IN THE SUPREME COURT

STATE OF NORTH DAKOTA 20000126

SUPREME COURT NO.: 20000126



State of North Dakota,

Plaintiff-Appellee,

- vs -

Tanya Renee Glass,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT JUDGMENT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY CRIMINAL NO. 99-K-2829
THE HONORABLE BURT L. RISKEDAHL, PRESIDING

# APPELLANT'S BRIEF

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## NATURE OF THE CASE

On October 16, 1999 at 1:27 a.m. Tanya Renee Glass ("Glass") was arrested by Bismarck Police Officer, Brian Weigel ("Weigel") for Driving While Under the Influence ("DUI"). This DUI was charged on a North Dakota Uniform Complaint and Summons.

Glass plead not guilty to the DUI charge. A jury trial was held on March 1, 2000. At the conclusion of that trial Glass was found guilty. From the guilty verdict Glass is now appealing to the North Dakota Supreme Court.

## STATEMENT OF THE FACTS

On October 16, 1999 at about 1:30 a.m., Bismarck Police Officer, Brian Weigel ("Weigel") was alone on patrol in Bismarck, North Dakota. He was driving a Bismarck Police car in an easterly direction on Boulevard Avenue and was approaching 15th Street. TR. P.8, L.22-25. At that time he was aware of two moving vehicles in that area. One moving vehicle was some distance ahead, in front of him and driving in an easterly direction. The other was a silver pickup ("pickup") that was southbound on 15th Street. TR. P.9, L.9-15. Weigel claims the pickup didn't brake for a stop sign. He estimated the pickup's speed at about 25 to 30 m.p.h. as it went through the intersection at Boulevard Avenue and 15th Street. As the pickup went through the intersection, Weigel saw the vehicle in front of him apply the brakes. TR. P.9, L.16-23.

Weigel made a right turn on 15th Street and followed the pickup. He stopped the pickup on Avenue D, three blocks' from the intersection of Boulevard Avenue and 15th Street, by turning on his emergency lights, Tr. P.10, L.8-13.

Weigel got out of the police car and approached the driver's window of the pickup. Weigel started talking to the female driver who was alone in the pickup. He learned her name was Tanya Renee Glass ("Glass"). TR. P.10, L.16-25 and P.11, L.1-23. During this time, Weigel smelled an odor of alcohol, observed the driver's eyes were blood shot and that she had slow jerky muscle movement. Tr. P.12, L.10-21.

Weigel asked Glass to step out of the pickup. According to Weigel, Glass had trouble getting out of the truck and dropped her identification card. After Glass got out of the pickup, Weigel had her perform a gaze nystagmus test which she had problems

performing. Weigel didn't have Glass do the one legged stand test because she told him she had bad knees. Then, Weigel asked Glass to do the walk and turn test. She replied that she had done wrong and he was going to arrest her, so he should just take her in, TR. P. 12, L.22-25, P.13, L.1-25, P.14, L.1-25 and P.15, L.1-24.

At that point, Weigel, based upon his observations, decided Glass was under the influence of alcohol and he arrested her, TR. P.16, L.21-25, and P.17, L.1-6. Weigel then took Glass to the St. Alexius Medical Center where he asked her to take a blood test. She refused, TR. P.17, L.15-25.

Glass's testimony during the trial differs from Weigel's. The difference begins with her testimony that she was driving on Boulevard Avenue and turned off on 15th Street, TR. P.38, L.13-22. Glass agrees she pulled over when Weigel turned on the police car's lights, TR. P.39, l.104. Glass disputes dropping her ID card. She claims she gave it to Weigel when she was outside the pickup, TR. P.39, L.20-25 and P.40, L.1-9. Glass also denied slipping when getting out of the pickup, TR. P.40, L.10-15.

Glass explained why she had problems with the gaze nystagmus test, TR. P.40, L.23-25, P.40, L.1-6. She also testified about her knee problems, TR. P.41, L.7-15 and the fact she had no problems talking, TR. P.41, L.16-17.

As to Glass's manner of driving on October 16, 1999, Weigel had no recollection of her weaving even though he had followed her onto Avenue D and was right behind her when he put on his emergency lights, TR. P.21, L.2-11.

Glass consumed beer beginning at about 7:00 p.m. on October 15, 1999, TR. P.41, L.21-24. There were four people consuming the beer which came out of a 18-pack.

Glass had five beers between 7:00 p.m. and 12:30 a.m. on the 16th of October, 1999, a period of 5½ hours, TR. P.44. L.1-12.

The burn off effect of alcohol on a person with Glass's weight is discussed in the TR. starting at L.1 of P.45 and ending at L.25 of P.53.

The State in its opening statement, told the jury that Glass's mood swings were indicators of alcohol impairment, TR. at P.6. L.14-16 . During the trial, Weigel testified that the swing from laughing and crying was a sign of intoxication, TR. P.18. L.11-15. At the conclusion of the trial the State, in its closing argument, again mentioned these mood swings as evidence Glass was under the influence of alcohol.

Glass wasn't allowed to put in any testimony, about her bipolar disorder, to explain the mood swings, TR. P.27, L.4-11 and Appendix page 9.

The jury instruction in this case failed to contain any instruction on culpability.

The jury verdict was guilty. Glass is now appealing from the Judgment that was entered after that verdict.

## ARGUMENT

**ISSUE I.**

**DID THE TRIAL COURT ERR WHEN IT EXCLUDED EVIDENCE ABOUT BIPOLAR DISORDER?**

The N.D.R.Crim.P. involved in this case is 12.2. A copy of that rule appears in the Addendum at page 1. The Chapter in the North Dakota Century Code that is involved in this case is 12.1-04.1-01. A copy of that chapter appears in the Addendum at page 2.

Had Glass been allowed to explain her mood swings, on October 16, 1999, she would have testified she has a bipolar disorder. She would have explained how such a disorder affects her. A bipolar disorder is defined in Mosby's Medical Dictionary, Fourth Edition (1994) as follows:

> **Bipolar disorder,** a major psychologic disorder characterized by episodes of mania, depression, or mixed moods. One or the other phase may be predominant at any given time. One phase may appear alternately with the other, or elements of both phases may be present simultaneously. Characteristics of the manic phase are excessive emotional displays, excitement, euphoria, hyperactivity accompanied by elation, boisterousness, impaired ability to concentrate, decreased need for sleep, and seemingly unbounded energy, often accompanied by delusions of grandeur. In the depressive phase, marked apathy and underactivity or accompanied by feelings of profound sadness, loneliness, guilt, and lowered self-esteem. Causes of the disorder are multiple and complex, often involving biologic, psychologic, interpersonal, and social and cultural factors. Treatment includes lithium, carbamezapine, valproic acid, antipsychotic medication, antidepressants, tranquilizers antianxiety drugs, or the use of electroconvulsive therapy

for persons who present an immediate and serious risk of suicide, followed by long-term psychotherapy. Careful nursing observation is important during depression, particularly during the recovery from depression, because of the possibility of suicide.

The crime charged in this case is a Driving Under the Influence ("DUI"). The elements of this crime are set out in the Jury Instruction at Appendix page 17.

There is no way the above definition of bipolar disorder could be used as a defense against a DUI for a lack of criminal responsibility by reason of mental disease or defect at the time of the offense. The bipolar condition could, however, be used as an explanation to Glass's mood swings.

To use N.D.C.C. 12.1-04.1-01(1)(a) as a defense, Glass would have to establish that, because of her bipolar disorder, she lacked either the substantial capacity to comprehend the seriousness of driving under the influence or that bipolar results in serious distortion of her capacity to recognize reality. Obviously under the above definition of bipolar disorder, Glass can't establish the requirements needed under N.D.C.C. 12.1-04.1-01(1)(a) to raise it as a defense. However, she could use her bipolar disorder to explain her mood swings.

DUI Defendants, have previously been allowed to testify at trials about their physical and mental conditions and why their actions or inactions were a result of these conditions and not from being under the influence of alcohol. The trial court in this case allowed Glass to testify about her having nystagmus and bad knees and explain how these conditions affected her on October 16, 1999. Glass should also have been allowed to testify about her bipolar disorder and how it also affected her speech and appearance on

October 16, 1999.

