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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

City of Grafton,

Plaintiff/Appellee,

v.

Supreme Court No. 20120360

William Florian Wosick,

Defendant/Appellant.

* *

BRIEF OF APPELLANT-I Addendum

* *

Appeal from Judgment

Walsh County District Court
Northeast Judicial District
Walsh County Case No. 50 2012 CR 00057

* *

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Issue For Review No. 2

The City's violation of Rule 707(a), N.D.R.Ev., is reversible error.

Issue for Review No. 3

Proper foundation for admission of the blood test was not shown, and this is a failure of proof and not just error affecting substantial rights under Rule 103, N.D.R.Ev.

STATEMENT OF THE CASE

This is a criminal case wherein defendant William Florian Wosick was charged with "DUI". Wosick pleaded not guilty to the charge, and a jury trial was had. The jury found Wosick guilty, and Wosick appeals from the criminal judgment.

STATEMENT OF THE FACTS

More specifically, Wosick was charged by a North Dakota Uniform Complaint and Summons with "Drove or actual physical control of a Motor Vehicle while under the influence of alcohol 39-08-01" in violation of City of Grafton Ordinance 23-1 (see App. 6; see Add. 1-2, 10). The complaint indicated a blood test, but did not list a result (App. 6).

In municipal court, Wosick pleaded not guilty "to the charge of DUI in violation of NDCC Section 39-08-01, or equivalent ordinance, Class B Misdemeanor" (Docket #3), and requested the case transferred to the district court for jury trial (Docket #2). The municipal court transferred the case to district court (Docket #4).

The district court held a pretrial conference on May 17, 2012, in which the City stated, "There is a lab analysis. This is a blood test." (App. 7). In a conversation determining the amount of days necessary for trial,

defense counsel stated, "I'm sure it's only going to be the highway patrol and then the analyst and then my expert." (App. 8).

On the morning of trial, August 16, 2012, the court had prepared an Elements of Offense jury instruction which stated that Wosick was charged with "driving a vehicle while under the influence of intoxicating liquor and/or with an alcohol content of .08% or greater." (App. 9). Defense counsel did not object to the instruction (Tr. 2-3).

During jury selection, the court informed the prospective jurors the charge against Wosick was that he "operated a motor vehicle while under the influence of intoxicating liquor or with an alcohol content of .08 percent or greater." (App. 14-17). Following jury selection, the court instructed the jury using the Elements of Offense instruction (App. 9; Tr. 21). Defense counsel did not object at either time.

Defense counsel did object, however, on the morning of trial before jury selection, under Rule 707, N.D.R.Ev. (Add. 25), that the City had failed to give written notice under Rule 707(a) and therefore the blood test results were inadmissible (App. 10). The City responded that it had the analyst present to testify (App. 11), and the court overruled the objection (App. 12-13). Later in the trial, after reviewing State, ex rel. Roseland v. Herauf, 2012 ND 151, 819 N.W.2d 546, and State v. Lutz, 2012 ND 156, 820

N.W.2d 111, both cases decided July 26, 2012, the court affirmed its decision based on the availability of the analyst (App. 18-19).

The City called as witnesses the arresting officer (Tr. 43), the registered nurse who drew Wosick's blood (Tr. 119), and Roberta Grieger-Nimmo, the analyst (Tr. 127). The City put into evidence Exhibit 1, the video of the traffic stop (Tr. 63), and six (6) documents, Exhibits 2, 3, 4, 5, 6 and 7 (App. 20-33). Defense counsel objected to Exhibit 4, which contained the blood test results, by preserving his Rule 707 objection (Tr. 74-75). Defense counsel had no other objection to Exhibit 4 and made no objections to Exhibits 2, 3, 5, 6 and 7 (Tr. 65, 68, 69, 137, 139, 140).

In the closing instructions, the district court instructed the jury on both driving under the influence of intoxicating liquor and driving with an alcohol concentration of at least .08% by weight (App. 34). Defense counsel had no objection to these instructions or to the verdict forms (Tr. 168, 170-171).

The jury found Wosick guilty of "driving a vehicle while under the influence of intoxicating liquor or with an alcohol content of .08% or greater." (App. 35).

Wosick timely appealed from the judgment (App. 36-37).

ARGUMENT

Issue for Review No. 1

Wosick was charged only with under the influence of intoxicating liquor, and his prosecution for having an alcohol concentration of at least .08% by weight is obvious error under Rule 52(b), N.D.R.Crim.P.

The North Dakota Uniform Complain and Summons (App. 6) charged Wosick only with "under the influence of alcohol" under N.D.C.C. § 39-08-01(b), and not with having an alcohol concentration of at least .08% by weight under N.D.C.C. § 39-08-01(a) (see Add. 10).

The record does not reflect that the court ever informed Wosick of what the complaint charged or that Wosick was ever arraigned. First, Rule 5(e), N.D.R.Crim.P. (Add. 16), states in relevant part, "Notwithstanding Rule 5(a), a uniform complaint and summons may be used in lieu of a complaint and appearance before a magistrate . . ." (See N.D.C.C. § 29-05-31, Uniform traffic complaint and summons, Add. 5-7). It appears this is a fact here. Wosick never appeared before a magistrate under Rule 5, N.D.R.Crim.P. If he had, the magistrate would have informed him of the charge against him. Rule 5(b)(1)(A), N.D.R.Crim.P. (Add. 15).

