North Dakota Attorney General's LAW REPORT

Wayne Stenehjem, Attorney General
State Capitol - 600 E Boulevard Ave. Dept 125
Bismarck, ND 58505-0040
(701) 328-2210

November 2017

State v. Hall, 2017 ND 124, 894 N.W.2d 836

Search and Seizure

An officer who was conducting surveillance at an Amtrak Station noticed Hall acting suspiciously in many ways. The officer followed Hall to an apartment building where Hall was unable to gain entry into an apartment through the patio door. That apartment belonged to an individual the officer knew had pending drug charges. The officer took a photograph of Hall at a restaurant and sent it to another officer. That second officer identified Hall. Hall took a taxi to a hotel and the officer followed him. The officer approached Hall and spoke to him while other officers and a K-9 arrived. Hall's backpack was alerted on by the K-9 and the officers seized the backpack pending application for a search warrant.

Hall was allowed to leave while the officers got the search warrant. The subsequent search revealed oxycodone pills. Hall was later found and arrested at the airport. Hall filed a motion to suppress the evidence from the back pack claiming the search/sniff was illegal. The trial court denied his motion and Hall conditionally pled guilty. Hall appealed arguing the initial contact of him made by the officer constituted a seizure unsupported by reasonable suspicion.

On appeal, a trial court's decision on a motion to suppress findings of facts is deferred to, but questions of law are fully reviewable. *State v. Knox*, 2016 ND 15, ¶ 6, 873 N.W.2d 664. Hall asserts the initial contact was an illegal seizure of his person. A Fourth Amendment seizure occurs when an officer, by force or show of authority, in some way restricts a person's liberty. *City of Jamestown v. Jerome,* 2002 ND 34, ¶ 5, 639 N.W.2d 478.

The district court found the initial encounter here was a consensual encounter because no order by the officer or show of authority restricted Hall's liberty. On appeal that finding was upheld. Hall also argued both the seizure and dog sniff of his backpack were unconstitutional. The testimony revealed that K-9 was on scene and the sniff took place within minutes of the officer approaching Hall. A dog sniff without a seizure is not a search. *United States v. Place*, 462 U.S. 696, 706 (1983).

There is no legitimate expectation of privacy that can be violated by governmental conduct if that conduct can only reveal information about contraband. *State v. Nguyen*, 2013 ND 252, ¶ 11, 841 N.W.2d 676. The temporary seizure of a piece of luggage for purposes of a K-9 sniff only requires a reasonable suspicion. *Place*, 462 U.S. at 706. A reasonable suspicion is determined by an objective standard looking at the totality-of-circumstances, including the inference and deductions an investigating officer

would make based on the officers' training and experience. *State v. Deviley*, 2011 ND 182, ¶ 8, 803 N.W.2d 561.

The officer here knew the following things before the K-9 sniff: Hall was traveling Amtrak (a commonly used conduit for drug trafficking); Hall enter a taxi and the taxi doubled back to the station as if attempting to see if he was being followed; Hall attempted to enter an apartment known to house individuals with drug charges; the identification of Hall by another officer who also said Hall was suspected of drug trafficking; and finally while talking to officers Hall set down his backpack and stepped away from it. All these facts, coupled with the officers' training and experience gave the officers reasonable suspicion to temporarily seize Hall's backpack for the K-9 sniff. The dog sniff and alert to drugs established probable cause to seize it pending application for a search warrant. Hall's rights were not violated and his conviction was affirmed.

State v. Shick, 2007 ND 134, 895 N.W.2d 773

Consent to Search

Law enforcement went to Shick's residence regarding a report of Shick shouting at and threatening some co-workers. Shick invited law enforcement into his home and consented to a search of it. A backpack containing methamphetamine, drug paraphernalia, and ammunition was found in his bedroom. Shick then denied permission to search his pickup. Shick was told officers would tow the pickup and then get a search warrant. When the tow truck arrived Shick agreed to let them search the pickup if they wouldn't tow it. Inside the pickup they found more drugs and paraphernalia. A pistol, loaded magazines, and ammunition were also found.