ISSUE II.

**DID THE TRIAL COURT ERR WHEN IT FAILED TO INSTRUCT THE JURY ON CULPABILITY?**

In North Dakota, according to *State vs. Kraft*, 413 N.W.2d 303 (N.D. 1987) and *State vs. Olander*, 1998 ND 50, 575 N.W.2d 658, a trial judge has a duty to properly instruct the jury on the law applicable to a case even if the defense fails to request an instruction on the applicable law. The Rule of Criminal Procedure which governs the Judge's duty to instruct is Rule 30(a), (a copy of N.D.R.Crim.P. 30 appears in the Addendum at page 16) a defendant fails to request an instruction under N.D.R.Crim.P. 30(b), according to *Olander*, the Supreme Court can still review such a failure to instruct under N.D.R.Crim.P. 52. A copy of N.D.R.Crim.P. 52 appears in the Addendum at page 17.

The Jury Instructions given by the trial judge in this case can be found in the Appendix from page 10 to page 26. No where in these instructions is there any instruction on the Requirements of Culpability. The Requirements of Culpability are set out in N.D.C.C. 12.1-02-02. A copy of N.D.C.C. 12.1-02-02 appears in the Addendum at page 18 and 19.

The crime charged in this case was Driving Under the Influence ("DUI"). The Statute which lists the required elements is N.D.C.C. 39-08-01. A copy of 39-08-01 appears in the Addendum at page 20 and 21. Since the definition of the crime in 39-08-01 does not specify any culpability and it does not provide explicitly that a person maybe

guilty without culpability the question becomes, "under North Dakota law is there any culpability required?" N.D.C.C. 12.1-02-02(2) requires culpability and that culpability is willful. Therefore, the trial judge, according to *Kraft* and *Olander*, had a duty to instruct the jury on the willful culpability required for the crime of DUI. The jury instructions given at page 10 to 26 of the Appendix shows he did not give this instruction.

The circumstances and the procedure under which the North Dakota Supreme Court exercises its power to notice obvious error are set out in *Olander* as follows:

> "We exercise our power to notice obvious error cautiously and only in exceptional circumstances where the accused have suffered serious injustice. *State v. Keller*, 550 N.W.2d 411, 412 (N.D. 1996); *State v. Woehlhoff*, 540 N.W.2d 162, 164 (N.D. 1995); *State vs. McNair*, 491 N.W.2d at 399. In analyzing obvious error, our decisions require examination of the entire record and the probable effect of the alleged error in light of all the evidence. See *Woehlhoff*, 540 N.W.2d at 165. We have rarely noticed obvious error under N.D.R.Crim.P 52(b). See *State v. Kraft*, 413 N.W.2d 303, 307 (N.D. 1987) (failure to instruct on UCC defense was obvious error); *State v. Hersch*, 445 N.W.2d 626, 634 (N.D. 1989) (failure to instruct on statute of limitations defense was obvious error); *State v. Wiedrich*, 460 N.W.2d 680, 685 (N.D. 1990) (in homicide case with self-defense evidence, prejudicial effect of trial court's failure to instruct on included offense of negligent homicide was obvious). [ 13] In *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), the Supreme Court described the framework for analyzing "plain error" under FRCrimP 52(b). Our rule differs

from the federal rule only in the substitution of the work "obvious" or "plain." See NDRCrimP 52, Explanatory Note. The *Olano* analysis is largely consistent with our cautious application of NDRCrimP 52(b). Therefore, we use the *Olano* framework for our analysis of obvious error in this case."

It is Glass's position that:

1. In order for the jury to be properly instructed on the law applicable to her case, the trial judge had to give instruction on the culpability applicable to the crime of DUI which is wilful.
2. The failure of the trial judge to instruct the jury on wilful which is the culpability applicable to the crime of DUI affected her substantial rights.
3. The trial judge's failure to instruct the jury on wilfully which is the culpability applicable to the crime of DUI is obvious error.

**ISSUE III.**

**WERE THE TRIAL COURT'S RULINGS EXCLUDING EVIDENCE ABOUT GLASS'S BIPOLAR DISORDER OR THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE CULPABILITY, AS REQUIRED BY STATUTE, OBVIOUS ERROR?**

According to *State vs. Trotter*, 524 N.D.2d 601 (N.D. 1994):

"Under NDREv 103(a), error cannot be predicated upon exclusion of evidence unless a substantial right of the party is affected. Error which does not affect substantial rights must be disregarded. N.D.R.Crim.P 52(a); *State v. Bohe*, 447 N.W.2d 277, 282 (N.D. 1989). As *State v. Micko*, 393 N.W.2d 741, 746 (N.D. 1986), states, our objective in reviewing trial court error is to determine

whether the error was so prejudicial that substantial injury resulted and a different decision probably would have resulted absent the error."

In the case now before the Court, the State was allowed to claim, in its opening statement, that Glass's mood swings were indications of being under the influence. During the trial, the police officer told the jury about Glass's mood swings. He testified the mood swings were an indicator of being under the influence. The trial judge then prevented Glass from using her bipolar disorder to explain the mood swings. The State, in closing argument, then argued that Glass's mood swings were indicators that Glass was under the influence.

The State used the mood swings as a sword. The trial judge prevented Glass's explanation and took away her shield. There is no doubt that the result was prejudicial and substantial injury to Glass resulted.

If Glass had been allowed to explain her mood swings, by testifying about her bipolar disorder, the jury would have reached a different decision. The State of course can be counted on to claim there was enough evidence and testimony without Glass's mood swings for a jury to convict her. To this Glass's reply is, that in a criminal case the proof has to be beyond a reasonable doubt. The exclusion of this evidence was obvious error.

A trial judge must instruct a jury on the law applicable to a case. N.D.C.C. 12.1-02-02 requires that culpability must be included in any Statute or regulation defining a crime if that crime doesn't specify credibility or provide explicitly that a person maybe guilty without culpability. The culpability required is wilful. The crime in the case before the Court is DUI. This crime is set out and defined in N.D.C.C. 39-08-01. The definition

of the crime of DUI does not specify any culpability and does not provide explicitly that a person may be found guilty without culpability. Therefore, one of the jury instructions required in a DUI case is an instruction on wilful which was not given. This omission was obvious error.

## CONCLUSION

For the above and forgoing reasons, the judgment of the trial court must be reversed and the case remanded for a new trial.

DATED at Mandan, North Dakota, this 5 day of July, 2000.

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## ADDENDUM

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"The Supreme Court of Illinois recently upheld an Illinois statute which requires a defendant to give notice of his alibi witnesses although the prosecution is not required to disclose its alibi rebuttal witness. People v. Holiday, 8 Cr. L. 2238 (Jan. 13, 1971) (265 N.E.2d 634 (Ill. 1970)). Because the defense complied with the requirement, the court did not have to consider the propriety of penalizing noncompliance.

"The requirement of notice of alibi seems to be an increasingly common requirement of state criminal procedure."

Sources: Joint Procedure Committee Minutes of April 20, 1989, page 4; December 3, 1987, page 15; January 23, 1986, page 7; January 25-26, 1979, pages 2-3; December 7-8, 1978, pages 30-32; October 12-13, 1978, page 2; April 24-26, 1973, page 9; May 11-12, 1972, pages 13-14; Fed.R.Crim.P., Proposed Amendment, Preliminary Draft, 52 F.R.D. 432 (1971); Fed.R.Crim.P. 12.1.

Statutes Affected:

Superseded: N.D.C.C. § 29-14-28.

Objections to Information.

—Specificity.

Defendant in resident child molester case was not denied the right to prepare his defense by the state's inability to be more specific as to the time of the commission of the offenses; when multiple acts of molestation are alleged by a minor child, specificity as to the time of the offense may be impossible and an alibi defense is not likely to be a viable defense since the defendant does not claim that he was not alone with the child. State v. Vance, 537 N.W.2d 545 (N.D. 1995).

Collateral References.

22A C.J.S. Criminal Law, § 452.

Validity and construction of statutes requiring defendant to disclose matter as to alibi defense, 45 A.L.R.3d 958.

