
IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File No.
)	20200159
)	
Plaintiff and Appellee,)	Walsh County No.
)	50-2019-CR-117
)	
v.)	
)	
)	
Steven Donald Aune,)	APPELLANT'S BRIEF
)	
Defendant and Appellant.)	

**Appeal from the criminal judgment entered June 9, 2020
 in Walsh County district court, Northeast Judicial
 District, North Dakota, the Honorable Barbara Whalen
 presiding**

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant's written arguments on their merits.

Transcript References:

A jury trial was held on January 14 through 17, 2020. The transcript of that trial is referred to as [Tr.] in this brief. The sentencing hearing was held on June 4, 2020. The transcript of that trial is referred to as [Sent.] in this brief.

JURISDICTION

[¶ 1] The Defendant, Steven Aune, timely appealed the district court's final criminal judgment. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI, § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

- [¶ 2] I. Whether the jury gave an inconsistent and compromised verdict by finding Mr. Aune not guilty of both intentional murder and murder under circumstances manifesting extreme indifference to the value of human life, while also finding Mr. Aune guilty of manslaughter.
- II. Whether Mr. Aune's sentence was illegal.

STATEMENT OF CASE

[¶ 3] This is a criminal matter on direct appeal from northeast judicial district, Walsh County Criminal Judgment. This case was before the district court in *State v. Steven Donald Aune*, 50-2019-CR-00117. The initial complaint was filed with the court on May 2, 2019. Mr. Aune was charged with one count of intentional murder, in violation of N.D.C.C. § 12.1-16-01(1), a class AA Felony.

[¶ 4] On May 7, 2019, Attorney Mottinger was assigned to represent Mr. Aune. On June 6, 2019, the initial appearance was held in this case. Mr. Mottinger motioned to have Mr. Aune evaluated at the State Hospital. Mr. Aune was deemed fit to proceed. Mr. Aune, through his attorney, waived his preliminary hearing on October 10, 2019, and proceeded to trial in this matter.

[¶ 5] The trial began on January 14 and ended on January 17, 2020. Lesser included charges of manslaughter and negligent homicide were included in the jury instructions. The jury ultimately found Mr. Aune guilty of manslaughter in violation of N.D.C.C. § 12.1-16-02, a class B Felony. Mr. Aune was sentenced on June 4, 2020, to confinement with the ND DOCR for ten (10) years, first to serve 85% and given credit for 401 days of pretrial detention. Mr. Aune timely filed a notice to appeal on June 9, 2020.

STATEMENT OF FACTS

[¶ 6] In May of 2019, Mr. Aune's two adult daughters were living with him on his farm in Adams, North Dakota. Tr. pp. 144, 321. Mr. Aune got into a disagreement with one of his daughter's (S.A.) regarding her pet rats. Tr. 147-148. Mr. Aune testified that he had been heavily drinking the evening before and Law enforcement recognized he had been drinking on the day he and S.A. talked about her pet rats. Tr. pp. 174, 326, 327, 328. Mr. Aune wanted his daughters and the rats out of his house. Tr. p. 148. He testified that he could not afford to have his children staying with him. Tr. p. 329. Mr. Aune's other daughter heard the conversation but was in a different part of the house. *Id.* S.A.'s sister testified that she heard, "a gun go off and 'Ah! You shot me!'" Tr. p. 149. She also testified that she saw her sister right after that and they discussed that perhaps a pelt air shot had ricocheted and hit her. *Id.* at 150. Mr. Aune told his daughter to drive S.A. to the hospital. *Id.*

[¶ 7] Mr. Aune testified that he kept a .22 rifle in the kitchen of his home. Tr. pp. 329-330. He testified the gun was not usually loaded. Tr. p. 330. However, he kept shells in the magazine. *Id.* Mr. Aune testified to put a shell in the chamber, "You cock it. You pull it along the side, you cock it, and the shell's in the chamber." *Id.* at ln 23-24. He testified that his usual practice with the gun was to, "put it back in the kitchen with shells in the magazine, nothing in the chamber, and the safety on." *Id.* at 331 ln 8-9.

[¶ 8] Mr. Aune went on to testify about what happened on May 1, 2019. He explained that he had picked up the rifle because he was going to take it back downstairs. Tr. p 336. He said, “I had the gun in one hand; it was pointing down; and I don’t know. It went off.” Tr. p. 333 ln 1-2. He testified that after the gun went off, he was “shocked” and that he “didn’t want to shoot her.” *Id.* ln 9.