Shick was charged with multiple crimes and prior to trial he moved to suppress the evidence found in his pickup claiming his "consent was coerced." He claims the towing of his pickup would have resulted in financial hardship and he only consented when officers threatened to tow it if he didn't consent to the search. The district court found the consent to be valid and denied the motion. After the State rested its case, Shick renewed his motion to suppress and made a motion for mistrial. However, Shick had not made any objections to the evidence during the trial.

An objection to evidence during a trial focuses the court on the objection in the context of the trial, when the relevance and potential for prejudice is more apparent. *State v. Brewer*, 2017 ND 95, ¶ 4, 893 NW.2d 184. Failing to object during the trial is a waiver of a claim of error. *Id.* Shick failed to do this and therefore his conviction was upheld.

State v. Turbeville, 2017 ND 139, 895 N.W.2d 758

Probable Cause Determination

The State appealed a district court order dismissing a charge of possession of a controlled substance with intent to deliver. On appeal it was determined there was probable cause for the charge and the charge was reinstated and the case remanded for trial.

Law enforcement responded to Turbeville's residence about a domestic dispute. When the door was opened, the smell of burnt marijuana was immediately evident. After resolving the domestic incident the officer asked for consent to search the residence but was denied. The officer applied for a search warrant and found drug paraphernalia, a sizable quantity of marijuana, baggies, grinder, and some cash. Turbeville was charged with possession with intent to deliver marijuana. At a probable cause hearing the district court found probable cause did not exist for that charge and dismissed it. The State appealed that ruling.

The State can appeal an order dismissing a charge. N.D.C.C. § 29-28-07. A preliminary hearing is a screening tool used to determine if the facts are sufficient to warrant a person of reasonable caution to believe an offense was committed by the person charged. *State v. Blunt*, 2008 ND 135, ¶ 17, 751 N.W.2d 692. A preliminary hearing is not a trial and probable cause may be based on hearsay evidence and evidence that might not be admissible at trial. N.D.R. Crim. P. 5.1(a). The State is not required to prove its charge beyond a reasonable doubt, only to produce sufficient evidence to show a crime was committed and the accused is probably guilty. *Blunt*, 2008 ND at ¶ 15. Whether the facts presented to the trial court established probable cause is a questions of law and is fully reviewable on appeal. *State v. Foley*, 2000 ND 91, ¶ 8, 610 N.W.2d 49.

The trial court here didn't think the State had presented enough evidence to establish the element of intent to deliver. The evidence presented included testimony of a "sizable" amount of marijuana that looked like it had been processed into smaller/equal pieces; a box for a small scale; a grinder; baggies containing marijuana and almost $400 in cash were found in Turbeville' s bedroom. On appeal this evidence was determined to be enough to show probable cause that Turbeville possessed the marijuana with intent to distribute it. The district court's ruling was reversed and the case sent back for further proceedings.

Denault v. State, 2017 ND 167, 898 N.W.2d 452

Sex Offender Registration

Denault pled guilty in Minnesota in 2000 to the crime of lewd exhibition. Denault then moved to North Dakota and filed a petition for declaratory relief to excuse him from having to register as a sexual offender in North Dakota. Denault had not been required to register as a sexual offender in Minnesota. The district court granted Denault's petition and vacated

his sexual offender registration requirement in North Dakota.

The district court said the executive brand of the government (here the Attorney General's Office) acted in excess of its authority and only the courts could order Denault to register as a sexual offender in North Dakota. The State appealed that ruling, arguing the district court erred. On appeal this question of law was fully reviewable.