## Rule 12.2. Notice of defense based on mental condition.

(a) **Defense of lack of criminal responsibility by reason of mental disease or defect.** If a defendant intends to rely upon the defense of lack of criminal responsibility by reason of mental disease or defect at the time of the alleged offense, the defendant, within the time provided for the filing of pretrial motions or at such later time as the court may direct, shall notify the prosecuting attorney of that intention in open court or in writing and file the notice. If there is a failure to comply with the requirements of this subdivision, the defense of lack of criminal responsibility may not be raised. The court for cause shown may allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) **Mental disease or defect inconsistent with the mental element required for the offense charged.** If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether the defendant had the mental state required for the offense charged, the defendant, within the time provided for the filing of pretrial motions or at such later time as the court may direct, shall notify the prosecuting attorney of that intention and file the notice. The court for cause shown may allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) **Psychiatric examination.** In an appropriate case the court, upon motion of the prosecuting attorney, may order the defendant to submit to an examination by one or more mental health professionals retained by the prosecuting attorney. No statement made by the accused in the course of any examination provided for by this rule, whether the examination is with or without the consent of the accused, shall be admitted in evidence against the accused in any criminal, civil, or administrative proceeding.

(d) **Failure to comply.** If there is a failure to give notice when required by subdivision (b) or to submit to an examination when ordered under subdivision (c), the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental state.

(e) **Inadmissibility of withdrawn intention.** Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

(1)

## 12.1-04.1-01. Standard for lack of criminal responsibility.

1. An individual is not criminally responsible for criminal conduct if, as a result of mental disease or defect existing at the time the conduct occurs:
   a. The individual lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality; and
   b. It is an essential element of the crime charged that the individual act willfully.
2. For purposes of this chapter, repeated criminal or similar antisocial conduct, or impairment of mental condition caused primarily by voluntary use of alcoholic beverages or controlled substances immediately before or contemporaneously with the alleged offense, does not constitute in itself mental illness or defect at the time of the alleged offense. Evidence of the conduct or impairment may be probative in conjunction with other evidence to establish mental illness or defect.

Source: S.L. 1985, ch. 173, § 1.

**Cross-References.**

Defense based on mental condition, see N.D.R. Crim. P., Rule 12.2.

**Civil and Criminal Candidates Compared.**

For discussion on the differences between the class of potential civil commitment candidates and the class of insanity detainees after a criminal trial, including their different standards of proof, see State v. Nording, 485 N.W.2d 781 (N.D. 1992).

**Constitutional Considerations.**

Defendant's equal protection rights under the federal and state constitutions were not infringed when he was detained and committed for treatment after the jury found that he engaged in criminal conduct but was not guilty "by reason of lack of criminal responsibility." State v. Nording, 485 N.W.2d 781 (N.D. 1992).

**Forced Medication.**

The very specific protections afforded by section 25-03.1-18.1 are applicable to all persons committed for treatment. There is no language under this chapter that manifests a legislative intent to avoid application of section 25-03.1-18.1 to persons who have been committed for treatment under this chapter. State v. Nording, 485 N.W.2d 781 (N.D. 1992).

Section 25-03.1-18.1 applies to insanity detainees who are committed to treatment facilities under this chapter. The court has authority to commit and order treatment under this chapter, but, when the treatment is to include forced medication, the procedural requirements of section 25-03.1-18.1 must be met. State v. Nording, 485 N.W.2d 781 (N.D. 1992).



(2)

**Inquiry Requirement.**

In order to determine whether or not a defendant has competently, intelligently, and voluntarily waived the defense of lack of criminal responsibility, the trial court must make some type of inquiry of the defendant. City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989).

As to the type of inquiry which should be made by the trial court to determine whether a defendant has competently, intelligently, and voluntarily waived the defense of lack of criminal responsibility, see City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989).

**Jury Instructions.**

A jury instruction on consequences of a verdict of not guilty by reason of a lack of criminal responsibility ordinarily should not be given, except where an erroneous view of law on subject has been planted in minds of jurors and a curative instruction is necessary. State v. Huber, 361 N.W.2d 236 (N.D. 1985), cert. denied, 471 U.S. 1106, 105 S. Ct. 2339, 85 L. Ed. 2d 855 (1985).

**Pretrial Dismissal.**

Defense based on lack of criminal responsibility is not proper subject of a pretrial motion to dismiss because defense has a bearing on very issue of a defendant's legal guilt or innocence and, as such, raises a factual question to be submitted to and determined by trier of fact. State v. Kolobakken, 347 N.W.2d 569 (N.D. 1984).

**Purpose.**

This chapter seeks to protect society from persons who commit violent crimes and who suffer from mental illness or defect. This chapter also seeks to secure appropriate treatment for those individuals and to release them from involuntary commitment when neither society's protection nor their welfare requires continued confinement. State v. Nording, 485 N.W.2d 781 (N.D. 1992).

DECISIONS UNDER PRIOR LAW

**Jury Instructions.**

The defense of insanity was a legal defense, and hence it would not be disparaged, or placed under the ban of disapproval by the court in an instruction to the jury. State v. Barry, 11 N.D. 428, 92 N.W. 809 (1902).

**Collateral References.**

Criminal Law ⇐ 47-51.

21 Am. Jur. 2d, Criminal Law, §§ 37, 46-51.

22 C.J.S. Criminal Law, §§ 96-108.

Presumption of continuing insanity as applied to accused in criminal case, 27 A.L.R.2d 121.

Bail: insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R.3d 146.

Diminishing responsibility for crime, mental or emotional condition as, 22 A.L.R.3d 1228.

Comment note on prosecution of chronic alcoholic for drunkenness offenses, 40 A.L.R.3d 321.

XYY syndrome as affecting criminal responsibility, 42 A.L.R.3d 1414.

Amnesia as affecting capacity to commit crime or stand trial, 46 A.L.R.3d 544.

Drug addiction or related mental state as defense to criminal charge, 73 A.L.R.3d 16.

Necessity or propriety of bifurcated criminal trial on issue of insanity defense, 1 A.L.R.4th 884.

Modern status of test of criminal responsibility—state cases, 9 A.L.R.4th 526.

Adequacy of defense counsel's representation of criminal client regarding incompetency, insanity, or related issues, 17 A.L.R.4th 575.

Competency to stand trial of criminal defendant diagnosed as "mentally retarded" — modern cases, 23 A.L.R.4th 493.

Automatism or unconsciousness as defense to criminal charge, 27 A.L.R.4th 1067.

"Guilty but mentally ill" statutes: validity and construction, 71 A.L.R.4th 702.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

**Law Reviews.**

Criminal Law — Capacity to Commit and Responsibility for Crime — Validity of the XYY Syndrome as Part of the Defense of Insanity, 52 N.D. L. Rev. 729 (1976).

**12.1-04.1-02. Court authorization of state-funded mental health services for certain defendants.** A defendant who is unable to pay for the services of a mental health professional, and to whom those services are not otherwise available, may apply to the court for assistance. Upon a showing of a likely need for examination on the question of lack of criminal responsibility or lack of requisite state of mind as a result of the defendant's mental condition, the court shall authorize reasonable expendi-



(3)

tures from public funds for the defendant's retention of the services of one or more mental health professionals. Upon request by the defendant, the application and the proceedings on the application must be ex parte and in camera, but any order under this section authorizing expenditures must be made part of the public record.

Source: S.L. 1985, ch. 173, § 2.

**Second Evaluation.**
The trial court's denial of defendant's request for a second psychiatric evaluation deprived him of neither his constitutional nor statutory right to publicly funded mental health services. State v. Norman, 507 N.W.2d 522 (N.D. 1993).

**12.1-04.1-03. Notice of defense of lack of criminal responsibility.**

1. If the defendant intends to assert the defense of lack of criminal responsibility, the defendant shall notify the prosecuting attorney in writing and file a copy of the notice with the court. The notice must indicate whether the defendant intends to introduce at trial evidence obtained from examination of the defendant by a mental health professional after the time of the alleged offense.
2. The defendant shall file the notice within the time prescribed for pretrial motions or at such earlier or later time as the court directs. For cause shown, the court may allow late filing of the notice and grant additional time to the parties to prepare for trial or may make other appropriate orders.
3. If the defendant fails to give notice in accordance with this section, lack of criminal responsibility may not be asserted as a defense.

