this phrasing could potentially be ambiguous or confusing to the jurors and it gives the impression that if the statutory elements are not met, the jurors could use alternative means to convict Mr. Hultberg without consideration of the intent requirements, and so the defense would ask that the word alternative be removed and that the section include the intent element so as to mirror those listed in the essential element section just so that it's perfectly clear for the jury.

THE COURT: So let me make sure that I understand what it is you are saying. So if I'm understanding correctly, sir, what you are asking the Court to do is to insert the culpability requirement before each of the four alternatives; is that correct?

MR. ROLLER: Or just in the section in general. It doesn't appear in the unanimous verdict section at all was my concern.

THE COURT: All right. Let me just look at that here again. I'm just having a little difficulty with Odyssey this morning.

MR. ROLLER: Not a problem.

THE COURT: All right. And so you are looking at page 12 of the instructions; correct?

MR. ROLLER: Yes.

THE COURT: So in that case you want me to insert -- so number one would say the defendant willfully masturbated in a public place, number two would say the defendant willfully masturbated in the listed within the essential elements, to unanimously agree on which alternatives the crime was committed under.

MR. ROLLER: Mm-hmm. Your Honor, I understand that fully and respect that interpretation. Like I said, I'm just concerned that a lay person might hear that instruction and feel that they have the ability to waive the intent requirements, so just any additional phrasing that would clarify that for the jurors is what I'm asking for.

THE COURT: Okay. Well, I've inserted the word willfully before each of the four alternatives that are listed on page 12 at lines 14 through 19, and I'm wondering what other addition then besides inclusion of the word willfully you are requesting.

MR. ROLLER: I think that would be sufficient, Your Honor."

[¶25] After the above discussion and the change of wording in the jury instruction the court gave the following general jury verdict form to the jury, App. p. 25:

"We, the jury, duly impaneled and sworn to try the above-entitled action, make the following findings of the defendant, Maxwell Dean Hultberg:

On the charge of Indecent Exposure, we, the jury, find the defendant:

NOT GUITLY _____ GUILTY_____"

[¶26] In City of Mandan v. Sperle, 2004 ND 114, 680 N.W. 2d 275 (N.D. 2004), the North Dakota Supreme Court affirmed a conviction that listed the following elements of a disorderly conduct charge:

> "4. Engaged in fighting, or in violent, tumultuous or threatening behavior; made unreasonable noise; used obscene language or made an obscene gesture in a public place; created a hazardous, physically offensive, or seriously alarming condition by any act which served no legitimate purpose; or otherwise engaged in harassing conduct by means of intrusive or unwanted acts, words, or gestures that were intended to adversely affect the safety, security, or privacy of another person; and"

[¶27] According to Sperle, supra, at [¶15]:

> "The ordinance in this case permitted the jury to find Sperle guilty of disorderly conduct through a number of alternative behaviors, any one of which is deemed disorderly conduct and none of which is exclusive. The alternative behaviors include fighting, threatening behavior, and abusive language that result in harassing another person. The evidence in this case would support a rational factfinder's concluding that Sperle had committed all of these behaviors, any one of which was sufficient to constitute prohibited conduct and a violation of the ordinance. We conclude Sperle has failed to show the alleged error by the court in submitting a general verdict form constitutes an exceptional case involving obvious serious injustice."

[¶28] No doubt the state will claim that the above quote from Sperle, supra, applies to the case now before the Court.

[¶29] Mr. Hultberg claims that Sperle, supra, doesn't apply because of the language in [¶26] above. He also claims the following language in the Jury Instruction Requirement of Unanimous Verdict, App. p. 21:

> "Before you can return a verdict of guilty for indecent exposure, you must unanimously agree on the alternatives methods of commission of the charge, either that:
> 1. The defendant willfully masturbated in a public place; and/or
> 2. The defendant willfully masturbated in the presence of a minor, and/or

3. The defendant willfully exposed the Defendant's penis in a public place; and/or
4. The defendant willfully exposed the Defendant's penis to a minor in a public place.

Before you can return a verdict of guilty, each of you must not only find, beyond a reasonable doubt, that the defendant committed each element of the crime charge, but you must also unanimously agree as to the method of commission of the alleged offense" (emphasis added)

[¶30] According to Sperle, supra, at ¶14:

> "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law."

[¶31] In the case now before the Court the trial judge said at Jury Trial Tr. p. 10 L. 13 – L. 22:

> "And so the concern that I have is when the State charges in the alternative, I don't want there to be a situation where half of the jurors think that, you know, the State has proven one of the alternatives where, you know, a smaller percentage think another, and they think because at least they agree that one of the four alternatives in this case applies that they are going to convict. I want to make sure they understand that they all have to agree on the method."

[¶32] In this case Mr. Hultberg didn't object to jury verdict form. Therefore, the state will probably argue Mr. Hultberg can't raise that issue for the first time on appeal.

[¶33] If the state chooses to make the above agreement Mr. Hultberg's response is State v. Kraft, 413 N.W.2d 303 (N.D. 1987):

> "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)

[¶34] The significant impact in this case is the general verdict form allowed the jury to find Mr. Hultberg guilty without all agreeing on a method.

[¶35] The above quote from Kraft, supra, deal with jury instructions. Mr. Hultberg believes jury verdict forms should be considered part of jury instruction and that they are the end result of what the jury must find after applying the jury instructions to the facts of the case.

ORAL ARGUMENT

[¶36] Oral argument has been requested to emphasize and clarify the appellant's written arguments on their merits.

CONCLUSION

[¶37] The general jury instruction in this case allowed the jury to find Mr. Hultberg guilty without determining which method applied. Such a findings is contrary to what the trial judge said in [¶23]. According to [¶23] the trial judge from what she said indicates the jury had to agree on a method.

[¶38] This case should be remanded to the district court with an Order to grant Mr. Hultberg a new trial and at that trial use a special verdict that will require the jury to agree on the same method.

Dated this 30th day of December, 2021.

/S/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
(701) 663-1929
pulkrabek@lawyer.com
Attorney for Appellant, Maxwell Dean Hultberg

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Maxwell Dean Hultberg, Defendant and Appellant.	Supreme Court File No. 20210301 Morton County District Court No. 30-2020-CR-00964 **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 11 pages and appendix consists of 35 pages.

Dated this 30th day of December, 2021.

/S/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
(701) 663-1929
pulkrabek@lawyer.com
Attorney for Appellant, Maxwell Dean Hultberg

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Maxwell Dean Hultberg, Defendant and Appellant.	Supreme Court File No. 20210301 Morton County District Court No. 30-2020-CR-00964 **CERTIFICATE OF SERVICE**

[¶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:

North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

Allen Koppy
Morton County States Attorney
mortonsa@mortonnd.org

and by U.S. postal service with proper postage affixed to:

Maxwell Dean Hultberg
613 Columbia Drive
Bismarck, ND 58504
Defendant/Appellant.

Dated this 30th day of December, 2021.

/S/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
(701) 663-1929
pulkrabek@lawyer.com
Attorney for Appellant, Maxwell Dean Hultberg