IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff/Appellee,

Supreme Court No. 20090110

v.

Charles Blunt,

Defendant/Appellant.

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BRIEF OF APPELLANT

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Appeal from Order Deferring Imposition of Sentence

Burleigh County District Court
South Central Judicial District
Criminal No. 08-07-K-00789

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

STATEMENT OF THE ISSUES

ISSUE FOR REVIEW NO. 1

Did the trial court's granting of the Rule 29 motion on the grant money prohibit Blunt's further prosecution on Count I?

ISSUE FOR REVIEW NO. 2

Did the trial court err in allowing the State to constructively amend Count I to include the allegations of Spencer sick leave and relocation expenses without a new preliminary hearing?

ISSUE FOR REVIEW NO. 3

Is the culpable mental state for "disposes of, uses, or transfers any interest in property" in NDCC 12.1-23-07(1) "knowingly" or "willfully"?

ISSUE FOR REVIEW NO. 4

Can the State aggregate amounts under NDCC 12.1-23-07 as it did in Count I to reach a class B felony level?

ISSUE FOR REVIEW NO. 5

Is "committed pursuant to one scheme or course of conduct" contained in NDCC 12.1-23-05(6) an essential element of Misapplication of entrusted property under NDCC 12.1-23-07, which must be alleged in Count I, charged to the jury, and found by the jury beyond a reasonable doubt?

ISSUE FOR REVIEW NO. 6

Was the State's allegation that Blunt "failed to collect relocation (moving) expenses from Dave Spencer" not proven as a matter of law?

ISSUE FOR REVIEW NO. 7

Is there insufficient evidence as a matter of law to support the finding of guilt on Count I in that all of the expenditures in this case were within Blunt's discretion, reasonable and necessary and a benefit to WSI?

ISSUE FOR REVIEW NO. 8

Was Blunt convicted on a burden of proof below that which is constitutionally required for beyond a reasonable doubt?

STATEMENT OF THE CASE

This is a criminal case which went to a jury on a Third Amended Information charging defendant Charles Blunt with two counts of Misapplication of Entrusted Property under N.D.C.C. 12.1-23-07(1) (see Addendum 1). Count I charged a class B felony for property misapplied on May 10, 2004, through March 31, 2007, which exceeded $10,000; and Count II charged a class C felony for property misapplied on July 1, 2005, through November 30, 2005, which exceeded $500 (A. 61). The jury found Blunt guilty of Count I and not guilty of Count II (R. 125). Blunt appeals from the Order Deferring Imposition of Sentence as to Count I, dated March 2, 2009 (A. 79-81).

The original Complaint (A. 5), Count I, was obtained on testimony that "Blunt allowed unauthorized expenses through WSI" which "involved violation of state statute. Some of those expenses included purchasing gift certificates, party favors, paying people to go to conventions, paying for banquets and parties, and stuff of that nature, totaling in excess of $10,000." (A. 6). The State early on gave Blunt a list of witnesses (A. 8). Before the preliminary hearing the State moved to amend the original Complaint in a manner which did not change the property alleged or its value (and which

does not effect this appeal), and an Amended Complaint was allowed (A. 10-12).

At the preliminary hearing, Count I involved $4,331.00 in gift certificates (R. 18, 21), and $7,053.29 in expenses related to employee meetings (R. 19), for a total of $11,384.29. These sums were part of an $18,300.00 sum reflected in a State Auditor's audit of WSI. Following the preliminary hearing, the magistrate found no probable cause (R. 36).

The State appealed the finding of no probable cause to the North Dakota Supreme Court (R. 41). As the case was before the North Dakota Supreme Court, "Count I charged Blunt with a class B felony for misapplying over $10,000 in WSI funds for gift certificates, meeting expenses, and expenditures on legislators." State v. Blunt, 2008 ND 135, ¶ 3, 751 N.W.2d 692.

The North Dakota Supreme Court reversed the finding of no probable cause and remanded the case back to the district court (R. 56). An Information (A. 13-14) was filed which tracked the charging language in the Amended Complaint, but which added a number of witnesses not named in the State's initial discovery response (see A. 8); and Blunt was arraigned (R. 60-61).

Shortly after arraignment, Blunt filed a motion to dismiss the Information "for the State's failure to allege the required culpability of 'knowingly' as applied to the elements that defendant 'disposed of, used, or transferred any interest in property that had been entrusted to him'." (A. 15). In part, Blunt argued that he had a right to a preliminary hearing on this culpable mental state (A. 16).