Second, it appears Wosick was never arraigned under Rule 10, N.D.R.Crim.P. (Add. 19). That rule requires the court, in open court, to

ensure Wosick has a copy of the complaint and that he be read the complaint or informed the substance of the charge.

Finally, the record does not reflect that Wosick was read the complaint at trial under N.D.C.C. § 29-21-01(1) (Add. 8). Therefore, Wosick personally was never read or informed of the charge by the court.

Neither did the City request jury instructions on having an alcohol concentration of at least .08% by weight under Rule 30, N.D.R.Crim.P. (Add. 20), nor did the City move to amend the complaint to add the charge of having an alcohol concentration of at least .08% by weight under Rule 3(c), N.D.R.Crim.P. (Add. 14), or Rule 7(e), N.D.R.Crim.P. (Add. 18).

Wosick here contends that he was entitled under due process of law, Article I, Section 12 of the North Dakota Constitution, and the Fifth and Sixth Amendments to the United States Constitution made applicable to the States by the Fourteenth Amendment to the United States Constitution, to be given notice of the charge against him. Here, only the North Dakota Uniform Complaint gave notice to Wosick before trial of the charge against him and it charged only "under the influence of alcohol" and not having an alcohol concentration of at least .08% by weight.

N.D.C.C. § 29-01-06(2) gives Wosick the right to be informed of the nature and cause of the accusation (Add. 3).

N.D.C.C. § 29-05-01(4) states a complaint must state the acts or omissions complained of as constituting the crime or public offense named (Add. 4).

Rule 3(a), N.D.R.Crim.P., states in relevant part the complaint is a written statement of the essential facts constituting the elements of the offense charged (Add. 14). See also Rule 7(c)(1), N.D.R.Crim.P. ("The indictment or the information . . . must be a plain, concise, and definite written statement of the essential facts constituting the elements of the offense charged.") (Add. 17); ("A count may allege . . . that the defendant committed it by one or more specific means.") (Add. 18).

In Russell v. United States, 369 U.S. 749 (1962), the United States Supreme Court held that a charging document must fairly inform the defendant of the factual theory of criminal liability. See also Stirone v. United States, 361 U.S. 212 (1960).

In North Dakota, this Court has held that the charging document must "fairly and factually apprise defendant of the offenses charged." State v. Jelliff, 251 N.W.2d 1, 6 (N.D. 1977); State v. Edinger, 331 N.W.2d 553, 555 (N.D. 1983). See also State v. Gwyther, 1999 ND 15, 589 N.W.2d 575.

The City's prosecution of Wosick for the "blood test" (App. 7) violated all of the foregoing law.

Wosick's problem in the appeal of this issue is that his trial counsel did not bring these matters to the district court's attention (see Rule 52(b), N.D.R.Crim.P.) (Add. 23), nor did his trial counsel object to the district court's jury instructions which included having an alcohol concentration of at least .08% by weight (see Rule 30(c) and (d), N.D.R.Crim.P) (Add 20-21).

However, Wosick asks this Court to judge this deficiency of his trial counsel in the context of the deficiency of the prosecution not charging the blood test, not moving for an amendment of the charge, and not requesting any jury instructions, and the deficiency of the district court not informing Wosick personally of the charge against him and not arraigning him on the charge. In this regard, Wosick contends Rule 5(e), N.D.R.Crim.P. (Add. 16) is unconstitutional as applied to him. The complaint in this case is unsigned by defendant Wosick (App. 6) and there is a complete lack of showing that Wosick was ever personally informed of the charge against him. This is a complete failing of fundamental due process.

Going back to the deficiency of Wosick's trial counsel, Wosick here contends that this was obvious error under Rule 52(b), N.D.R.Crim.P. (App. 23) and plain error under Rule 30(d)(2), N.D.R.Crim.P. (Add. 21). These matters affected Wosick's substantial rights. First, subdivisions (1)(a) and (b) of N.D.C.C. § 39-08-01 do in fact represent different crimes. State v.

Schwab, 2003 ND 119, 665 N.W.2d 52. Second, the City never moved for an amendment in advance of trial. Cf. State v. Schwab, supra. Finally, Wosick contends the proper remedy for the fundamental violation of his due process rights, as shown above, should have been that the City could proceed only on the original charge of under the influence. To proceed also on the blood test was not harmless error as there is no way to separate the blood test from the jury's verdict. (App. 35).

Issue For Review No. 2

The City's violation of Rule 707(a), N.D.R.Ev., is reversible error.

Here, the City failed to give written notice as required by Rule 707(a), N.D.R.Ev. (Add. 25). Wosick's trial counsel objected. Wosick here contends that his trial counsel's objection should have been sustained and the blood test results should not have come into evidence.