Source: S.L. 1985, ch. 173, § 3.

**12.1-04.1-04. Notice regarding expert testimony on lack of state of mind as element of alleged offense.**

1. If the defendant intends to introduce at trial evidence obtained from examination of the defendant by a mental health professional after the time of the alleged offense to show that the defendant lacked the state of mind required for the alleged offense, the defendant shall notify the prosecuting attorney in writing and file a copy of the notice with the court.
2. The defendant shall file the notice within the time prescribed for pretrial motions or at such earlier or later time as the court directs. For cause shown, the court may allow late filing of the notice and grant additional time to the parties to prepare for trial or may make other appropriate orders.

Source: S.L. 1985, ch. 173, § 4.

**Cross-References.**
Expert witnesses and interpreters, see N.D.R. Crim. P., Rule 28.

Notice of defense based on mental condition, see N.D.R. Crim. P., Rule 12.2.



(4)

**12.1-04.1-05. Examination at request of prosecuting attorney.**

1. If the defendant has given notice under section 12.1-04.1-03 or 12.1-04.1-04 of intent to introduce evidence obtained from examination of the defendant by a mental health professional after the time of the alleged offense, the court, upon application by the prosecuting attorney and after opportunity for response by the defendant, shall order that the defendant be examined by one or more mental health professionals retained by the prosecuting attorney. The court shall include in the order provisions as to the time, place, and conditions of the examination.
2. If the parties agree to examination of the defendant by a mental health professional retained by the prosecuting attorney without order of the court, sections 12.1-04.1-06, 12.1-04.1-07, 12.1-04.1-08, 12.1-04.1-10, 12.1-04.1-11, 12.1-04.1-12, 12.1-04.1-13, 12.1-04.1-14, and 12.1-04.1-15 apply to that examination.

Source: S.L. 1985, ch. 173, § 5.

**12.1-04.1-06. Explanation to defendant.** At the beginning of each examination conducted under section 12.1-04.1-05, the mental health professional shall inform the defendant that the examination is being made at the request of the prosecuting attorney; the purpose of the examination is to obtain information about the defendant's mental condition at the time of the alleged offense; and information obtained from the examination may be used at trial and, if the defendant is found not guilty by reason of lack of criminal responsibility, in subsequent proceedings concerning commitment or other disposition.

Source: S.L. 1985, ch. 173, § 6.

**12.1-04.1-07. Scope of examination.** An examination of the defendant conducted under section 12.1-04.1-05 may consist of such interviewing, clinical evaluation, and psychological testing as the mental health professional considers appropriate, within the limits of nonexperimental, generally accepted medical, psychiatric, or psychological practices.

Source: S.L. 1985, ch. 173, § 7.

**12.1-04.1-08. Recording of examination.**

1. An examination of the defendant conducted under section 12.1-04.1-05 must be audio-recorded and, if ordered by the court, video-recorded. The manner of recording may be specified by rule or by court order in individual cases.
2. Within seven days after completion of an examination conducted under section 12.1-04.1-05, the mental health professional conducting the examination shall deliver a copy of the recording of the examination, under seal, to the court and a copy of the recording to



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the defendant. The recording may not be disclosed except in accordance with this chapter.

Source: S.L. 1985, ch. 173, § 8.

**12.1-04.1-09. Consequence of deliberate failure of defendant to cooperate.** If the defendant without just cause deliberately fails to participate or to respond to questions in an examination conducted under section 12.1-04.1-05, the prosecuting attorney may apply before trial to the court for appropriate relief. The court may consider the recording of the examination as evidence on the application, but proceedings under this section involving consideration of the recording must be in camera and out of the presence of counsel.

Source: S.L. 1985, ch. 173, § 9.

**12.1-04.1-10. Reports by mental health professionals and expert witnesses.** A mental health professional retained by the prosecuting attorney and a mental health professional whom the defendant intends to call to testify at trial shall prepare a written report concerning any examination of the defendant and other pretrial inquiry by or under the supervision of the mental health professional. Any other individual whom either party intends to call at trial as an expert witness on any aspect of the defendant's mental condition shall prepare a written report. A report under this section must contain:

1. The specific issues addressed.
2. The identity of individuals interviewed and records or other information used.
3. The procedures, tests, and techniques used.
4. The date and time of examination of the defendant, the explanation concerning the examination given to the defendant, and the identity of each individual present during an examination.
5. The relevant information obtained and findings made.
6. Matters concerning which the mental health professional was unable to obtain relevant information and the reasons therefor.
7. The conclusions reached and the reasoning on which the conclusions were based.

Source: S.L. 1985, ch. 173, § 10.

**12.1-04.1-11. Exchange of reports and production of documents.** Not less than fifteen days before trial, the prosecuting attorney shall furnish to the defendant reports prepared pursuant to section 12.1-04.1-10, and the defendant shall furnish to the prosecuting attorney reports by each mental health professional or other expert on any aspect of the defendant's mental condition whom the defendant intends to call at trial. Upon application by either party and after hearing, the court may require



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production of documents prepared, completed, or used in the examination or inquiry by the mental health professional or other expert.

Source: S.L. 1985, ch. 173, § 11.

**12.1-04.1-12. Use of reports at trial.** Use at trial of a report prepared by a mental health professional or other expert is governed by the North Dakota Rules of Evidence. A report of a mental health professional or other expert furnished by the defendant pursuant to section 12.1-04.1-10 may not be used at trial unless the mental health professional or other expert who prepared the report has been called to testify by the defendant.

Source: S.L. 1985, ch. 173, § 12.

**Collateral References.**
Admissibility of results of computer analysis of defendant's mental state, 37 A.L.R.4th 510.

**12.1-04.1-13. Notice of expert witnesses.** Not less than twenty days before trial, each party shall give written notice to the other of the name and qualifications of each mental health professional or other individual the respective party intends to call as an expert witness at trial on the issue of lack of criminal responsibility or requisite state of mind as an element of the crime charged. For good cause shown, the court may permit later addition to or deletion from the list of individuals designated as expert witnesses.

Source: S.L. 1985, ch. 173, § 13.

**12.1-04.1-14. Use of evidence obtained from examination.**

1. Except as provided in subsection 2 and in sections 12.1-04.1-09 and 12.1-04.1-26, information obtained as a result of examination of a defendant by a mental health professional conducted under section 12.1-04.1-05 is not admissible over objection of the defendant in any proceeding against the defendant.
2. Subject to the limitation in section 12.1-04.1-15, information obtained from an examination of the defendant by a mental health professional conducted under section 12.1-04.1-05 is admissible at trial to rebut evidence introduced by the defendant obtained from an examination of the defendant by a mental health professional or to impeach the defendant on the defendant's testimony as to mental condition at the time of the alleged offense.

Source: S.L. 1985, ch. 173, § 14.

**Collateral References.**
Admissibility of results of computer analysis of defendant's mental state, 37 A.L.R.4th 510.



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**12.1-04.1-15. Use of recording of examination.** Except as provided in section 12.1-04.1-09, recording of an examination of the defendant concerning the defendant's mental condition at the time of the alleged offense may be referred to or otherwise used only on cross-examination for the purpose of impeachment of the mental health professional who conducted the examination and then on redirect examination of that witness to the extent permitted by the North Dakota Rules of Evidence. The defendant must make the recording available to the prosecuting attorney before any use of it pursuant to this section. If the recording is so used, this section does not preclude its use for the purpose of impeachment of the defendant in any other criminal, civil, or administrative proceeding.

Source: S.L. 1985, ch. 173, § 15.

**12.1-04.1-16. Bifurcation of issue of lack of criminal responsibility.** Upon application of the defendant, the court may order that issues as to the commission of the alleged offense be tried separately from the issue of lack of criminal responsibility.

Source: S.L. 1985, ch. 173, § 16.

**12.1-04.1-17. Jury instruction on disposition following verdict of lack of criminal responsibility.** On request of the defendant in a trial by jury of the issue of lack of criminal responsibility for the alleged offense, the court shall instruct the jury as to the dispositional provisions applicable to the defendant if the jury returns a verdict of not guilty by reason of lack of criminal responsibility.