At the same time, Blunt filed a motion for a bill of particulars seeking the State to "specify the manner and means Charles Blunt 'knew' he was 'not authorized' to dispose of, use, or transfer the alleged property" (A. 18). Blunt cited numerous statutes under Title 65, N.D.C.C., giving WSI responsibilities and powers over money (A. 18-19), and specifically stated the following:

> "For example, from the preliminary hearing and discovery, defendant knows Count I includes $4,331.00 in gift certificates . . . However, NDCC 65-02-03.3(7) specifically orders the board to '[i]ncorporate principles of continuous improvement goalsetting, a procedure for implementing a team-oriented continuous improvement program throughout all operations of the organization.'"

"Count I also includes $7,053.29 in expenses related to employee meetings . . . Yet, NDCC 65-02-05 specifically orders WSI to spend all necessary expenses to carry out the provisions of its task." (A. 19-20).

The State responded to Blunt's motion to dismiss by arguing that the proper culpable mental state was "willfully" as to the elements "disposed of, used, or transferred any interest in property that had been entrusted to him", not "knowingly" as contended by Blunt; and moved the district court to amend the information to include the missing culpable mental state of "willfully" (A. 28-30).

The State responded to Blunt's motion for a bill of particulars by stating that Blunt misapplied "thousands of dollars of public funds despite being informed of specific state monetary laws, administrative policies and WSI's own internal policies prohibiting his illegal conduct." (A. 23). Then, in a manner unresponsive to Blunt's motion, the State informed Blunt that, in regard to Count I, he "can also expect the state to present evidence of the illegal use of public funds to pay sick leave to a former WSI employee who was not sick; to fail to collect relocation expenses from an employee who quit; to award funds under a grant program that did not exist; and to buy select employees everything from gift certificates to refreshments to

inducements." (A. 23). The State went on to delineate facts about employee Dave Spencer and paid sick leave in violation of "WSI's own internal policies" (A. 24), Dave Spencer and the failure to collect moving expenses in the sum of $7,000.00, in violation of "WSI policy and state law" (A. 24-25), and illegally committing $150,000 in grant money in violation of "N.D.C.C. Section 65-03-04" and "North Dakota Administrative Code Sections 92-05-03 and 92-05-03" (sic) (A. 25).

Before Blunt could file a reply brief to the State's responses, the trial court found "the culpability is willfully for the forbidden conduct of 'misapplication of entrusted property'." (A. 34). The trial court also found "the exhaustive preliminary hearing and the subsequent appeal indicating probable cause was sufficient provided (sic) Blunt with a fair opportunity to defend this action to this point. No surprise or prejudice attaches to Blunt by 'willfully' not being included in the information." (A. 35).

The trial court also found, "As to the knowingly element (which the trial court found to be willfully), the Court finds Blunt has sufficient information from the file, the preliminary hearing, the appeal and the State's response to adequately prepare his defense." (A. 32). The trial court denied Blunt's request for a bill of particulars over and above what the State provided in its response to Blunt's request (A. 32).

The State filed an Amended Information charging that Blunt "willfully disposed of, used, or transferred any interest in property that had been entrusted to him" (A. 36). Blunt objected. In regard to the addition of willfully, "Such amendment violates defendant's rights to a preliminary hearing on the elements of the crime and therefore substantial rights of the defendant are prejudiced." (A. 38). In regard to the addition of payment of sick leave to Dave Spencer, the failure to collect relocation expenses from Dave Spencer, and illegally committing $150,000 for a grant, this "reflects a different offense from the offense addressed at the preliminary hearing. This amounts to a constructive amendment . . ." (A. 43).

The State disagreed it was now charging a different offense (A. 45). Blunt replied, outlining for the trial court the history of the case and informing the court that he first received discovery from the State on Dave Spencer on August 25, 2008, the day before his arraignment on the original Information, and again on September 19, 2008, but that he did not see the relevance of this discovery at that time (A. 48-49). Further, Blunt did not receive discovery on the alleged grant until October 7, 2008, two weeks after the State announced Count I included that allegation as well (A. 50).

A pretrial conference hearing was held on November 3, 2008 (see Tr. of Pretrial Conference Hearing) (R. 98). At the hearing, Blunt argued his

motion to dismiss the information for failure to delineate the property and for the constructive amendment (R. 98, pp. 3, 10, 20-22). The State's response was, "I can tell the Court that the information pertaining to this was part of the original audit that was conducted. The information pertaining to sick leave, the information pertaining to the relocation expense, the information pertaining to grant funds, that was part of the original." (R. 98, p. 11, lines 17-22). The State added, "[T]his was always the case from the get-go. No, we didn't bring it forth during the preliminary hearing." (R. 98, p. 18, lines 9-11). "[T]his is all part of one course of conduct. . . [T]he State could charge out each one of these things as separate, it doesn't make sense to do that." (R. 98, lines 20-24).