The City's failure to give written notice as required by Rule 707(a) deprived Wosick of the opportunity to object under Rule 707(b) and identify the State Toxicologist as a witness to be produced to testify about the blood test report at trial. Cf. State, ex rel. Madden v. Rustad, 2012 ND 242, which involved the Director of the State Crime Laboratory and not the State Toxicologist.

Here, the State Toxicologist was allowed to "bear testimony" against Wosick in the form of "solemn declarations or affirmations" made for the purpose of proving fair administration of the blood test under N.D.C.C. § 39-20-07(5) and (7) (Add. 11-13). See State, ex rel. Madden v. Rustad, at ¶¶ 8-10; see Exhibits 2, 3, 4, 5, 6, and 7 (App. 20-33).

Unlike the "must" in Rule 707(b), see State, ex rel. Madden v. Rustad, at ¶ 19, Wosick contends the "must" in Rule 707(a) is mandatory, as Wosick's trial counsel contended, so that a defendant can have the opportunity to make a proper objection under Rule 707(b).

Finally, Wosick also contends Rule 707(a) is not just a confrontation rule, but is a notice rule as well . Rule 707(a) begins, "If the prosecution intends to introduce an analytical report issued under N.D.C.C. chs. . . . 39-20 . . ." By not serving the written notice, the prosecution is giving the opposite message, that it does not intend to introduce the analytical report. This may account for Wosick not calling his expert in regard to the blood test.

Issue for Review No. 3

Proper foundation for admission of the blood test was not shown, and this is a failure of proof and not just error affecting substantial rights under Rule 103, N.D.R.Ev.

N.D.C.C. § 39-20-07(5) (Add. 12) provides that fair administration has to be shown by the director of the state crime laboratory or the director's designee. Here, fair administration was attempted to be shown by Exhibits 2, 3, 4, 5, 6 and 7 (App. 20-33). However, none of these documents is a document of the director, nor is there an exhibit which shows that either Charles E. Eder or Roberta Grieger-Nimmo is a designee of the director for showing fair administration under N.D.C.C. § 39-20-07(5).

Wosick contends this failure under N.D.C.C. § 39-20-07(5) is a failure of proof for which the proper finding is a finding of insufficient evidence. There was no showing of fair administration by the director or the director's designee.

Alternatively, Wosick's trial counsel did not object to the admissibility of any of these documents on foundation, in particular to Exhibit 4, the blood test results (App. 24). Wosick now contends this was error affecting his substantial rights under Rule 103, N.D.R.Ev. (Add. 24). Wosick contends this is an exceptional situation in which he has suffered a serious injustice. See State v. Dymowski, 459 N.W.2d 777 (N.D. 1990). Here, N.D.C.C. § 39-20-07(5) is clear as to the requirements for proof and admissibility, and the City had neither a witness nor the proper foundational documents to make the necessary showing of proof. Therefore, this is not

even a question involving the sound discretion of the trial court. See Slaaten v. Amerada Hess Corp., 459 N.W.2d 765 (N.D. 1990). This is a complete and utter lack of foundation. The blood test should not have come into evidence in this case.

The blood test should not have come into evidence in the face of all the errors in this case.

CONCLUSION

WHEREFORE, Mr. Wosick asks this Honorable Court to reverse his conviction and order his acquittal.

Dated: January 9, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing brief, along with a copy of the accompanying appendix, by mail, on this 9 day of January 2013, on:

Kelley Marie Riley Cole
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Michael R. Hoffman

ADDENDUM

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Chapter 23

TRAFFIC AND MOTOR VEHICLES*

ARTICLE I. IN GENERAL

Sec. 23-1. Adoption of North Dakota Century Code.

It is hereby declared that the city for the purpose of providing additional and updated regulations for traffic within the bounds and jurisdiction of the city as well as regulation of operators, hereby adopts as its own regulations the following provisions of Title 39 of the N.D.C.C., to wit sections 39-04-11; 39-04-37; 39-06-01; 39-06-16; 39-06-34.1; 39-06-38; 39-06-40; 39-06-42; 39-06-44; 39-06-45; chapter 39-07; chapter 39-08; chapter 39-09; chapter 39-10; chapter 39-10.1; chapter 39-10.2; chapter 39-20; and chapter 39-21. In addition, it is expressly provided herein that all revisions and amendments of the recited chapters and sections of the N.D.C.C., Title 39, are by reference herein included.

(Rev. Ords. 1941, Ch. 6, Arts. 1—15; Ord. No. 227, § 1, 12-28-64; Ord. No. 230, § 1, 4-12-65; Ord. No. 282, § 1, 12-23-70; Ord. No. 352, § 2, 7-12-76; Ord. No. 409, § 1, 4-14-80; Ord. No. 10, § 1, 5-13-85; Ord. No. 52, § 1, 5-9-88; Ord. No. 78, § 1, 7-8-91)

Sec. 23-2. Intent.

It is hereby declared to be the intent of the city to adopt the same provisions that exist with respect to driving under the laws

*Cross references—Alcoholic beverages, Ch. 3; streets, sidewalks and other public places, Ch. 22; parks and recreation, Ch. 17.