[¶ 9] After S.A. was shot, she went downstairs. Tr. p. 333. Mr. Aune went down a different set of stairs. *Id.* He testified that at this point he did not know that she was seriously injured. *Id.* He testified that he did not know how serious S.A.’s injury was until he had been interviewed at the jail by Agent Zachmeier. *Id.* p. 335. S.A. died as a result of the gunshot wound and Deputy Sherlock placed Mr. Aune under arrest. Tr. p. 97.

LAW AND ARGUMENT

I. Whether the jury gave an inconsistent and compromised verdict by finding Mr. Aune not guilty of both intentional murder and murder under circumstances manifesting extreme indifference to the value of human life, while also finding Mr. Aune guilty of manslaughter.

Standard of Review

[¶ 10] The jury’s verdict of guilty on the charge of manslaughter, but not guilty on the charges of intentional murder and murder under circumstances manifesting extreme indifference is inconsistent. There was not sufficient evidence of all of the elements in manslaughter to convict Mr.

Aune beyond a reasonable doubt. Therefore the charge was duplicative and illogical.

[¶ 11] A verdict is not inconsistent when it is permissible under the law and facts of the case. When determining possible conflicts in a jury's verdict this Court reviews:

“[W]hether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted. If after a review of the district court's judgment no reconciliation is possible and the inconsistency is such that the special verdict will not support the judgment entered below or any other judgment, then the judgment must be reversed and the case remanded for a new trial.” *Moszer v. Witt*, 2001 ND 30, ¶ 11, 622 N.W.2d 223 (*quoting Barta v. Hinds*, 1998 ND 104, ¶ 6, 578 N.W.2d 553).

For appellate review, the Court “reconcile[s] a verdict by examining both the law of the case and the evidence to determine whether the verdict is logical and probable or whether it is perverse and clearly contrary to the evidence.” *Id.*

[¶ 12] Mr. Aune was charged with murder, in violation of N.D.C.C. § 12.1-16-01(1), a class AA Felony. The State had to prove beyond a reasonable doubt that Mr. Aune **intentionally** or **knowingly** caused the death of another human being. The jury found Mr. Aune not guilty beyond a reasonable doubt of **intentional** or **knowing** murder to move on to the alternative charge of murder under circumstances manifesting extreme indifference to the value of human life.

[¶ 13] The State charged in the alternative murder under circumstances manifesting extreme indifference to the value of human life.

The State had to prove beyond a reasonable doubt that Mr. Aune **willfully** (which includes the culpability levels of intentionally, knowingly, or recklessly) caused the death of another human being. The jury found Mr. Aune not guilty beyond a reasonable doubt of **intentionally, knowingly, or recklessly** causing the death of another human being to move on to the lesser included charge of manslaughter.

[¶ 14] For the lesser included charge of manslaughter, the State had to prove beyond a reasonable doubt that Mr. Aune **recklessly** caused the death of another human being. This is ultimately what the jury found, however because of the alternative charge and the way the jury was instructed to reach their verdicts, the jury had to find Mr. Aune not guilty of this same conduct and mens rea (culpability) to even consider the lesser included charges.

[¶ 15] North Dakota uses an elements analysis to determine whether an offense is lesser included. *State v. Keller*, 2005 ND 86, ¶ 31, 695 N.W.2d 703. The commission of the greater offense must not be possible without also committing the lesser offense. *Id.* This part of the analysis is met in the case before the Court. “For a lesser included offense instruction to be proper, there must be evidence creating reasonable doubt as to the greater offense **but supporting conviction of the lesser offense beyond a reasonable doubt.**” *Emphasis added State v. Carlson*, 1997 ND 7, ¶ 34, 559 N.W.2d 802.

[¶ 16] In this case manslaughter was not available as a lesser included offense because of the way the jury was instructed to deliberate. First the jury found Mr. Aune not guilty of intentional murder (1. intentional or 2. knowing culpability). By alternatively charging murder under circumstances manifesting extreme indifference the jury had to next deliberate and find Mr. Aune not guilty of willful murder (1. intentional, 2. knowing, or 3. reckless culpability) before deliberating on manslaughter. Because the jury had already determined Mr. Aune was not guilty of intentional or knowing murder, they could only have been deliberating on the third possible culpability, recklessness.