The trial court ruled Blunt "is adequately informed of the charges by the State's response to Defendant's request for a bill of particulars setting out the specifics of the crimes charged." (A. 54-55). In effect, the trial court allowed the additions to Count I, that being the Spencer sick leave and relocation expenses, and the grant money. A Second Amended Information was ordered filed, adding witnesses but not changing the language of Count I (A. 51-53).

Prior to trial, Blunt filed a Motion and Brief in Limine arguing Count I, with its various additions of items, was duplicitous (A. 56-60). Blunt

argued the various additions of items were separate transactions, offenses (A. 56, 58), and could not be added to prove the allegation that the property misapplied exceeded $10,000 (A. 59). Blunt warned of double jeopardy problems (A. 56), and that a jury instruction requiring unanimity as to a transaction may not be sufficient (A. 57). Blunt argued that the State should elect which of the transactions upon which it would proceed (A. 57), and that the only transaction which he knew to exceed $10,000 by itself was the allegation of the grant money (A. 59). Blunt believed only that transaction was relevant to Count I (A. 60).

The trial court heard Blunt's motion in limine pretrial (see In Camera Proceedings, December 12, 2008) (R. 141, p. 36). The trial court denied Blunt's motion (R. 141, p. 45).

The case went to jury trial on the Third Amended Information, which simply added a witness (A. 61). In opening statement, the State began Count I by stating, "Count I has a number of different pieces to it." (Tr. 37). First addressed was the sick leave of Dave Spencer in the sum of $7,053.14 (Tr. 37-39). Next were the relocation expenses of Dave Spencer in the sum of $7,964.80 (Tr. 39-40). Then came the grant and the allegation that "the North Dakota Firefighters drew about $15,000 of grant funds" (Tr. 41-43).

This opening statement is the first Blunt heard these three numbers (see Tr. 62, lines 8-13).

Next came the gift certificates in the familiar sum of $4,331 (Tr. 43-44), and finally the meeting expenses in the also familiar sum of $7,053.29 (Tr. 44-46). The total the State was alleging against Blunt in Count I was $41,402.33 (Tr. 47). This, too, was the first Blunt heard this number.

After the State rested its case-in-chief, Blunt made a motion for judgment of acquittal (Tr. 741). In regard to Count I, the trial court ruled, "I'm going to grant the motion in regards to the grant program." (Tr. 756, lines 22-23). "I'm finding there is insufficient evidence for that portion of it to go to the Jury." (Tr. 757, lines 12-14).

At that time, the State recognized a problem:

> [The State]: . . . [W]hen you look at a Rule 29, . . . is a count out, is a count in, is there sufficient evidence for that count to go forward? It isn't really a situation where you can pick and choose and say . . . I find this evidence credible. I don't find this other evidence credible. . . . [I]t's all part and parcel of one charge. <u>They're not separate and individual charges. They are all part of one</u>.
>
> . . . [O]n what basis can you take the position that certain pieces of evidence are not going to be able to be considered by the Jury? . . .

[I]t's all charged as an ongoing course of conduct that happened within a specific period of time. . . . I don't know how you can pick and choose pieces of evidence.

. . .

. . . [W]hen it's all charged . . . as part of one count, it is one count.

(Tr. 759-760) (emphasis added).

The trial court responded, "I don't think you proved that portion of it. You charge it out that way." (Tr. 762, lines 7-8). "It's like it was a separate count, so to speak, and it's been dismissed." (Tr. 763, lines 5-6).

After Blunt rested his case, Blunt made another Rule 29 motion for judgment of acquittal (Tr. 882). The trial court denied the motion (Tr. 885). The State called a rebuttal witness and therefore Blunt renewed his Rule 29 motion after the close of all the evidence (Tr. 912). The trial court denied the motion (Tr. 912-913).

At that time, the State reargued the grant money (Tr. 913). The State argued that Rule 29 required "granting or dismissing based upon Count I as a whole . . . rather than partial . . . dismissal of a specific factual theory available for the Jury to consider in support of one count." (Tr. 913, lines 12-16) (emphasis added). The State then took that further and argued that

the grant money issue needed to be taken forward to the jury (Tr. 914, lines 7-11). The trial court disagreed with the State and stated, "I'm indicating there is insufficient evidence to go before the Jury to find a conviction on the Firemens Fund grant program as an offense." (Tr. 914, lines 20-22).

Blunt then stated, "[G]iven what the State just said, . . . Mr. Blunt is not guilty of Count I at this point in time, and I would move that we not proceed on Count I whatsoever." (Tr. 915, lines 7-10). The trial court responded, "Understand. Not going to happen." (Tr. 915, line 11).