State law reference—Power to regulate, N.D.C.C. §§ 40-05-01(17), (18), 40-05-02(14).

of the state and by adopting these provisions the violation of state law of the above-described chapters and statutes will henceforth be also a violation of the city ordinances.
(Ord. No. 409, § 2, 4-14-80)

Sec. 23-3. Penalty for violation.

Every person, firm or corporation convicted of a violation of any of the provisions of this article, for which another penalty is not specifically provided herein shall, upon conviction thereof, be punished by a fine or imprisonment, or both, according to the general penalty provision of this Code (section 1-14). The court to have power to suspend such sentence and revoke the suspension thereof.
(Ord. No. 409, § 5, 4-14-80; Ord. No. 168, § 1, 4-13-98)

Secs. 23-4—23-13. Reserved.

TITLE 29

JUDICIAL PROCEDURE, CRIMINAL

CHAPTER 29-01

GENERAL PROVISIONS

29-01-06. Rights of defendant. In all criminal prosecutions the party accused has the right:

1. To appear and defend in person and with counsel;
2. To demand and be informed of the nature and cause of the accusation;
3. To meet the witnesses against the party face to face;
4. To have the process of the court to compel the attendance of witnesses in the party's behalf; and
5. To a speedy and public trial, and by an impartial jury in the county in which the offense is alleged to have been committed or is triable, but subject to the right of the state to have a change of the place of trial for any of the causes for which the party accused may obtain the same.

Source: C. Crim. P. 1877, § 11; R.C. 1895, § 7749; R.C. 1899, § 7749; R.C. 1905, § 9557; C.L. 1913, § 10393; R.C. 1943, § 29-0106; 2009, ch. 264, § 2.

Effective Date.

The 2009 amendment of this section by section 2 of chapter 264, S.L. 2009 became effective August 1, 2009.

Confrontation of Witnesses.

Exclusion of the forensic analyst's testimony based on defendant's acquiescence to admission of the chemical test results was contrary to N.D.C.C. § 39-20-07 and the refusal to allow the analyst to testify was unreasonable and warranted a new trial. While defendant admitted to drinking and smelled of alcohol, there was little evidence indicating that he was under the influence of intoxicating liquor and thus, exclusion of the testimony was not harmless. State v. Schwab, 2008 ND 94, 748 N.W.2d 696, 2008 N.D. LEXIS 91 (May 15, 2008).

Speedy Trial.

Fifteen-month delay between defendant's arrest and his trial did not violate his right to a speedy trial under the Sixth Amendment and N.D.C.C. § 29-01-06(5) because the pri-

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29-05-01. What complaint must state. A complaint must state:

1. The name of the person accused, if known, or if not known and it is so stated, that person may be designated by any other name;
2. The county in which the offense was committed;
3. The general name of the crime or public offense committed;
4. The acts or omissions complained of as constituting the crime or public offense named;
5. The person against whom, or against whose property, the offense was committed, if known; and
6. If the offense is against the property of any person, a general description of such property.

The complaint must be subscribed and sworn to by the complainant.

Source: R.C. 1895, § 7886; R.C. 1899, § 7886; R.C. 1905, § 9694; C.L. 1913, § 10530; R.C. 1943, § 29-0501.

Cross-References.
The complaint, see N.D.R.Crim.P., Rule 3.

Description of Property.
A complaint in justice court charging a person with keeping and maintaining a nuisance "in a certain one-story frame building" in a certain village and county, without specifying the lot and block where kept, is a sufficient description upon which to base a preliminary examination. State v. Wisnewski, 13 N.D. 649, 102 N.W. 883 (1905).

Statement of Facts Constituting Offense.
A criminal complaint, on preliminary hearing before the magistrate, need not state the facts constituting the offense with the same technical accuracy as an information. State v. Cook, 53 N.D. 429, 206 N.W. 786 (1925).

Collateral References.
Indictment and Information ⇐ 54-123.
5 Am. Jur. 2d, Arrest, §§ 10, 12, 15, 16, 19, 23-27, 29-33.
42 C.J.S. Indictment and Information, §§ 43-141.

29-05-02. Who must make complaint. Superseded by N.D.R.Crim.P., Rule 3.

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the agency will extradite from outside the county or state and the county or state from which the agency will extradite.

Source: S.L. 2009, ch. 121, § 3.

Effective Date.
This section became effective August 1, 2009.

29-05-20. Unnecessary delay after arrest prohibited — Attorney visitation.

Administrative License.

—Suspension Proceeding.
Finding by the state transportation agency's hearing officer, that the motorist was offered a reasonable opportunity to contact an attorney, as required by N.D.C.C. § 29-05-20, after the motorist had been stopped for suspected DUI and refused to take a requested chemical test, was supported by the record, as required by N.D.C.C. § 28-32-46. Since the record showed that the motorist had remarked that it was too late at night to contact an attorney, the revocation of the motorist's driving privileges had to be upheld. Kasowski v. Dir., N.D. DOT, 2011 ND 92, —N.W.2d —, 2011 N.D. LEXIS 92 (May 12, 2011).

Law Reviews.
North Dakota Supreme Court Review (Eriksmoen v. N.D. Dep't of Transp.), 82 N.D. L.Rev. 1033 (2006).