Source: S.L. 1985, ch. 173, § 17.

**12.1-04.1-18. Form of verdict or finding.** If the issue of lack of criminal responsibility is submitted to the trier of fact:

1. In a unitary trial, the trier of fact must first determine whether the prosecuting attorney has proven that the defendant committed the crime charged. In a bifurcated trial, the trier of fact must first determine whether the prosecuting attorney has proven that the defendant committed the crime charged and, if so, whether the defendant is criminally responsible. Each determination must be made at the conclusion of the phase of the trial at which the respective issue is tried. If the trier of fact concludes that the prosecuting attorney failed to prove that the defendant committed the crime charged, the appropriate verdict or finding is "not guilty".
2. If the trier of fact determines that the defendant committed the crime charged and the defendant was criminally responsible for that crime, the appropriate verdict or finding is "guilty".
3. If the trier of fact determines that the defendant committed the crime charged, but was not criminally responsible for that crime, the appropriate verdict or finding is a statement that the defendant



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committed the crime charged but that the defendant is "not guilty by reason of lack of criminal responsibility".

Source: S.L. 1985, ch. 173, § 18.

Collateral References.
Propriety of transferring patient found not guilty by reason of insanity to less restrictive confinement, 43 A.L.R.5th 777.

**12.1-04.1-19. Post-trial motions and appeal from verdict or finding of not guilty by reason of lack of criminal responsibility.**

1. A defendant found not guilty by reason of lack of criminal responsibility may seek post-trial relief in the trial court and may appeal to the supreme court on issues pertaining to the verdict or finding that the defendant committed the crime charged.
2. If the verdict or finding is not guilty by reason of lack of criminal responsibility, and a new trial is ordered on the issue of whether the defendant committed the crime charged, unless defendant elects to waive the defense, the verdict or finding of lack of criminal responsibility is conclusive on that issue in the retrial.

Source: S.L. 1985, ch. 173, § 19.

**12.1-04.1-20. Jurisdiction of court.**

1. Unless earlier discharged by order of the court pursuant to section 12.1-04.1-22, 12.1-04.1-24, or 12.1-04.1-25, an individual found not guilty by reason of lack of criminal responsibility is subject to the jurisdiction of the court for a period equal to the maximum term of imprisonment that could have been imposed for the most serious crime of which the individual was charged but found not guilty by reason of lack of criminal responsibility.
2. Upon expiration of its jurisdiction under this chapter or earlier discharge by its order, the court may order that a proceeding for involuntary commitment be initiated pursuant to chapter 25-03.1.

Source: S.L. 1985, ch. 173, § 20.

Collateral References.
Validity of statutory provision for commitment to mental institution of one acquitted of crime on ground of insanity without formal determination of mental condition at time of acquittal, 50 A.L.R.3d 144.

Validity of conditions imposed when releasing person committed to institution as consequence of acquittal of crime on ground of insanity, 2 A.L.R.4th 934.

**12.1-04.1-21. Proceeding following verdict or finding.** After entry of a verdict, finding, or an unresisted plea, that an individual committed the crime charged, but is not guilty by reason of lack of criminal responsibility, the court shall:

1. Make a finding, based upon the verdict or finding provided in section 12.1-04.1-18, of the expiration date of the court's jurisdiction; and



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2. Order the individual committed to a treatment facility, as defined under chapter 25-03.1, for examination. The order of the court may set terms of custody during the period of examination.

Source: S.L. 1985, ch. 173, § 21.

**12.1-04.1-22. Initial order of disposition — Commitment to treatment facility — Conditional release — Discharge.**

1. The court shall conduct a dispositional hearing within ninety days after an order of commitment pursuant to section 12.1-04.1-21 is entered, unless the court, upon application of the prosecuting attorney or the individual committed, for cause shown, extends the time for the hearing. The court shall enter an initial order of disposition within ten days after the hearing is concluded.
2. In a proceeding under this section, unless excused by order of the court, defense counsel at the trial shall represent the individual committed.
3. If the court finds that the individual lacks sufficient financial resources to retain the services of a mental health professional and that those services are not otherwise available, it shall authorize reasonable expenditures from public funds for the individual's retention of the services of one or more mental health professionals to examine the individual and make other inquiry concerning the individual's mental condition.
4. In a proceeding under this section, the individual committed has the burden of proof by a preponderance of the evidence. The court shall enter an order in accordance with the following requirements:
   a. If the court finds that the individual is not mentally ill or defective or that there is not a substantial risk, as a result of mental illness or defect, that the individual will commit a criminal act, it shall order the person discharged from further constraint under this chapter.
   b. If the court finds that the individual is mentally ill or defective and that there is a substantial risk, as a result of mental illness or defect, that the individual will commit a criminal act of violence threatening another individual with bodily injury or inflicting property damage and that the individual is not a proper subject for conditional release, it shall order the individual committed to a treatment facility for custody and treatment. If the court finds that the risk that the individual will commit an act of violence threatening another individual with bodily injury or inflicting property damage will be controlled adequately with supervision and treatment if the individual is conditionally released and that necessary supervision and treatment are available, it shall order the person released subject to conditions it considers appropriate for the protection of society.



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c. If the court finds that the individual is mentally ill or defective and that there is a substantial risk, as a result of mental illness or defect, that the individual will commit a criminal act not included in subdivision b, it shall order the individual to report to a treatment facility for noncustodial evaluation and treatment and to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the treatment facility.

Source: S.L. 1985, ch. 173, § 22.

**Involuntary Commitment.**

Following a dispositional hearing, the court can involuntarily commit the detainee for custody and treatment only if the court finds that the detainee is mentally ill or defective, that there is a substantial risk that the detainee will commit a criminal act of violence, and that the detainee is not a proper subject for conditional release. State v. Nording, 485 N.W.2d 781 (N.D. 1992).

**12.1-04.1-23. Terms of commitment — Periodic review of commitment.**

1. Unless an order of commitment of an individual to a treatment facility provides for special terms as to custody during commitment, the director or superintendent of the treatment facility may determine from time to time the nature of the constraints necessary within the treatment facility to carry out the court's order. In an order of commitment, the court may authorize the director or superintendent to allow the individual a limited leave of absence from the treatment facility on terms the court may direct.
2. In an order of commitment of an individual to a treatment facility under this chapter, the court shall set a date for review of the status of the individual. The date set must be within one year after the date of the order.
3. At least sixty days before a date for review fixed in a court order, the director or superintendent of the treatment facility shall inquire as to whether the individual is presently represented by counsel and file with the court a written report of the facts ascertained. If the individual is not represented by counsel, the court shall appoint counsel to consult with the individual and, if appropriate, to apply to the court for appointment of counsel to represent the individual in a proceeding for conditional release or discharge.
4. If the court finds in a review that the individual lacks sufficient financial resources to retain the services of a mental health professional and that those services are otherwise not available, the court shall authorize reasonable expenditures from public funds for the individual's retention of the services of one or more mental health professionals to examine the individual and make other inquiry concerning the individual's mental condition. In proceedings brought before the next date for review, the court may authorize expenditures from public funds for that purpose.



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5. If an application for review of the status of the individual has not been filed by the date for review, the director or superintendent shall file a motion for a new date for review to be set by the court. The date set must be within one year after the previous date for review.

**Source:** S.L. 1985, ch. 173, § 23.

**Review of Status.**
The detainee is entitled to another review of status within one year after the date of the court's order. State v. Nording, 485 N.W.2d 781 (N.D. 1992).

**12.1-04.1-24. Modification of order of commitment — Conditional release or discharge — Release plan.**

1. After commitment of an individual to a treatment facility under this chapter, the director or superintendent may apply to the court for modification of the terms of an order of commitment or for an order of conditional release or discharge. The application must be accompanied by a report setting forth the facts supporting the application and, if the application is for conditional release, a plan for supervision and treatment of the individual.
2. An individual who has been committed to a treatment facility under this chapter, or another person acting on the individual's behalf, may apply to the court for modification of the terms of a commitment order or for an order of conditional release or discharge. If the application is being considered by the court at the time of the review of the order of commitment, the court shall require a report from the director or superintendent of the treatment facility.
3. The court shall consider and dispose of an application under this section promptly. In a proceeding under this section, the applicant has the burden of proof by a preponderance of the evidence. The court shall enter an order in accordance with the following requirements:
   a. If the court finds that the individual committed is not mentally ill or defective or that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act, it shall order the individual discharged from further constraint under this chapter.
   b. If the court finds that the individual is mentally ill or defective, but that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage, it shall vacate the order committing the individual to a treatment facility. If the court finds that there is a substantial risk that the individual will commit, as a result of mental illness or defect, a nonviolent criminal act, it may order the individual to report to any treatment facility for noncustodial evaluation and treatment and to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the treatment facility.