The trial court instructed the jury on willfully as to the initial part of the offense of misapplication of entrusted property, as opposed to knowingly contended by Blunt in pretrial motion, discussed above, and requested in proposed jury instructions (R. 68, pp. 2, 6, 8; R. 141, pp. 10-12, 53; see Tr. 16, 938). The trial court also instructed the jury on unanimity as requested by Blunt as follows: "Count I charges Misapplication of Entrusted Property exceeding $10,000. To find dollars exceeding $10,000, you the Jury must be unanimous in the items totaling in excess of $10,000, if any." (Tr. 757-759, 927-928, 945).

The jury found Blunt guilty of Count I and not guilty of Count II (Tr. 1038; R. 125).

Following the trial, Blunt moved the trial court to set aside the jury verdict of guilty on Count I and to enter a judgment of acquittal on Count I based upon the trial court's granting of Blunt's Rule 29 motion on the grant money (A. 64). Blunt contended the State chose to charge this offense in one count, there was an acquittal by the trial court on that one count, and that acquittal protected Blunt from further prosecution on Count I (A. 64-67). The State resisted Blunt's motion (A. 68-73), and Blunt replied that the United States Supreme Court had specifically rejected similar arguments as were being made by the State when "discrete bases of criminal liability are duplicitously joined in a single count" (A. 74-75). The trial court, however, denied Blunt's motion (A. 76-78).

Blunt received a deferred imposition of sentence on Count I (A. 79), and Blunt timely appealed to the North Dakota Supreme Court (A. 81).

STATEMENT OF THE FACTS

The State Auditor's office did a performance audit of WSI "to identify areas where improvements could be made to the operation of an agency" (Tr. 227-228). The "audit wasn't called upon to focus on the conduct of Sandy Blunt" (Tr. 227, lines 18-20). The audit covered the time frame of July, 2003 to March, 2006. Blunt began as CEO of WSI on April 30, 2004 (Tr. 227).

During the course of the audit, the State Auditor's office found irregularities in expenditures at WSI. They believed "public funds were used for purposes which were not for the public". (Tr. 72). They decided that certain expenditures were not "reasonable and necessary, looking back at whether the use of the public funds benefited the public." (Tr. 111, lines 1-5).

All of these funds were "used to pay expenses in the workplace" of WSI (Tr. 487, lines 7-8). This is not a case of Blunt taking or giving money for his own personal use (see Tr. 484, lines 10-17). This is a case of Blunt running WSI with the idea, "We want to be great, not good." (Tr. 528, line 21). Some, if not most, of these expenses were of type done by previous CEO's of WSI (see Tr. 477, lines 12-22).

The State Auditor's office testified to the jury that, when confronted, Blunt gave no authority to justify these expenditures (Tr. 119-120). However, this was not true, as Blunt and WSI relied on NDCC, Title 65, and, in particular NDCC 65-02-01.2, to justify these expenses to the State Auditor (Tr. 163-164, 175, 717-718). Blunt and WSI believed their decisions were reasonable and necessary and benefited WSI and the public (see Tr. 552-553).

ARGUMENT

ISSUE FOR REVIEW NO. 1

Did the trial court's granting of the Rule 29 motion on the grant money prohibit Blunt's further prosecution on Count I?

Over Blunt's objections, warnings of duplicity and double jeopardy implications, and motion that the State elect on which basis it would proceed, the State chose to charge multiple items of property in Count I. When the State rested its case-in-chief, Blunt made a motion for judgment of acquittal, and the trial court found insufficient evidence to support the State's allegations regarding the grant money and granted Blunt's motion as to the grant money. This was an acquittal.

"[T]o determine what constitutes an acquittal . . . we look as the substance of the judge's ruling to determine whether it actually represents a resolution of some or all of the factual elements of the offense charged." State v. Deutscher, 2009 ND 98, ¶ 8. Here, the trial court resolved some of the factual elements of Count I, that being the grant money. He did so on lack of evidence, and this is an acquittal. State v. Meyer, 494 N.W.2d 364 (N.D. 1992).

An acquittal goes to an "offense". Rule 29(a), NDRCrimP (see Addendum 3). Therefore, the acquittal found by the trial court went to

Count I. The entire Count I was acquitted. Under Rule 31(b), NDRCrimP, there are partial verdicts only for "multiple defendants" or "multiple counts". (See Addendum 5). There are no partial verdicts for an individual offense or count.

When the trial court granted Blunt's motion for acquittal, "there had been no jury verdict." Further proceedings on Count I to secure a verdict were impermissible, violating double jeopardy. Smith v. Massachusetts, 543 U.S. 462, 467 (2005); Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986).

The State may argue the trial court erred in granting the motion for judgment of acquittal because, even without the grant money, there was sufficient evidence to sustain a conviction on Count I. See Rule 29(a), NDRCrimP. However, "Requiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause – even when the acquittal was erroneous because the evidence was sufficient." Smith v. Massachusetts, 543 U.S., at 473, fn. 7, citing Sanabria v. United States, 437 U.S. 54, 77-78 (1978).