29-05-31. Uniform traffic complaint and summons. There is established a uniform complaint and summons that may be used in cases involving violations of statutes or ordinances. The use of a uniform complaint and summons must comply with the North Dakota Rules of Criminal Procedure and be in substantially the following form:

State of North Dakota)
) ss.
County of _____)

In ____ Court,

Before Hon. ____ ;

The undersigned, being sworn, says that, on _____, _____,

_____
First Name Middle Name Last Name Street City State
did unlawfully operate a motor vehicle upon a public highway, namely _____, _____ N E S W of _____ and did then
Location City
and there commit the following offense: _____
MPH in _____
MPH Zone _____
_____
_____
_____
_____
All in violation of N.D. Century Code Sec. ____ and against the peace and dignity of the state of N.D.
Officer ____ LET A WARRANT ISSUE HEREIN Sworn to and subscribed before me on _____, ____.

_____ _____
Judge State's Attorney

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DESCRIPTION OF DEFENDANT AND VEHICLE

Mo. ____ Day ____ Yr. ____ Race ____ Sex ____ Wt. ____ Ht. ____
Birth date
Hair ____ Dr. Lic: State ____ No. ____ Motor Vehicle:
PSC
Make ____ Reg. No. ____ State ____ Year ____ ICC No. ____

CLAIMED CONDITIONS OF THE VIOLATION

SLIPPERY SURFACE
_____ Rain _____ Snow _____ Ice
DARKNESS
_____ Night _____ Fog _____ Snow
OTHER TRAFFIC PRESENT
____ Cross ____ Oncoming ____ Pedestrian ____ Same direction
IN ACCIDENT
____ Ped. ____ Vehicle ____ Intersection
____ Right angle ____ Head on ____ Rear end
____ Ran off road ____ Other

Area: _____ School _____ Rural _____ Business
_____ Industrial _____ Residential
Highway: _____ 2 Lane _____ 4 Lane _____ 4 Lane Divided
_____
Type: _____ Gravel _____ Dirt
OFFENSE CONTRIBUTED MATERIALLY TO ACCIDENT
_____ Yes _____ No

THE STATE OF NORTH DAKOTA TO THE ABOVE-NAMED DEFENDANT

(CITY ORDINANCE OR STATE CRIMINAL TRAFFIC VIOLATION)

You are summoned to appear at the time and place designated below to answer to the charge made against you.

Appearance
Before: Municipal Judge District Ct. _____
_____ A.M./P.M.
Location Month Day Year Time

Dated _____, ____

Officer _____

PROMISE TO APPEAR

I consent and promise to appear at the time and place specified in the above summons, the receipt of a copy of which is acknowledged, and I expressly waive earlier hearing.

Dated _____, ____

Defendant _____

(STATE NONCRIMINAL TRAFFIC VIOLATION)

You are notified of your right to request, within fourteen days of the date of this citation, a hearing concerning the alleged traffic violation. If you do

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not request a hearing, the bond is deemed forfeited and the violation admitted. If you are requesting a hearing, date and sign the following portion of this citation AND INCLUDE THE BOND NOTED ON THIS CITATION for the alleged violation. Failure to do so may result in the suspension of your operator's license. You will be notified of the hearing date by the court for the county in which this citation was issued.

REQUEST FOR HEARING

I submit the designated bond and request a hearing on the alleged traffic violation and promise to appear at the time and date specified in the summons issued by the court for the county in which the citation was issued.

Dated _____, ____

Defendant _____

Source: S.L. 1959, ch. 249, § 1; 1973, ch. 301, § 15; 1979, ch. 187, § 59; 1981, ch. 320, § 71; 1995, ch. 318, § 1; 1999, ch. 51, § 16; 2009, ch. 279, § 3.

Effective Date.

The 2009 amendment of this section by section 3 of chapter 279, S.L. 2009 becomes effective January 1, 2010.

CHAPTER 29-06

ARREST

29-06-02. Who may make an arrest.

Arrest Under Warrant.

Officers were acting lawfully under N.D.C.C. § 29-06-02 when executing a federal arrest warrant, and defendant made no contrary showing. Therefore, the contraband yielded was admissible against defendant because it was found in a search incident to a valid arrest. State v. Proell, 2007 ND 17, 726 N.W.2d 591 (2007).

29-06-05.2. Federal law enforcement officer — Authority to make arrests.

1. "Federal agent" means an employee of the federal bureau of investigation or the federal drug enforcement administration who is authorized to arrest, with or without a warrant, any individual for a violation of the United States Code and carry a firearm in the performance of the employee's duties as a federal law enforcement officer.
2. A federal agent has the same authority and immunity as a peace officer in this state when making an arrest for a nonfederal crime if any of the following exist:
   a. The federal agent has reasonable grounds to believe that a felony offense was committed and the individual arrested committed the offense.
   b. The federal agent is rendering assistance to a peace officer in an emergency or at the request of the peace officer.
   c. The federal agent is working as a part of a task force composed

CHAPTER 29-21
TRIAL

29-21-01. Order of trial. The jurors having been impaneled and sworn, the trial must proceed in the following order:

1. If the information or indictment is for a felony, the clerk or state's attorney shall read it, and shall state the plea of the defendant to the jury. In all other cases this formality may be dispensed with;
2. The state's attorney, or other counsel for the state, shall open the case and offer the evidence in support of the information or indictment;
3. The defendant or the defendant's counsel then may open the defense and offer the defendant's evidence in support thereof.
4. The parties then, respectively, may offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, or to correct an evident oversight, permits them to offer evidence upon their original case;
5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the counsel

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for the state shall commence, and the defendant or the defendant's counsel shall follow. Then the counsel for the state shall conclude the argument to the jury.