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c. If the court finds that the individual is mentally ill or defective, but that the risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage will be controlled adequately with supervision and treatment and that necessary supervision and treatment are available, it shall order the individual released subject to conditions it considers appropriate for the protection of society.

4. In any proceeding for modification of an order of commitment to a treatment facility, if the individual has been represented by counsel and the application for modification of the order of commitment is denied after a plenary hearing, the court shall set a new date for periodic review of the status of the individual. The date set must be within one year after the date of the order.

Source: S.L. 1985, ch. 173, § 24.

**Modification of Terms.**

The detainee may apply to the court for modification of the terms of the commitment order or for an order of conditional release or discharge, and the court must consider and dispose of that application "promptly." State v. Nording, 485 N.W.2d 781 (N.D. 1992).

**12.1-04.1-25. Conditional release — Modification — Revocation — Discharge.**

1. In an order for conditional release of an individual, the court shall designate a treatment facility or a person to be responsible for supervision of the individual.
2. As a condition of release, the court may require the individual released to report to any treatment facility for evaluation and treatment, require the individual to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the treatment facility, and impose other conditions reasonably necessary for protection of society.
3. The person or the director or superintendent of a treatment facility responsible for supervision of an individual released shall furnish reports to the court, at intervals prescribed by the court, concerning the mental condition of the individual. Copies of reports submitted to the court must be furnished to the individual and to the prosecuting attorney.
4. If there is reasonable cause to believe that the individual released presents an imminent threat to cause bodily injury to another, the person or the director or superintendent of the treatment facility responsible for supervision of the individual pursuant to an order of conditional release may take the individual into custody or request that the individual be taken into custody. An individual taken into custody under this subsection must be accorded an emergency hearing before the court not later than the next court day to determine whether the individual should be retained in custody pending a further order pursuant to subsection 5.



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5. Upon application by an individual conditionally released, by the director or superintendent of the treatment facility or person responsible for supervision of an individual pursuant to an order of conditional release, or by the prosecuting attorney, the court shall determine whether to continue, modify, or terminate the order. The court shall consider and dispose of an application promptly. In a proceeding under this section, the applicant has the burden of proof by a preponderance of the evidence. The court shall enter an order in accordance with the following requirements:
   a. If the court finds that the individual is not mentally ill or defective or that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act, it shall order that the individual be discharged from further constraint under this chapter.
   b. If the court finds that the individual is mentally ill or defective, but that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage, it may modify the conditions of release as appropriate for the protection of society.
   c. If the court finds that the individual is mentally ill or defective and that there is a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage and that the individual is no longer a proper subject for conditional release, it shall order the individual committed to a treatment facility for custody and treatment. If the court finds that the individual is mentally ill or defective and that there is a substantial risk that the individual, as a result of mental illness or defect, will commit a nonviolent criminal act, it may order the individual to report to any treatment facility for noncustodial evaluation and treatment and to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the treatment facility.

Source: S.L. 1985, ch. 173, § 25.

### 12.1-04.1-26. Procedures.

1. An applicant for a court order under sections 12.1-04.1-20 through 12.1-04.1-25 shall deliver a copy of the application and any accompanying documents to the individual committed, the prosecuting attorney, the director or superintendent of the treatment facility to which the individual has been committed, or the person or the director or superintendent of a treatment facility responsible for supervision of an individual conditionally released. The North Dakota Rules of Civil Procedure, adapted by the court to the circum-



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stances of a postverdict proceeding, apply to a proceeding under sections 12.1-04.1-20 through 12.1-04.1-25.

2. In a proceeding under sections 12.1-04.1-20 through 12.1-04.1-25 for an initial order of disposition, in a proceeding for modification or termination of an order of commitment to a treatment facility initiated by the individual at the time of a review, or in a proceeding in which the status of the individual might be adversely affected, the individual has a right to counsel. If the court finds that the individual lacks sufficient financial resources to retain counsel and that counsel is not otherwise available, it shall appoint counsel to represent the individual.
3. In a proceeding under sections 12.1-04.1-20 through 12.1-04.1-25, the North Dakota Rules of Evidence do not apply. If relevant, evidence adduced in the criminal trial of the individual and information obtained by court-ordered examinations of the individual pursuant to section 12.1-04.1-04 or 12.1-04.1-22 are admissible.
4. A final order of the court is appealable to the supreme court.

Source: S.L. 1985, ch. 173, § 26.

## CHAPTER 12.1-05

## JUSTIFICATION—EXCUSE—AFFIRMATIVE DEFENSES



### 12.1-05-01. Justification.

1. Except as otherwise expressly provided, justification or excuse under this chapter is a defense.
2. If a person is justified or excused in using force against another, but he recklessly or negligently injures or creates a risk of injury to other persons, the justifications afforded by this chapter are unavailable in a prosecution for such recklessness or negligence.
3. That conduct may be justified or excused within the meaning of this chapter does not abolish or impair any remedy for such conduct which is available in any civil action.

Source: S.L. 1973, ch. 116, § 5.

**In General.**

This section provides that any justification or excuse in this chapter, 12.1-05, is a defense, and that a person who is otherwise justified or excused in using force against another is not justified in doing so if he is prosecuted for



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State v. Thompson, 68 N.D. 98, 277 N.W. 1 (1938).

**Refusal to Advise Acquittal.**

A refusal of a court to advise an acquittal at the close of the state's case did not constitute ground for reversal. State v. Wright, 20 N.D. 216, 126 N.W. 1023, 1912C Ann. Cas. 795 (1910); State v. Miller, 59 N.D. 286, 229 N.W. 569 (1930); State v. Farrier, 61 N.D. 694, 240 N.W. 872 (1931); State v. Gammons, 64 N.D. 702, 256 N.W. 163 (1934); State v. Thompson, 68 N.D. 98, 277 N.W. 1 (1938); State v. St. Croix, 79 N.D. 269, 55 N.W.2d 635 (1952); State v. Johnson, 88 N.W.2d 209 (N.D. 1958).

**Waiver by Defendant.**

Failure to ask for an instruction that the court advise an acquittal was a waiver of that right after verdict was given. Territory v. Stone, 2 Dak. 155, 4 N.W. 697 (1879).

**Collateral References.**

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence-modern cases, 70 A.L.R.4th 664.

## Rule 29.1. Closing argument.

[Reserved for future use.]

EXPLANATORY NOTE

The Committee recommends that no rule be adopted pertaining to closing argument, as the subject is adequately covered by N.D.C.C. §§ 29-21-01 and 29-21-02.

**Sources:** Joint Procedure Committee Minutes of December 7-8, 1978, page 15; October 12-13, 1978, page 9.

**Statutes Affected:** None.

**Cross-References.**

Order of trial, change of order, see §§ 29-21-01, 29-21-02.

## Rule 30. Instructions.

(a) **Instructions to jury; written or oral.** Immediately after the jury is sworn, the court may instruct the jury concerning its duties, its conduct, the order of proceedings, and the elementary legal principles governing the proceeding. The court shall instruct the jury immediately before or after the arguments of counsel. The court shall instruct the jury only as to the law of the case. The instructions must be reduced to writing unless the parties otherwise agree. If written instructions are given they must be signed by the judge and must be taken by the jurors in their retirement. When oral instructions are given, they may not be taken by the jurors in retirement unless, after they have been transcribed, it is so ordered by the court. All instructions taken by the jurors in retirement must be returned into court with their verdict.