In reviewing a statute the plain language of the statute is looked at and each word is given its ordinary meaning. *State v. Meador*, 2010 ND 139, ¶ 11, 785 N.W.2d 886. N.D.C.C. § 12.12-32-15(3) is the statutory authority for requiring people to register as sexual offenders and states:

> 3. If a court has not ordered an individual to register in this state, an individual who resides, is homeless, or is temporarily domiciled in this state shall register if the individual:
>
> a. Is incarcerated or is on probation or parole after July 31, 1995, for a crime against a child described in section 12.1-29-02, or section 12.1-18-01 or 12.1-18-02 if the individual was not the parent of the victim, or as a sexual offender;
>
> b. Has pled guilty or nolo contendere to, or been adjudicated for or found guilty of, an offense in a court of this state for which registration is mandatory under this section or an offense from another court in the United States, a tribal court, or court of another country equivalent to those offenses set forth in this section; or
>
> c. Has pled guilty or nolo contendere to, or has been found guilty of, a crime against a child or as a sexual offender for which registration is mandatory under this section if the conviction occurred after July 31, 1985.

On appeal it was determined that this statute allows the Attorney General to require a convicted sexual offender to register even if they were not required to register by a court in another state. The next issue is whether the Minnesota conviction is substantially similar to a North Dakota statute that required registration as a sexual offender. Denault was convicted of lewd exhibition. A review of the Minnesota Statute shows it is equivalent to Indecent Exposure per N.D.C.C. § 12.1-20-12.1. Both required exposing one's genitals to a minor. Denault was required to register as a sexual offender in North Dakota.

State v. Friesz, 2017 ND 177, 898 N.W.2d 688

Emergency Exception to Warrant Requirement

Friesz shot and killed another man in a home in Mandan in October 2014. Frieze then set the home on fire and left the area. The fire was reported and police and firefighters responded. The first police officer on scene could smell and see smoke so he attempted to gain access to the residence to see if anyone

was inside. The door was locked and no one answered so he kicked in the door. He was unable to enter the residence due to the smoke. After the fire was contained, law enforcement was advised a dead body was located inside on a living room couch. A fireman also saw a rifle leaning up against a wall. Concerned it could be kicked over and accidentally discharged, he seized the firearm and gave it to law enforcement. Law Enforcement later learned the trailer belonged to Todd Friesz and that the Defendant had lived there off and on. The Defendant arrived on the scene with other people.

The Defendant spoke to officers and said he was there to retrieve keys for a vehicle from the trailer. The Defendant's story then changed and was confusing to the officer. This led to suspicions of the Defendant's involvement. The Defendant then told the officer who the deceased person in the trailer was and that he had shot him in self-defense from a knife attack. The Defendant then admitted starting the fire with a torch lighter. This conversation was audio recorded and played at trial. The Defendant admitted the deceased was breathing when he started the fire.

An officer was sent to get a search warrant to search the trailer. Among the items found in the search in a car belonging to the Defendant was a cap ring from a gasoline can, a cigarette lighter and a receipt from a gas station from that day.

The coroner testified at trial that the victim's cause of death was a gunshot wound to the head and the injury was not survivable regardless of the fire. Friesz moved to suppress all the evidence found in the house claiming the search was illegal and conducted without a warrant. The court denied his motion and Friesz was convicted of manslaughter and arson. On appeal Friesz asserts the initial search of the residence and seizure of evidence was illegal.

Findings of fact in a ruling on a motion to suppress are deferred to and conflicts in testimony are resolved in favor of affirmance. *State v. Knox,* 2016 ND 15, ¶ 6, 873 N.W.2d 664. A trial court's decision on a motion to suppress is upheld if sufficient competent evidence exists to support the findings and if the decision is not contrary to this manifest weight of the evidence. *Id.* Questions of law however are fully reviewable on appeal. *Id.*

Warrantless searches and seizures inside a home are presumptively unreasonable, but there are certain exceptions. *State v. Karna*, 2016 ND 232, ¶ 7, 887 N.W.2d 549. One of these exceptions is when emergency circumstances exist making the needs of law enforcement so compelling a warrantless search is objectively reasonable under the Fourth Amendment. *State v. Hart*, 2014 ND 4, ¶ 13, 841 N.W.2d 735. These types of situations involve an emergency situation requiring swift action to prevent imminent disregard to life or serious damage to property, or to stop the imminent escape of a suspect or destruction of evidence. *State v. Nagel*, 308 N.W.2d 539, 543 (N.D. 1981). This exception does not require probable cause but must be motivated by a perceived need to render aid or assistance. *State v. Matthews*, 2003 ND 108, ¶ 13, 665 N.W.2d 28.