[¶ 17] Manslaughter, in this case, required proof that Mr. Aune recklessly (the third culpability level of which the jury already found Mr. Aune not guilty) caused the death of S.A. In order for the manslaughter instruction to be proper there must be evidence supporting conviction of the lesser offense beyond a reasonable doubt, but this jury's previous deliberation had already made that impossible. The only lesser included charge that could have still been determined by the jury's continued deliberation was negligent homicide. Negligent homicide required that Mr. Aune negligently caused the death of S.A. Negligence is the only culpability level that the jury had not already acquitted Mr. Aune of in their deliberations. The jury's verdict of guilty on the charge of manslaughter but not guilty on the charges of intentional murder and murder under

circumstances manifesting extreme indifference is illogical and inconsistent. The district court allowed that inconsistent verdict because it determined it was the correct outcome. When sentencing Mr. Aune, the court stated that his conduct was clearly reckless, not negligent. Sent. p. 32. But by the jury's own deliberation they had already acquitted him of reckless conduct. Therefore, the verdict was compromised and must be reversed.

II. Whether Mr. Aune's sentence was illegal.

[¶ 18] A trial court has broad discretion in fixing a criminal sentence. *State v. Henes*, 2009 ND 42, ¶ 6, 763 N.W.2d 502. This Court's review of a district court's sentence is generally limited to determining whether the court acted within the sentencing limits prescribed by statute or substantially relied upon an impermissible factor. *State v. Clark*, 2012 ND 135, ¶ 18, 818 N.W.2d 739. A court abuses its discretion when it acts in an unreasonable, arbitrary, or capricious manner, or when it misinterprets or misapplies the law. *Id.*

[¶ 19] A sentence is illegal if it is not authorized by the judgment of conviction. *See State v. Hutchinson*, 2017 ND 160, ¶ 9, 897 N.W.2d 321. A sentence in excess of a statutory provision or in some other way contrary to an applicable statute is an illegal sentence. *See Id.* Statutory interpretation is a question of law, which is fully reviewable on appeal. *State v. Corman*, 2009 ND 85, ¶ 15, 765 N.W.2d 530. Penal statutes are generally strictly construed against the government. *Id.*

[¶ 20] N.D.C.C. § 12.1-32-04 lists a number of factors a trial court must consider in sentencing a criminal defendant to imprisonment. However, the sentencing factors do not control the trial court's discretion. N.D.C.C. § 12.1-32-04; *State v. Steinbach*, 1998 ND 18, ¶ 24, 575 N.W.2d 193. The trial court does not have to explicitly reference the factors and the listed factors are not comprehensive of everything a trial court may consider in fixing a criminal sentence. *State v. Halton*, 535 N.W.2d 734, 739 n. 1 (N.D.1995).

[¶ 21] In *State v. Cummings*, this Court held, "a prior uncounseled conviction without waiver of counsel, is an impermissible factor which may not be substantially relied on by a trial judge in sentencing a defendant." *State v. Cummings*, 386 N.W.2d 468, 469 (N.D. 1986). The State in its sentencing argument to the court listed Mr. Aune's prior criminal history but did not tell the court if those convictions were uncounseled or with a proper waiver. Sent. pp. 11-12, 24. Without providing the court with more information simply listing what was found on Mr. Aune's criminal history report is an invitation to the court to consider an impermissible factor.

[¶ 22] In this case it was not simply an invitation to consider an impermissible factor, the court explained that Mr. Aune's criminal history was one of the reasons for, what was ultimately, a maximum possible sentence. Sent. p. 32. The district court asked Mr. Aune if he'd been to prison on three separate occasions, but did not ask him if those convictions were

with the assistance of counsel or a valid waiver took place. Therefore, the court considered an impermissible factor and the sentence was illegal.

CONCLUSION

[¶ 23] The jury's verdict of guilty on the charge of manslaughter was inconsistent and illogical, when considered with their finding of not guilty to the charges of intentional or knowing murder and murder under circumstances manifesting extreme indifference. Mr. Aune was illegally sentenced because the trial court relied on an impermissible factor to sentence him.

[¶ 24] WHEREFORE the Defendant respectfully requests the Court to reverse Mr. Aune's conviction. Alternatively, Mr. Aune respectfully requests the Court to reverse the illegal sentence of the trial court.

Dated this 8th day of September, 2020

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Steven Donald Aune,)	CERTIFICATE OF
)	COMPLIANCE
Defendant and Appellant.)	

[¶ 1] This Appellant's Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: September 8, 2020.

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[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief with Certificate of Compliance
Appellant's Appendix

And that said copies were served upon:

Kelley Cole, State's Attorney, walshsa@nd.gov

by electronically filing said documents via email. Also served upon:

Steven Aune #25918, c/o ND DOCR, 3100 E Railroad Ave, Bismarck, ND 58506

by placing a true and correct copy of said items in a sealed envelope with USPS.

Dated: September 8, 2020.

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