6. The judge then shall charge the jury.

Source: C.Crim.P. 1877, § 343; R.C. 1895, § 8175; R.C. 1899, § 8175; R.C. 1905, § 9984; C.L. 1913, § 10821; R.C. 1943, § 29-2101.

Charge.

The charge of the court may be oral, unless it is requested in writing. Territory v. Christensen, 4 Dak. 410, 31 N.W. 847 (1887).

The court must mark requests for instructions either "given" or "refused". State v. Campbell, 7 N.D. 58, 72 N.W. 935 (1897).

The trial court, in charging the jury, cannot give expression to its views upon the credibility, weight or effect of testimony. State v. Barry, 11 N.D. 428, 92 N.W. 809 (1902).

A trial judge is prohibited from expressing an opinion upon the facts. State v. Hazlett, 14 N.D. 490, 105 N.W. 617 (1905).

Discretion As to Order.

Trial court is vested with a broad discretion in regard to the order of proof at trials, and, except in cases of clear abuse of such discretion, his decision will not be disturbed. State v. Werner, 16 N.D. 83, 112 N.W. 60 (1907).

It is within the discretion of the court to allow the prosecution to give evidence in aid of the case already made, after the defense has rested, although the evidence is in contradiction of matters sworn to by the prisoner. State v. Schneider, 53 N.D. 931, 208 N.W. 566 (1926).

It is within the discretion of the trial court to allow the state in a criminal prosecution to give evidence in aid of its case already made after the defense has rested. State v. Puhr, 316 N.W.2d 75 (N.D. 1982).

Opening Statement by Prosecutor.

It was not error for prosecutor to read the bill of particulars and the amended indictment to the jury during his opening statement. State v. Skjonsby, 319 N.W.2d 764 (N.D. 1982).

Postponing Ruling.

Trial court did not act arbitrarily, unconscionably, or unreasonably in postponing its ruling on the admissibility, for purposes of impeachment, of a statement made by defendant, which defendant claimed unfairly influenced his decision to testify on his own behalf. State v. Carlson, 1997 ND 7, 559 N.W.2d 802 (1997).

Reading of Indictment.

Where the prosecuting attorney has stated the offense charged, and the defendant's plea, to each juror as he was impaneled, and after the jury had been sworn to try the case, he, in his opening remarks, stated to them the allegations of the indictment in substance, and the plea and the proposed proof, the jurors were sufficiently informed to try the issue regardless of the specific requirement that the indictment and the plea of the defendant must be read to the jurors. Territory v. King, 6 Dak. 131, 50 N.W. 623 (1889).

Inadvertent reading of the information by the trial court, rather than by the clerk or state's attorney, did not prevent defendant from having a fair trial. State v. Ellvanger, 453 N.W.2d 810 (N.D. 1990).

Reopening Case.

Decision as to whether or not to allow a party to reopen his case is a matter that lies within trial court's discretion. State v. Mayer, 356 N.W.2d 149 (N.D. 1984).

Because the state had attempted to locate witness earlier, because witness was not a surprise witness, and because the trial court addressed the jury in an impartial manner regarding witness's belated testimony, the court did not abuse its discretion by allowing the state to reopen its case after it had rested. State v. Jones, 557 N.W.2d 375 (N.D. 1996).

Stating Plea to Jury.

Where there was an initial failure by the state or the clerk to inform the jury that defendant had pled not guilty to the charges in the indictment, trial court did not abuse its discretion in permitting the state to recite defendant's not guilty plea to the jury after a witness had testified. State v. Skjonsby, 319 N.W.2d 764 (N.D. 1982).

Surrebuttal.

The right of surrebuttal is discretionary with the trial court. State v. Goulet, 1999 ND 80, 593 N.W.2d 345 (1999).

Defendant who made no offer of proof pertaining to his proposed surrebuttal evidence failed to preserve the issue for appellate review. State v. Goulet, 1999 ND 80, 593 N.W.2d 345 (1999).

Variation in Swearing Jury.

Inasmuch as no objection was made by the

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Source: S.L. 1993, ch. 383, § 9; 1999, ch. 278, § 61; 2001, ch. 120, § 1; 2005, ch. 195, § 15; 2011, ch. 288, § 12.

Effective Date.
The 2011 amendment of this section by section 12 of chapter 288, S.L. 2011 became effective August 1, 2011.