In this case the firefighter removed the firearm out of concern for safety of the firefighter and first responders. The evidence presented supports the ruling that seizure of the rifle was admissible

under the emergency exception. Frieze's conviction for manslaughter and arson was affirmed.

State v. Hyde, 2017 ND 186, 899 N.W.2d 671

Emergency Exception to Search Warrant Requirement

Ward County law enforcement entered Hyde's residence in response to a report he may be suicidal. Hyde's brother called law enforcement saying Hyde had been calling their mother crying with suicidal ideations, but the last call was about 7 hours prior. The call was recorded as a request for a welfare check with a low priority. When law enforcement arrived they initially spoke to the landlord who said if a certain vehicle was present Hyde would be there. The officers began knocking on Hyde's door around 10:20 a.m. After nine minutes the officers let themselves in through the unlocked door.

Officers saw a marijuana plant in plain view before finding Hyde. Hyde was sleeping but upon waking said he was okay and not suicidal. The officer said they had to seize the marijuana plant and Hyde agreed. Hyde also showed them 35 more plants; all of the plants were seized. Hyde was charged with manufacturing marijuana and possession of drug paraphernalia. Hyde filed a motion to suppress the evidence but the motion was denied. Hyde appeals that ruling claiming officers did not have a warrant to enter his house and no emergency circumstances existed justifying their entry.

Deference is given to the district courts findings of fact on appeal and conflicts in testimony are resolved in favor of affirmance. *State v. Tognotti*, 2003 ND 99, ¶ 5, 663 N.W.2d 642. Questions of law are fully reviewable on appeal and whether findings of facts meet a legal standard is a question of law. *State v. Reis*, 2014 ND 30, ¶ 8, 842 N.W.2d 845. Exigent circumstances are a well-recognized exception to the premise that warrantless searches are unreasonable searches. *State v. Nagel*, 308 N.W.2d 539, 543 (N.D. 1981). To qualify as exigent, the circumstances must require swift action to protect any imminent danger to life, serious damage to property, escape of a suspect or destruction of evidence. *Id.*

The emergency exception is a narrower exception that requires law enforcement to have an objectively reasonable basis to believe someone is seriously injured or in threat of such injury. *Michigan v. Fisher*, 558 U.S. 45, 47-48 (2009). This exception does not require probable cause but three elements must be established. First the police must have reasonable grounds to believe an emergency exists; the search must not be primarily motivated by intent to arrest and seize evidence; and there must be a reasonable basis to associate the emergency with the area or place to be searched. *State v. Karna*, 2016 ND 232, ¶ 8, 887 N.W.2d 549. The burden is on the State to prove all these factors to justify the warrantless entry into a home. *State v. DeCoteau*, 1999 ND 77, ¶ 14, 592 N.W.2d 579.

Hyde was only asserting that the officer did not have reasonable grounds to believe an emergency existed requiring an immediate need for assistance to protect life or property. The deputies'

concern here was entirely based on the second hand report of Hyde making suicidal comments. Typically the emergency exception relies on direct and contemporaneous observations establishing the immediate need for assistance to protect life or property. *State v. Nelson*, 2005 ND 11, ¶ 15, 691 N.W.2d 218. The information about Hyde did not include specific threats and was from many hours before. The Court determined the information was too vague and lacked reliability to rise to the level of an emergency exception to the requirement of a search warrant. The hours of delay also weighed against a finding of a need for immediate assistance. The district court's judgment was reversed, the evidence suppressed, and Hyde was allowed to withdraw his guilty plea.

State v. Davison, 2017 ND 188, 900 N.W.2d 66

Patronizing a Minor for Sexual Activity

Davison was arrested as part of a sting aimed at catching individuals paying for or attempting to pay for sex with minors.