There is no North Dakota rule of criminal procedure which provides that the trial court's ruling on the motion was nonfinal. Therefore, it was final for double jeopardy purposes. Smith v. Massachusetts, 543 U.S., at 471-473. Even if the trial court's ruling on the motion was "'based upon an

egregiously erroneous foundation,' Fong Foo v. United States, 369 U.S. 141, 143 (1962) *(per curiam)*, its finality is unassailable." Yeager v. United States, 557 U.S. ___ (2009), No. 08-67, decided June 18, 2009.

Count I was duplicitous by the State's own doing. At the pretrial conference on November 3, 2008, the State argued it could have charged each of these items separately (R. 98, p. 19, lines 22-23). But it did not. "Legal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight." City of Dickinson v. Kraft, 472 N.W.2d 441 (N.D. 1991), citing Sanabria v. United States, 437 U.S., at 65.

Therefore, Blunt was finally acquitted on Count I when the trial court granted Blunt's motion for judgment of acquittal at the conclusion of the State's case-in-chief. Blunt requests the North Dakota Supreme Court to order the jury verdict be vacated and the entry of a judgment of acquittal on Count I.

ISSUE FOR REVIEW NO. 2

Did the trial court err in allowing the State to constructively amend Count I to include the allegations of Spencer sick leave and relocation expenses without a new preliminary hearing?

The State should not have been allowed to add the allegations of Spencer sick leave and relocation expenses as this created "an additional or different offense" than the offense originally charged in violation of Rule 7(e), NDRCrimP. Count I, as originally charged, included only the gift certificates and meeting expenses. Count I went through a preliminary hearing and an appeal to the North Dakota Supreme Court in that fashion. Not until after arraignment did this constructive amendment of Count I occur. This was error in violation of Rule 7(e) without an additional showing of prejudice. This was an abuse of discretion of the trial court. State v. Foreid, 2009 ND 41, ¶ 8.

Further, Blunt was entitled to a preliminary hearing on the new allegations of Spencer sick leave and relocation expenses as Count I now charged a crime under a different set of facts. State v. Foreid, at ¶¶ 14-15. These new Spencer facts materially changed Count I. Id. at ¶ 14.

Blunt timely objected to this constructive amendment. Blunt timely argued he was entitled to a new preliminary hearing.

ISSUE FOR REVIEW NO. 3

Is the culpable mental state for "disposes of, uses, or transfers any interest in property" in NDCC 12.1-23-07(1) "knowingly" or "willfully"?

The trial court overruled Blunt's objections which contended that the proper culpable mental state was "knowingly", and charged the jury on "willfully", which included "recklessly". Blunt contends this was error requiring reversal.

NDCC 12.1-23-07(1) provides no culpable mental state for "disposes of, uses, or transfers any interest in property", but does contain the subsequent elements, "in a manner that the person knows is not authorized and that the person knows to involve a risk of loss or detriment to the owner of the property". Because "knowingly" is required for the subsequent elements, "knowingly" is required for "disposes of, uses, or transfers any interest in property". See NDCC 12.1-02-02(3)(a), which provides, "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 required culpability is 'intentionally', the culpability required as to an attendant circumstance is 'knowingly'." (See Addendum 7).

Blunt contends NDCC 12.1-02-02(3)(a) makes it abundantly clear the proper culpable mental state is "knowingly". Blunt is bolstered in his belief by State v. Jelliff, 251 N.W.2d 1 (N.D. 1977), which states, "Each alleged

withdrawal of trust funds, knowingly applied to personal use in an unauthorized manner, conceivably involves a risk of loss to the owner of the property." (Emphasis added). Jelliff used knowingly in conjunction with the use, and therefore tied knowingly to the first element of the offense (see R. 141, p. 11, lines 4-11).

Here, the original complaint, the amended complaint, and the original Information never contained this required culpable mental state of "knowingly". All of these charging documents were fundamentally and fatally defective. State v. Gwyther, 1999 ND 15, ¶¶ 13-14, 589 N.W.2d 575. When the State was allowed, over objection, to amend Count I to allege "willfully" as to "disposes of, uses, or transfers any interest in property", this was error because it was the wrong culpable mental state and because Blunt was not allowed, again over objection, to a new preliminary hearing on this new culpable mental state. State v. Foreid, at ¶¶ 14-15.

Finally, it was certainly error for the trial court to charge the jury on the wrong culpable mental state of "willfully", especially when "willfully" contains "recklessly". "Recklessly" is a lesser culpable mental state than "knowingly" and charging "recklessly" illegally reduced what the State was required to prove.