(b) **Requested instructions.** At the close of the evidence or at an earlier time during the trial as the court reasonably directs, any party may file proposed jury instructions. The court may require each instruction to be written on a separate sheet, provided North Dakota pattern jury instructions may be requested by reference to instruction number only. The court shall inform counsel in writing of its action upon requested instructions prior to their argument to the jury. All instructions given by the court to the jurors must be read or given to them orally by the court without disclosing whether the instructions were requested.

(c) **Exceptions to instructions.** The giving of instructions and the failure to instruct the jurors are deemed excepted to unless the court, before instructing the jurors, submits to counsel the written instructions it proposes to give to the jurors and asks for exceptions to be noted. Thereupon, counsel shall designate the parts or omissions counsel considers objectionable. Thereafter, only the parts or omissions so designated are deemed excepted to by the counsel designating the same. All proceedings connected with the taking of exceptions must be in the absence of the jurors and a reasonably sufficient time must be allowed counsel to take exceptions and to note them in the record of the proceedings.

able matters not specified therein. State v. Campbell, 7 N.D. 58, 72 N.W. 935 (1897); State v. Youman, 66 N.D. 204, 263 N.W. 477 (1936).

**Findings of Fact.**

No exceptions to findings of fact are necessary or permissible. State ex rel. Minehan v. Thompson, 24 N.D. 273, 139 N.W. 960 (1912).

**Law Reviews.**

I Object!, 46 N.D. L. Rev. 203 (1970).

## Rule 52. Harmless error and obvious error.

(a) **Harmless error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) **Obvious error.** Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

### EXPLANATORY NOTE

Rule 52 is adapted in the language of Rule 57 of the Uniform Rules of Criminal Procedure of the National Conference of Commissioners on Uniform State Laws (1952) and differs from the Federal Rule only in the substitution of the word "obvious" error for "plain" error. This Rule applies to both the trial courts and the appellate courts. If the initial action of the trial court was correct, Rule 52 has no application. If, however, the original action was incorrect, three types of error may be assigned for review by the appellate court. These are: (1) harmless error or error not prejudicial to the defendant; (2) reversible error or error that was prejudicial and to which objection was made in the trial court; and (3) obvious error or error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time. [See Wright, Federal Practice and Procedure, § 851, page 349 (1969).]

Subdivision (a) provides that any error, defect, irregularity or variance that does not affect substantial rights of an accused shall be disregarded. To determine whether error affecting substantial rights of the defendant has been committed, the entire record must be considered and the probable effect of the error determined in the light of all the evidence. Generally speaking, however, an error of constitutional dimensions is more likely to be found prejudicial than ordinary errors. Before a Federal constitutional error may be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. [Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, 24 A.L.R.3d 1065, *rehearing denied*, 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967).] Generally, it may be said that the defendant has the burden of showing that a technical error has affected his substantial rights [Black v. United States, 309 F.2d 331 (8th Cir. 1962), *cert. denied*, 372 U.S. 934, 83 S. Ct. 880, 9 L. Ed. 2d 765 (1963)] but that if the error was fundamental, or of such a character as would normally prejudice substantial rights, the burden is on the prosecution to demonstrate its harmlessness. [Bihn v. United States, 328 U.S. 633, 66 S. Ct. 1172, 90 L. Ed. 1484 (1946)] [See Wright, *supra*, § 854, pages 356-357.]

Subdivision (b) provides that obvious errors affecting substantial rights may be noticed even though they were not brought to the attention of the court. But the power to notice obvious error, whether at the request of counsel or on the court's own motion, is one the courts should exercise cautiously and only in exceptional circumstances. The power should be exercised only where a serious injustice has been done to the defendant. [See Wright, Federal Practice and Procedure, § 856, pages 372-374 (1969).]

**Sources:** Joint Procedure Committee Minutes of February 20-23, 1973, page 11; December 10-12, 1970, pages 15-17; 18 U.S.C.A., Fed.R.Crim.P. 52, page 399; Wright, Federal Practice and Procedure: Criminal, §§ 851-856 (1969); 8A Moore's Federal Practice, Chapter 52 (Cipes, 2d Ed. 1971); Rule 57, Uniform Rules of Criminal Procedure, drafted by the National Conference of Commissioners on Uniform State Laws (1952).

**Statutes Affected:**

Superseded: N.D.C.C. § 29-28-26.

**Cross Reference:** N.D.R.Civ.P. 61. — Harmless Error.

**Cross-References.**

Harmless error, see N.D.R.Civ.P. 61.

**In General.**

When error occurs during a trial, the objective upon review is to determine whether the error was so prejudicial that substantial injury occurred and a different decision would have resulted without the error; if no prejudice resulted, the error is considered harmless and shall be disregarded. State v. Schimmel, 409 N.W.2d 335 (N.D. 1987).

Where an issue has not been properly preserved for review, inquiry is limited to determining whether the error constitutes an obvious error which affects substantial rights of the defendant; in cases of nonconstitutional error, the court's task is to determine whether the error had a significant impact upon the verdict, but it does not have to find that the error was harmless beyond a reasonable doubt. State v. Thiel, 411 N.W.2d 66 (N.D. 1987).

**Admission of Evidence.**

Where prior inconsistent statement of witness introduced at criminal trial was not admissible as substantive evidence, but could only be used for purposes of impeachment, and the prior inconsistent statement was the only

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2. A person who omits to perform an act does not commit an offense unless the person has a legal duty to perform the act, nor shall such an omission be an offense if the act is performed on the person's behalf by a person legally authorized to perform it.

Source: S.L. 1973, ch. 116, § 2.

DECISIONS UNDER PRIOR LAW

**Failure to Act.**
Statute making it a crime to perform a prohibited act even if no statute set forth a penalty for that act did not make it a criminal offense to fail to do an act which was required by statute. Langer v. Goode, 21 N.D. 462, 131 N.W. 258, 1913D Ann. Cas. 429 (1911).

**Forbidden Act.**
Where a certain act was forbidden and the forbidden act was done, and a punishment was prescribed for the doing of the forbidden act, such act was a crime. In re Hogan, 8 N.D. 301, 78 N.W. 1051, 45 L.R.A. 166, 73 Am. St. Rep. 759 (1899).

**Practice of Accounting.**
Since the statute relating to accountancy neither declared it to be a crime for one to practice, nor prescribed any punishment or penalty upon one who practiced, without a certificate from the board of accountancy, the statute did not create a crime. Brissman v. Thistlethwaite, 49 N.D. 417, 192 N.W. 85 (1922).

**Collateral References.**
Criminal Law ⇦ 12 et seq.
21 Am. Jur. 2d, Criminal Law, §§ 31-36
22 C.J.S. Criminal Law, § 2.

**Law Reviews.**
How to Identify Criminals and Other Citizens of North Dakota After July 1, 1975, 50 N.D. L. Rev. 617 (1974).

### 12.1-02-02. Requirements of culpability.

1. For the purposes of this title, a person engages in conduct:
   a. "Intentionally" if, when he engages in the conduct, it is his purpose to do so.
   b. "Knowingly" if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.
   c. "Recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 12.1-04-02, awareness of the risk is not required where its absence is due to self-induced intoxication.
   d. "Negligently" if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct.
   e. "Willfully" if he engages in the conduct intentionally, knowingly, or recklessly.
2. If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully.
3. a. Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense, except that where the



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required culpability is "intentionally", the culpability required as to an attendant circumstance is "knowingly".

b. Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required degree of culpability is required with respect to the result.

c. Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for grading.

d. Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in chapters 12.1-01 through 12.1-06; otherwise the least kind of culpability required for the offense is required with respect to such facts.

e. A factor as to which it is expressly stated that it must "in fact" exist is a factor for which culpability is not required.

4. Any lesser degree of required culpability is satisfied if the proven degree of culpability is higher.

5. Culpability is not required as to the fact that conduct is an offense, except as otherwise expressly provided in a provision outside this title.

**Source:** S.L. 1973, ch. 116, § 2.

**Applicability.**

This section applies only to offenses or crimes described in Title 12.1. City of Dickinson v. Mueller, 261 N.W.2d 787 (N.D. 1977).

This section applies only to recodified Criminal Code and not to earlier statutes not repealed by recodification. State v. North Dakota Educ. Ass'n, 262 N.W.2d 731, 4 A.L.R.4th 724 (N.D. 1978).