Sexually suggestive advertisements were posted on the internet on Craigslist. During discussions with Davison the officer posing as a minor told him she was a minor. Discussions involved hiring the "minor" for sexual activity and arrangements were made to meet at a local hotel. When Davison arrived he was arrested and charged with patronizing a minor for commercial sexual activity in violation of N.D.C.C. § 12.1-41-06(1)(a).

At his preliminary hearing Davison argued the charge should be dismissed. He claims the statutes requires an actual minor be involved. Davison was found guilty of the charge at a bench trial and appealed. The only question on appeal is one of statutory interpretation and as such is fully reviewable on appeal. *State v. Brown*, 2009 ND 150, ¶ 15, 771 N.W.2d 267. Words in a statute are given their plain, ordinary, and commonly understood meaning unless otherwise defined. *Dominguez v. State*, 2013 ND 249, ¶ 11, 840 N.W.2d 596.

Davis was convicted of violating N.D.C.C. § 12.1-41-06(1)(a):

> 1. A person commits the offense of patronizing a minor for commercial sexual activity if:
>
>   a. With the intent that an individual engage in commercial sexual activity with a minor, the person gives, agrees to give, or offers to give anything of value to a minor or another person so that the individual may engage in commercial sexual activity with a minor.

The term "commercial sexual activity" is defined at N.D.C.C. § 12.1-41-01(3):

> "Commercial sexual activity" means sexual activity for which anything of value is given to, promised to, or received, by a person.

This statute is aimed at individuals who seek to pay for sexual services from a minor but doesn't specifically say a minor has to be present or involved. Proof must be given that an individual offered or

agreed to give “anything of value to a minor “or another person” with intent to engage in a sexual activity with a minor. Davison’s verdict was supported by sufficient evidence at trial and is upheld. The statute does not require the presence of a minor.

State v. Blotske, 2017 ND 190, 899 N.W.2d 661

Prosecutor Misconduct

Blotske was charged with gross sexual imposition, terrorizing, and felonious restraint. Prior to trial the prosecutor informed the court it intended to introduce a video interview of Blotske at trial. Blotske’s attorney was concerned about a portion of the recording where Blotske discussed allegations of child molestation that Blotske had not been charged with. The State agreed that portion of the video should not be played. During trial the video was played by the State, and the portion the parties had agreed to omit was accidentally shown. The defense objected and the court allowed the state to address the jury about that mistake.

The State basically told the jury to disregard the portion of the video about Blotske’s uncharged child molestation allegations. The trial court also directed the jury to disregard that information. The defense asked for a curative jury instruction also. The next day the defense moved for a mistrial stating the video clip was too prejudicial to Blotske and he now couldn’t get a fair trial. The court denied that request but did give a curative jury instruction which was agreed upon by both parties. Blotske was convicted of all charges and appealed.

Blotske argues the trial court abused its discretion by denying his request for a mistrial. Blotske also argues the video played by the State was inadmissible and highly prejudicial and the State’s explanation to the jury further prejudiced him.

Granting a mistrial is an extreme remedy and is only done when a fundamental error in the trial makes it clear further proceedings would result in a manifest injustice. *State v. Skarsgard*, 2007 ND 160, ¶ 16, 739 N.W.2d 786. Juries are presumed to follow instructions given by the trial court and a curative instruction to disregard evidence is usually sufficient to correct any errors. *State v. Hernandez*, 2005 ND 214, ¶ 24, 707 N.W.2d 449. A ruling on a motion for mistrial will only be overturned if a district court abuses it discretion by acting in an arbitrary, unreasonable, or capricious manner or misapplies the law. *State v. Lang*, 2015 ND 181, ¶ 10, 865 N.W.2d 401.

The trial court denied Blotske’s request in part because he briefly referenced the child molestation allegation during his own testimony. However, the video played by the State about Blotske’s child molestation allegations during a trial on gross sexual imposition charges is highly prejudicial. The suggestion (to the jury) of separate allegations involving sexual misconduct in a trial for a sex offense, had a high potential to improperly prejudice Blotske. Even if it was unintentional, the state failed to take appropriate steps to avoid presenting the prejudicial portions of Blotske’s interview. Additionally, the State’s statements to the jury were also potentially prejudicial to

Blotske. These errors were too egregious to ignore and on appeal Blotske's conviction was reverse.