ISSUE FOR REVIEW NO. 4

Can the State aggregate amounts under NDCC 12.1-23-07 as it did in Count I to reach a class B felony level?

Before trial, Blunt objected to the State aggregating the amounts of the various items alleged by the State to reach the class B felony level of "exceeds ten thousand dollars." (A. 56). Blunt's arguments were heard (R. 141, pp. 36-45) and Blunt's motion wherein he expressed his objections was denied (R. 141, p. 45, lines 19-21).

NDCC 12.1-23-07(1) (Addendum 1) states "any interest in property" in language which appears to Blunt to be the singular. NDCC 12.1-23-07(2)(a) (Addendum 2) states "the value of the property misapplied" in language which also appears to be the singular. The definition of "property" in NDCC 12.1-23-10(7) (Addendum 9) does not clarify if "property" is to be interpreted in the singular or plural.

NDCC 12.1-23-07 contains no aggregating language within itself, as does NDCC 12.1-23-08.2, Possession of altered property. Nor does it contain language referencing itself back to NDCC 12.1-23-05(6), the "thefts" aggregation statute, as does NDCC 12.1-23-08, Defrauding secured creditors.

NDCC 12.1-23-05(6) is the aggregation statute for "thefts" (see Addendum 10). The theft offenses are addressed and contained in NDCC 12.1-23-01 to 12.1-23-05. The statute involved here in Count I, NDCC 12.1-23-07, Misapplication of entrusted property, is not a theft statute.

NDCC 12.1-23-05(6) provides, "Thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be charged as one offense and the amounts proved to have been stolen may be aggregated in determining the grade of the offense." The trial court found this statute allowed the State to aggregate the various items it alleged in Count I to total a value of misapplied property in excess of $10,000 under NDCC 12.1-23-07(2)(a). Blunt contends this interpretation is in conflict with the statutory scheme set out in NDCC Chapter 12.1-23, Theft and Related Offenses.

Blunt contends the various dollar amounts alleged by the State could not be aggregated, that each separate item was its own offense. See, e.g., State v. Jelliff, 251 N.W.2d 1, 7 (N.D. 1977), wherein the Court wrote, "the statutory offense is complete upon each separate misapplication of entrusted property."

Here, the only separate item which by itself exceeded $10,000 was the grant money, and the trial court found Blunt not guilty of that item. All of

the other items failed on their face to be sufficient proof of the charged class B felony, and for that Blunt should be completely acquitted of Count I and protected by jeopardy from a second prosecution for any of those items.

ISSUE FOR REVIEW NO. 5

Is "committed pursuant to one scheme or course of conduct" contained in NDCC 12.1-23-05(6) an essential element of Misapplication of entrusted property under NDCC 12.1-23-07, which must be alleged in Count I, charged to the jury, and found by the jury beyond a reasonable doubt?

If the State and trial court were correct, that the various items alleged by the State in Count I could be aggregated to prove a total exceeding $10,000, then Blunt contends that "committed pursuant to one scheme or course of conduct" contained in NDCC 12.1-23-05(6) should have been alleged in the complaint, charged to the jury, and found by the jury beyond a reasonable doubt. Factors which enhance "the seriousness of the offense", especially those which enhance the offense to another grade, are an element of the offense which must be charged and proven to a jury beyond a reasonable doubt. See State v. Tutt, 2007 ND 77, ¶¶ 7-9, 732 N.W.2d 382, citing Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 542 U.S. 296 (2004); see also State v. Emery, 2008 ND 3, 743 N.W.2d 815.

Here, the jury should have been required to find that items "committed pursuant to one scheme or course of conduct" totaled an amount exceeding $10,000. This they were not required to do. On this basis, Blunt would be entitled to a new trial.

ISSUE FOR REVIEW NO. 6

Was the State's allegation that Blunt "failed to collect relocation (moving) expenses from Dave Spencer" not proven as a matter of law?

NDCC 12.1-02-01(2) provides, "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."

At trial, the State never contended that Blunt did not have authority to pay Dave Spencer the relocation or moving expenses in the first instance. The State's case was that Blunt never sought to obtain reimbursement from Spencer after he allegedly quit his employment at WSI. The State, however, never put on any proof that Blunt had a legal duty to perform this act. As such, Blunt could not be guilty of that item as a matter of law.

The facts are that in the event of Spencer's "voluntary resignation", Spencer was "responsible to repay" moving expenses received when he took the job at WSI, according to a schedule (Tr. 128, lines 10-13). However, the

testimony was that Spencer was terminated (Tr. 443-444), that his "resignation" was "involuntary" (Tr. 460, lines 21-25). Legal counsel for WSI recommended that her client not pursue trying to recover the expenses (Tr. 859-860). The State Auditor's position was that, if Spencer's leaving WSI was involuntary, then recoupment of meeting expenses was a moot point (Tr. 845-846). These moving expenses were not contained in the State Auditor's audit (Tr. 188, lines 14-17).