CHAPTER 39-08
REGULATIONS GOVERNING OPERATORS

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 eight 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. Unless as otherwise provided in section 39-08-01.2, an individual 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 of a second or subsequent offense within five years under this section or equivalent ordinance, the court must order the

the driver's driving privileges; the notice complied with the requirements of N.D.C.C. ch. 39-20 and was reasonable, and the North Dakota Department of Transportation had the authority to suspend the driver's driving privileges. Schaaf v. N.D. DOT, 2009 ND 145, 771 N.W.2d 237, 2009 N.D. LEXIS 145 (July 21, 2009).

Due Process and Procedural Fairness.

North Dakota Department of Transportation violated plaintiff driver's right to due process at a license suspension hearing when it took the arresting officer's testimony telephonically under N.D.C.C. § 28-32-35 without providing notice to plaintiff; the dangers of telephonic testimony were evident, as the hearing officer could not see the police officer to judge his demeanor or determine if he was testifying from notes. The officer was also unable to diagram the roadway where the stop occurred or demonstrate how he conducted the field sobriety test; N.D.C.C. § 39-20-05 demonstrated that the legislature intended for the Department to conduct in-person hearings, and the Department could not unilaterally determine hearings would be conducted telephonically. Wolfer v. N.D. DOT, 2010 ND 59, 780 N.W.2d 645, 2010 N.D. LEXIS 58 (Apr. 6, 2010).

Reasonable Grounds.

—In General.

Suspension of the licensee's driving privileges for 180 days for DUI was appropriate under N.D.C.C. § 39-20-05(2) because the officer had probable cause to arrest, since witnesses described the vehicle involved in the accident; it was registered to the licensee; and the officer found the licensee extremely intoxicated. Because the officer had probable cause to arrest the licensee and had a right to remain at his elbow at all times, the officer did not violate the licensee's Fourth Amendment rights by following him into his bedroom without a warrant. Hoover v. Dir., N.D. DOT, 2008 ND 87, 748 N.W.2d 730, 2008 N.D. LEXIS 95 (May 15, 2008).

Type of Hearing.

North Dakota Department of Transportation failed to conduct administrative hearings in which it suspended the drivers privileges of driving for alcohol-related offenses in accordance with the law because under N.D.C.C. § 39-20-05 hearings were intended to be conducted in person, not telephonically and neither driver waived his right to an in-person hearing. Landsiedel v. Dir., N.D. DOT, 2009 ND 196, 774 N.W.2d 645, 2009 N.D. LEXIS 196 (Nov. 17, 2009).

39-20-06. Judicial review.

Law Reviews.

North Dakota Supreme Court Review (State v. Hahne, 2007 ND 116, 736 N.W.2d 483 (2007)), see 84 N. Dak. L. Rev. 567 (2008).

39-20-07. Interpretation of chemical tests. Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any individual while driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor, drugs, or a combination thereof, evidence of the amount of alcohol concentration or presence of other drugs, or a combination thereof, in the individual's blood, breath, or urine at the time of the act alleged as shown by a chemical analysis of the blood, breath, or urine is admissible. For the purpose of this section:

1. An individual having, at that time, an alcohol concentration of not more than five one-hundredths of one percent by weight is presumed not to be under the influence of intoxicating liquor. This presumption has no application to the administration of chapter 39-06.2.
2. Evidence that there was at that time more than five one-hundredths of one percent by weight alcohol concentration in an individual is relevant evidence, but it is not to be given prima facie effect in indicating whether the individual was under the influence of intoxicating liquor.
3. An individual having an alcohol concentration of at least eight one-hundredths of one percent by weight or, with respect to an individual under twenty-one years of age, an alcohol concentration of at least two one-hundredths of one percent by weight at the time

of the performance of a chemical test within two hours after driving or being in physical control of a vehicle is under the influence of intoxicating liquor at the time of driving or being in physical control of a vehicle.

4. Alcohol concentration is based upon grams of alcohol per one hundred milliliters of blood or grams of alcohol per two hundred ten liters of end expiratory breath or grams of alcohol per sixty-seven milliliters of urine.
5. The results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee. The director of the state crime laboratory or the director's designee is authorized to approve satisfactory devices and methods of chemical analysis and determine the qualifications of individuals to conduct such analysis, and shall issue a certificate to all qualified operators who exhibit the certificate upon demand of the individual requested to take the chemical test.
6. The director of the state crime laboratory or the director's designee may appoint, train, certify, and supervise field inspectors of breath testing equipment and its operation, and the inspectors shall report the findings of any inspection to the director of the state crime laboratory or the director's designee for appropriate action. Upon approval of the methods or devices, or both, required to perform the tests and the individuals qualified to administer them, the director of the state crime laboratory or the director's designee shall prepare, certify, and electronically post a written record of the approval with the state crime laboratory division of the attorney general at the attorney general website, and shall include in the record:
   a. An annual register of the specific testing devices currently approved, including serial number, location, and the date and results of last inspection.
   b. An annual register of currently qualified and certified operators of the devices, stating the date of certification and its expiration.
   c. The operational checklist and forms prescribing the methods currently approved by the director of the state crime laboratory or the director's designee in using the devices during the administration of the tests.
   d. The certified records electronically posted under this section may be supplemented when the director of the state crime laboratory or the director's designee determines it to be necessary, and any certified supplemental records have the same force and effect as the records that are supplemented.
   e. The state crime laboratory shall make the certified records required by this section available for download in a printable format on the attorney general website.
7. Copies of the state crime laboratory certified records referred to in subsections 5 and 6 that have been electronically posted with the state crime laboratory division of the attorney general at the attorney general website must be admitted as prima facie evidence of the matters stated in the records.
8. A certified copy of the analytical report of a blood or urine analysis