Subsection (2) is only applicable to Title 12.1, and the willful culpability level will not be read into other chapters unless the legislature specifically states as such. State v. Eldred, 1997 ND 112, 564 N.W.2d 283 (1997).

**Intentionally.**

Although this section may be directly applicable only to offenses or crimes described in Title 12.1, it was an appropriate source to look to in determining the definition of "intent" in section 57-38-45(3). State v. Benson, 376 N.W.2d 36 (N.D. 1985).

**Knowingly.**

"Knowingly" does not require absolute knowledge, but merely a firm belief, unaccompanied by substantial doubt. State v. Kaufman, 310 N.W.2d 709 (N.D. 1981).

**Negligent Conduct.**

It is not necessary to show that defendant realized her conduct would in all probability produce death in order to establish that death was negligently caused; negligent conduct requires only showing of an unreasonable disregard of a substantial likelihood of existence of relevant facts or risks. State v. Ohnstad, 359 N.W.2d 827 (N.D. 1984).

**Sufficient Notice of Violation.**

The language of section 12.1-16-03, when read together with the definition of "negligently," is sufficiently explicit to enable a reasonable person to determine what type of conduct renders him liable under the statute. State v. Tranby, 437 N.W.2d 817 (N.D.), cert. denied, 493 U.S. 841, 110 S. Ct. 128, 107 L. Ed. 2d 88 (1989).

**Willful Conduct.**

**—In General.**

A person acts "'Willfully' if he engages in the conduct intentionally, knowingly, or recklessly." Negligent conduct does not constitute willful conduct. State v. Anderson, 480 N.W.2d 727 (N.D. 1992).

**—Violation of Injunction.**

There was sufficient evidence for the jury to find that the defendant was guilty of disobeying a lawful preliminary injunction where the defendant evidenced knowledge of the injunction by her initial lawful demonstration, by her response to a warning, and by her testimony, where there was ample evidence that the defendant was part of a group that demonstrated other than quietly and peacefully, and where there were evidentiary conflicts and factual questions about the defendant's state of mind sufficient for the jury to infer a



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**39-08-01. Persons under the influence of intoxicating liquor or any other drugs or substances not to operate vehicle — Penalty.**

1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
   a. That person has an alcohol concentration of at least ten one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle.
   b. That person is under the influence of intoxicating liquor.
   c. That person is under the influence of any drug or substance or combination of drugs or substances to a degree which renders that person incapable of safely driving.
   d. That person is under the combined influence of alcohol and any other drugs or substances to a degree which renders that person incapable of safely driving.

   The fact that any person charged with violating this section is or has been legally entitled to use alcohol or other drugs or substances is not a defense against any charge for violating this section, unless a drug which predominately caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the drug to that person.
2. A person violating this section or equivalent ordinance is guilty of a class B misdemeanor for the first or second offense in a five-year period, of a class A misdemeanor for a third offense in a five-year period, of a class A misdemeanor for the fourth offense in a seven-year period, and of a class C felony for a fifth or subsequent offense in a seven-year period. The minimum penalty for violating this section is as provided in subsection 4. The court shall take judicial notice of the fact that an offense would be a subsequent offense if indicated by the records of the director or may make a subsequent offense finding based on other evidence.
3. Upon conviction, the court may order the motor vehicle number plates of the motor vehicle owned and operated by the offender at the time of the offense to be impounded for the duration of the period of suspension or revocation of the offender's driving privilege by the licensing authority. The impounded number plates must be sent to the director who must retain them for the period of suspension or revocation, subject to their disposition by the court.
4. A person convicted of violating this section, or an equivalent ordinance, must be sentenced in accordance with this subsection.
   a. For a first offense, the sentence must include both a fine of at least two hundred fifty dollars and an order for addiction evaluation by an appropriate licensed addiction treatment program.
   b. For a second offense within five years, the sentence must include at least five days' imprisonment or placement in a minimum security facility, of which forty-eight hours must be served consecutively, or thirty days' community service; a fine of at least five hundred dollars; and an order for addiction evaluation by an appropriate licensed addiction treatment program.
   c. For a third offense within five years, the sentence must include at least sixty days' imprisonment or placement in a minimum security facility, of which forty-eight hours must be served consecutively; a fine of one thousand dollars; and an order for

addiction evaluation by an appropriate licensed addiction treatment program.

d. For a fourth or subsequent offense within seven years, the sentence must include one hundred eighty days' imprisonment or placement in a minimum security facility, of which forty-eight hours must be served consecutively and a fine of one thousand dollars.

e. The execution or imposition of sentence under this section may not be suspended or deferred under subsection 3 or 4 of section 12.1-32-02.

f. For purposes of this section, conviction of an offense under a law or ordinance of another state which is equivalent to this section must be considered a prior offense if such offense was committed within the time limitations specified in this subsection.

g. If the penalty mandated by this section includes imprisonment or placement upon conviction of a violation of this section or equivalent ordinance, and if an addiction evaluation has indicated that the defendant needs treatment, the court may order the defendant to undergo treatment at an appropriate licensed addiction treatment program and the time spent by the defendant in the treatment must be credited as a portion of a sentence of imprisonment or placement under this section.

**Source:** S.L. 1923, ch. 254, §§ 1, 2; 1925 Supp., §§ 2976t10, 2976t11; S.L. 1927, ch. 162, §§ 2, 62; R.C. 1943, § 39-0801; S.L. 1949, ch. 250, § 1; 1953, ch. 247, § 1; 1957 Supp., § 39-0801; S.L. 1959, ch. 286, § 13; 1961, ch. 259, § 1; 1969, ch. 342, § 1; 1971, ch. 371, § 1; 1973, ch. 302, § 1; 1975, ch. 106, §§ 434, 673; 1975, ch. 342, § 1; 1975, ch. 343, § 1; 1975, ch. 344, § 2; 1977, ch. 350, § 2; 1977, ch. 356, § 1; 1981, ch. 394, § 1; 1981, ch. 395, § 1; 1981, ch. 486, § 16; 1983, ch. 415, § 21; 1985, ch. 429, § 8; 1987, ch. 460, § 7; 1989, ch. 158, § 14; 1991, ch. 394, § 6; 1993, ch. 382, § 2; 1993, ch. 387, § 1; 1993, ch. 388, § 1; 1997, ch. 323, § 2; 1999, ch. 112, § 3; 1999, ch. 346, § 1.

**Effective Date.**

The 1999 amendment of this section by section 3 of chapter 112, S.L. 1999 became effective August 1, 1999.

The 1999 amendment of this section by section 1 of chapter 346, S.L. 1999 became effective August 1, 1999.

**Note.**

Section 39-08-01 was amended twice by the 1999 Legislative Assembly. Pursuant to section 1-02-09.1, the section is printed above to harmonize and give effect to the changes made in section 3 of chapter 112, S.L. 1999, and section 1 of chapter 346, S.L. 1999.

**Administrative Proceedings.**

**—Res Judicata.**

Cancellation of license revocation hearing based on refusal to submit to chemical test did not operate as res judicata barring subsequent DUI license suspension proceedings. Fuchs v. Moore, 1999 ND 27, 589 N.W.2d 902 (1999).

**Enhancement.**

Guilty pleas to actual physical possession of a vehicle while under the influence of intoxicating liquor, made by defendant represented by counsel, could be used to enhance sentence of the same defendant subsequently convicted of driving under the influence. State v. Berger, 1999 ND 46, 590 N.W.2d 884 (1999).

Sentencing court is not required to advise a defendant of potential future sentence enhancements based on a guilty plea to a violation of this section. State v. Berger, 1999 ND 46, 590 N.W.2d 884 (1999).

**Evidence.**

**—Held Sufficient.**

Evidence was sufficient to support administrative suspension of driver's license for driving under the influence of alcohol. Wheeling v. Director of N.D. DOT, 1997 ND 193, 569 N.W.2d 273 (1997).

Testimony of law enforcement officers who observed defendant in an intoxicated state combined with the testimony of a passing motorist who saw defendant driving erratically and staggering after the accident was sufficient to support defendant's DUI conviction. State v. Roberson, 1998 ND App 15, 586 N.W.2d 687 (1998).