In State v. Arnold, 514 A.2d 330 (Conn. 1986), the Court held, "A general verdict of guilty to a single count charging alternative methods of committing the same crime may be upheld only if there is sufficient evidence to support the verdict as to each alternative." The general verdict "must be set aside if the evidence as to . . . [any] alternative submitted was insufficient." Id., citing Cramer v. United States, 325 U.S. 1, 34-36 (1945).

On this ground, Blunt contends Count I should be reversed and an acquittal entered. If the jury found Blunt guilty of Count I primarily on the Dave Spencer relocation expenses, Blunt should not face another trial on items this jury may have found insufficient but which remain unknown to us. The State chose to charge all of the various items in one count, over Blunt's objection, and the State should not be able to benefit from this act by a reversal and remand on this issue for review.

ISSUE FOR REVIEW NO. 7

Is there insufficient evidence as a matter of law to support the finding of guilt on Count I in that all of the expenditures in this case were within Blunt's discretion, reasonable and necessary and a benefit to WSI?

"[L]eaving the manner and means of exercising an administrative agency's powers to the discretion of the agency implies a range of reasonableness within which the agency's exercise of discretion will not be interfered with by the judiciary." State ex rel. Heitkamp v. Hagerty, 1998 ND 122, ¶ 26, 580 N.W.2d 139, citing Kasprowicz v. Finck, 1998 ND 4, ¶ 14, 574 N.W.2d 564. "Absent express constitutional or statutory limitations, we see no reason for this court to accord a constitutional officer like the Attorney General a narrower measure of discretion that the range of reasonableness accorded to other public officials". State ex rel. Heitkamp v. Hagerty, at ¶ 27 (emphasis added).

Here, there are no express constitutional or statutory limitations which prohibit any of the spending in this case. The State has pointed to N.D. Const. art. X, § 18, the North Dakota constitutional limitation on gifts. Justice Sandstrom has written that this provision "is the action of the people in general to restrain the government actors from gifting public funds or property." Teigen v. State, 2008 ND 88, ¶ 34, 749 N.W.2d 505. However,

that provision is also judged by reasonableness, weighing the money and the public good. Teigen v. State, at ¶ 31.

Here, there exists no item of property which is so unreasonable to call for the interference of the judiciary.

Further, "[i]n general, courts are to give great weight to an agency's construction of a statutory scheme it is entrusted to administer." Delorme v. N.D. Dep't of Human Services, 492 N.W.2d 585 (N.D. 1992), citing Clarke v. Securities Industry Association, 479 U.S. 388, 403 (1987) and Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). The court also wrote, "If the intent of [the legislature] is clear, that is the end of the matter . . . But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute,' Chevron, supra, at 843, that is, whether the agency's construction is 'rational and consistent with the statute,' NLRB v. Food and Commercial Workers, 484 U.S. 112, 123 (1987).

Here, Blunt contends Title 65 is a statutory scheme which is clear and gave WSI the authority to spend as it did in this case. At a minimum, Blunt and WSI's construction of Title 65 in this case was rational and consistent with the statutory scheme. See, also, Saefke v. Stenehjem, 2003 ND 202, ¶

21-22, 673 N.W.2d 41, which held that a state's attorney's discretionary decision not to initiate a civil action was supported by a "rational mental process leading to reasoned determination".

If an agency is protected in the exercise of its discretion in a civil case, Blunt should be so protected in the context of this criminal case. Blunt requests this Court to reverse his conviction in this case as a matter of law in that no expenditure was so unreasonable to call for the interference of the judiciary and for the reason that the statutory scheme of Title 65 was authority for all of the expenditures in this case.

ISSUE FOR REVIEW NO. 8

Was Blunt convicted on a burden of proof below that which is constitutionally required for beyond a reasonable doubt?

The trial court instructed the jury on reasonable doubt using the North Dakota pattern instruction (Tr. 13, lines 4-6; see Tr. 18, lines 6-16). Blunt objected (R. 103) and the trial court overruled his objections (Tr. 13, lines 8-13). Blunt recognizes this Court has previously addressed this pattern jury instruction in State v. Schneider, 505 N.W.2d 405 (N.D. 1996), but Blunt presents the following further arguments as to why the instruction is insufficient.

The instruction does not inform the factfinder that the proof must

be greater than the preponderance of the evidence standard and the clear and convincing evidence standard. Defendant contends this violates due process under our Federal Constitution. See Addington v. Texas, 441 U.S. 418, 433 (1979), wherein the United States Supreme Court held in regard to the clear and convincing evidence standard: "To meet due process demands, the standard has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases."