State v. Azure, 2017 ND 195, 899 N.W.2d 294

Prior Testimony

Law enforcement went to a residence after receiving several calls from there but with no response from the caller. The defendant was at the door when they arrived and directed them into the living room. A female was lying there injured so an ambulance was called. She initially said she had fallen. A couple weeks later, while still in the hospital, she told law enforcement the Defendant had caused her injuries by assaulting her. She said she lied about falling because she was afraid of the defendant. She testified at the preliminary hearing (and was cross examined). Prior to trial she died from other causes. The State moved to allow her prior statement to law enforcement and her testimony at the preliminary hearing to be used at trial. The Court allowed the State to introduce both her prior statements at trial.

A trial court's rulings on the admission of evidence are not overturned unless the court abused its discretion. *State v. Jaster*, 2004 ND 223, ¶ 12, 690 N.W.2d 213. Azure argues the court allowing law enforcement to testify about the statements the victim made to him at the hospital was an abuse of discretion. The issue on appeal is whether the declarant must testify and be subject to cross examination, at the trial, before the victim's prior statements (which were consistent with her testimony at the preliminary hearing) were admissible at trial. The rule requires the declarant (here the deceased victim) to testify and therefore be subject to cross examination at trial. This allows the jury to observe the cross examination of that person about any prior consistent statements. Allowing law enforcement to testify about her prior consistent statements was error. The officer's testimony also was not just duplicative because it was much more detailed than the victim's prior testimony at the preliminary hearing. The conviction was reversed and the matter remanded for a new trial.

***State v. Pulkrabek*, 2017 ND 203, 900 N.W.3d 798**

Proof Required for Theft Conviction

Pulkrabek's property was searched pursuant to a search warrant. Stolen sports memorabilia was found in his pickup. He was charged with a single count of theft for both taking the property and receiving the stolen property. On appeal Pulkrabek argues the trial court erred by not instructing the jury it must unanimously decide upon which of the two theories it found him guilty.

At trial the jury instruction was read (in part): "The Defendant knowingly took or exercised unauthorized control over certain property, or knowingly received, retained, or disposed of certain property . . ." This instruction is a combination of the

two separate instructions for taking property and for possessing stolen property. Pulkrabek claims the court should have advised the jury they must unanimously decide which of his actions, the taking or possessing, it found him guilty of.

Historically there were many variations of theft including larceny, receiving stolen property, swindling, etc. These offenses were consolidated into one offense in 1973 when the North Dakota Century Code was adopted and codified as:

> **12.1-23-02. Theft of property.** A person is guilty of theft if he:
>
> 1. Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof;
> 2. Knowingly obtains the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally deprives another of his property by deception or by threat; or
> 3. Knowingly receives, retains, or disposes of property of another which has been stolen, with intent to deprive the owner thereof.

Pulkrabek's argument is contrary to the legislative history which says if the prosecution can prove any thieving state of mind, it makes no difference if the jury infers the defendant took the property directly from the owner or acquired the property from the thief. As such, the subsections of N.D.C.C. § 12.1-23-02 are not separate elements but are alternative ways of proving the crime. Pulkrabek's conviction was affirmed.

State v. Majetic, 2017 ND 205, ____ N.W.2d ____

Instruction to Jury

Majetic was charged with two counts of gross sexual imposition and took his case to trial. A jury was selected and sworn in on May 17, 2016. Before the first break, the judge advised the jury to keep an open mind and to not discuss the case with anyone until they had heard all the evidence. The judge told the jury this rule when applied when they were outside the courtroom also. Following that first break the parties discussed an issue about the late notice of a witness. The Court agreed the notice was late and allowed the defense time to retain their own expert. The judge advised the jury to not discuss the case with anyone until the trial was concluded. The trial was then continued until July 13, 2016 (56 days).