Further, the pattern jury instruction in North Dakota on clear and convincing evidence, NDJI-CIVIL C-1.41 (2002), includes the sentence, "This is a higher standard of proof than proof by the greater weight of the evidence." Therefore, North Dakota has in fact given civil litigants the benefit of this comparison language. Defendant contends, therefore, that this comparison language is required by the due process protection of the North Dakota Constitution, Article I, Section 12. Due process, equal protection and fairness dictates that criminal defendants in North Dakota also get the benefit of this language.

The instruction does not correctly convey the concept of reasonable doubt to the jury. Victor v. Nebraska, 511 U.S. 1, 5 (1994). There is a reasonable likelihood that the jury will understand the

instruction to allow conviction based on proof insufficient to meet proof beyond a reasonable doubt. Victor v. Nebraska, 511 U.S., at 6.

The instruction does not define the proof in terms of possibilities and probabilities. In California v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93, fn. 6 (1981), the United States Supreme Court spoke of clear and convincing evidence in terms of ". . . a higher probability than is required by the preponderance-of-the-evidence standard", citing C. McCormick, Evidence 320, p. 679 (1954). In Victor v. Nebraska, 511 U.S. 1, 14 (1994), the Court spoke of " . . . the very high level of probability required by the Constitution in criminal cases." Also, in Victor v. Nebraska, 511 U.S., at 11, the Court wrote: " . . . In moral evidence, we rise, by an insensible gradation, from possibility to probability, and from probability to the highest degree of moral certainty", citing 1 Works of James Wilson, 519 (J. Andrews ed. 1896).

The instruction does not define the proof with language which states that the jury "needs to reach a subjective state of near certitude of the guilt of the accused". In Victor v. Nebraska, 511 U.S., at 15, the Court spoke of reasonable doubt in terms of requiring " . . . the need to reach a subjective state of near certitude of the guilt of the accused", citing Jackson v. Virginia, 443 U.S. 307, 315 (1979).

The instruction does not define the proof as all reasonable doubt. A reasonable doubt is any reasonable doubt, which is all reasonable doubt. Such language clarifies the proof and impresses upon the jury the importance of the proof. In Victor v. Nebraska, 511 U.S., at 28, Justice Blackmun, with whom Justice Souter joined, concurring in part and dissenting in part, wrote, " . . . unless guilt is established beyond all reasonable doubt, the accused shall go free." (Emphasis added).

The instruction does inform the jury that the State is not required to prove guilt beyond all doubt." See Addington v. Texas, 441 U.S. 418, 430 (1979). However, the instruction does not inform the jury of the context of this language. In Victor v. Nebraska, 511 U.S., at 17, 20, the Court recognized that "everything is open to some possible or imaginary doubt"; also, that a reasonable doubt is "distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." Defendant contends that failure to completely charge this language in its full context violates due process under our Federal Constitution. In the words of Victor v. Nebraska, "there was nothing else in the instruction to lend meaning to the phrase." Victor v. Nebraska, 511 U.S., at 16. Also, "the rest of the instruction provided insufficient context to lend meaning to the phrase." 511 U.S., at 21.

The final paragraph of the instruction equates "beyond a reasonable doubt" with "a firm and abiding conviction of the Defendant's guilt", and then ties this to "a full and fair consideration of the evidence presented in the case and not from any other source." Defendant contends this paragraph is misleading and violates Federal due process. The jury decides the facts of the case from the evidence presented in the case, but a reasonable doubt can arise from the evidence or from the lack of evidence. In Jackson v. Virginia, 443 U.S. 307, 317 (1979), the Court wrote, "A 'reasonable doubt,' at a minimum, is one based upon 'reason.'" Further explaining, the Court also wrote, "A 'reasonable doubt' has often been described as one 'based on reason which arises from the evidence or lack of evidence'", citing Johnson v. Louisiana, 406 U.S. 356, 360. Jackson v. Virginia, supra, at fn. 9. The final paragraph, therefore, is misleading, and, in fact, directs the jury away from any lack of evidence in deciding if the State's proof is beyond a reasonable doubt.

CONCLUSION

WHEREFORE, Blunt requests the Supreme Court of North Dakota to reverse the finding of guilt against him on Count I, in all things, and to order the entry of his acquittal on Count I.

Respectfully submitted this 22 day of June 2009.

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Michael R. Hoffman

CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing document by hand delivery, on this 22 day of June 2009, on:

Cynthia Feland
Assistant Burleigh County State's Attorney
Courthouse
514 East Thayer Avenue
Bismarck, ND 58501

Michael R. Hoffman