When the trial resumed the judge asked the jurors if any of them had discussed the case with anyone else during the 56 day break. No one replied. The judge then reviewed the preliminary instructions to the jury (including to not discuss the case with anyone) and the trial resumed. Majetic was found guilty on both counts of gross sexual imposition.

On appeal Majetic argues he was deprived of the right to an impartial jury because, after the 56 day break, the judge did not ask the jurors specifically whether any of them had formed an opinion in the case or if they had been influenced by the media. Majetic's trial

counsel did not object to this during the trial so Majetic had to argue it was an obvious error affecting his substantial rights. N.D.R. Crim. P. 52(b).

A defendant has the absolute right to a trial by an impartial jury. *State v. Smaage*, 574 N.W.2d 916, 919 (N.D. 1996). Jurors are also not allowed to communicate with each other about the trial during the trial. N.D.C.C. § 29-21-27. The trial court has a duty to advise the jurors at each break that they are not to discuss the case with anyone and to not form any opinions, until the case is submitted to them. *State v. Myers*, 2006 ND 242, ¶ 15-17, 724 N.W.2d 168.

However, generally issues must be properly raised at trial to allow the trial court to rule on the objection. *State v. Tresenriter*, 2012 ND 240, ¶ 9, 823 N.W.2d 774. Issues not raised to the trial judge will not be addressed on appeal unless the alleged error constitutes obvious error. *State v. Thompson*, 2010 ND 10, ¶ 20, 777 N.W.2d 617. The framework to establish an obvious error requires proof of (1) an error; (2) that is plain, and (3) which affects the substantial rights of the defendant. *State v. Olander*, 198 ND 50, ¶ 13, 575 N.W.2d 658. A plain error is one that is a clear deviation from a legal rule under current laws. *State v. Tresenriter,* 2012 ND at ¶ 12-13, 823 N.W.2d 774. In this case the trial court's instructions and admonitions to the jury before the trial was restarted complied with the requirements of law. Additionally, the trial court inquired, at the trial's restart, whether any jurors had discussed the trial with anyone else. No obvious error exists and Majetic's conviction was upheld.

State v. Lark, 2017 ND 251, ____ N.W.2d ____

Automobile Exception to Search Warrant

Lark was stopped for driving in the wrong lane. It was determined he had a suspended Oregon driver's license. The officer saw what he believed to be a "snort tube" made from a rolled up $10 bill and crack cocaine in the front passenger seat. Lark was handcuffed, advised of his rights, and searched. Lark possessed approximately $8400 in cash. The vehicle was eventually searched and a schedule III drug was found. The "cocaine" was field tested but was not actually cocaine. Lark filed a motion to suppress the evidence from the car and that motion was granted. The trial court found the probable cause to continue the vehicle search ended when the "cocaine" was field tested and the results were inconclusive. The State appealed that ruling.

The parties agreed the stop of Lark was proper. The automobile exception to the search warrant requirement allows law enforcement to search for illegal contraband if probable cause exists. *State v. Doohen*, 2006 ND 239, ¶ 19, 724 N.W.2d 158. Probable cause is present if it is shown that identifiable objects are probably connected with criminal activity and are likely to be found presently in an identifiable place. *Roth v. State*, 2006 ND 106, ¶ 13, 713 N.W.2d 513. The question on appeal is whether the officer had probable cause to support the seizure of Lark's vehicle. *State v. Sommer*, 2011 ND 151, ¶ 12, 800 N.W.2d 853.

The trial court found the continued search to be unsupported by probable cause

after the inconclusive cocaine testing. However, probable cause is the sum of all the layers of information weighed in total. *State v Wacht*, 2013 ND 126, ¶ 12, 833 N.W.2d 455. Here Lark had $8400 in cash, 3 cell phones, rolled up dollar bills with a burnt end, and what looked like drug residue. On appeal these factors were found to be enough to establish probable cause to continue the search of Lark's vehicle. The trial events court's order suppressing evidence was reversed and the matter sent back for further proceedings.