referred to in subsection 5 and which is issued by the director of the state crime laboratory or the director's designee must be accepted as prima facie evidence of the results of a chemical analysis performed under this chapter. The certified copy satisfies the directives of subsection 5.

9. Notwithstanding any statute or rule to the contrary, a defendant who has been found to be indigent by the court in the criminal proceeding at issue may subpoena, without cost to the defendant, the individual who conducted the chemical analysis referred to in this section to testify at the trial on the issue of the amount of alcohol concentration or presence of other drugs, or a combination thereof in the defendant's blood, breath, or urine at the time of the alleged act. If the state toxicologist, the director of the state crime laboratory, or any employee of either, is subpoenaed to testify by a defendant who is not indigent and the defendant does not call the witness to establish relevant evidence, the court shall order the defendant to pay costs to the witness as provided in section 31-01-16. An indigent defendant may also subpoena the individual who withdrew the defendant's blood by following the same procedure.

10. A signed statement from the individual medically qualified to draw the blood sample for testing as set forth in subsection 5 is prima facie evidence that the blood sample was properly drawn and no further foundation for the admission of this evidence may be required.

Source: S.L. 1959, ch. 286, § 7; 1961, ch. 269, § 3; 1965, ch. 281, § 1; 1969, ch. 357, § 1; 1969, ch. 358, § 1; 1975, ch. 359, § 1; 1983, ch. 415, § 29; 1983, ch. 444, § 5; 1985, ch. 429, § 19; 1989, ch. 461, § 5; 1993, ch. 236, § 8; 1993, ch. 383, § 14; 1993, ch. 387, § 6; 1997, ch. 334, § 7; 1997, ch. 345, § 1; 1997, ch. 346, § 1; 1999, ch. 278, § 63; 1999, ch. 358, § 8; 2001, ch. 120, § 1; 2003, ch. 316, § 7; 2003, ch. 469, § 11; 2005, ch. 195, § 20; 2007, ch. 339, § 3; 2007, ch. 325, § 5; 2011, ch. 288, § 18.

Effective Date.

The 2011 amendment of this section by section 18 of chapter 288, S.L. 2011 became effective August 1, 2011.

Attendance of Trial by Analyst.

—Refusal to Allow Testimony.

Exclusion of the forensic analyst's testimony based on defendant's acquiescence to admission of the chemical test results was contrary to N.D.C.C. § 39-20-07 and the refusal to allow the analyst to testify was unreasonable and warranted a new trial. While defendant admitted to drinking and smelled of alcohol, there was little evidence indicating that he was under the influence of intoxicating liquor and thus, exclusion of the testimony was not harmless. State v. Schwab, 2008 ND 94, 748 N.W.2d 696, 2008 N.D. LEXIS 91 (May 15, 2008).

Blood or Breath Test Results.

—Admissibility.

Police officer's conclusory testimony was insufficient to establish that the driver's blood test sample had been properly obtained, and was therefore insufficient to establish the test was fairly administered according to the State Toxicologist's approved methods, N.D.C.C. § 39-20-07. Schlosser v. N.D. DOT, 2009 ND 173, 775 N.W.2d 695, 2009 N.D. LEXIS 207 (Nov. 19, 2009).

—Chain of Custody.

Suspension of the driving privileges of a driver was affirmed because the testimony information on the top portion of Form 104 and the testimony of the two arresting police officers regarding the handling of the blood sample was sufficient to clear up any chain of custody concerns regarding the blood sample as required pursuant to N.D.C.C. § 39-20-07. The officers testified that they followed the required procedures, that the mix-up in the dates was due to poor handwriting, and that the driver's blood sample was the only sample that they handled on the days at issue. Barros v. N.D. DOT, 2008 ND 132, 751 N.W.2d 261, 2008 N.D. LEXIS 125 (June 26, 2008).

harmony with prior state practice and would not regard federal precedents as controlling. State v. Rueb, 249 N.W.2d 506 (N.D. 1976).

II. PRELIMINARY PROCEEDINGS.

Rule 3. The complaint.

(a) **General.** The complaint is a written statement of the essential facts constituting the elements of the offense charged. The complaint must be sworn to and subscribed before an officer authorized by law to administer oaths within this state and be presented to a magistrate

(b) **Magistrate review.** The magistrate may examine on oath the complainant and other witnesses and receive any affidavit filed with the complaint. If the magistrate examines the complainant or other witnesses on oath, the magistrate shall cause their statements to be reduced to writing and subscribed by the persons making them or to be recorded.

(c) **Amendment.** The magistrate may permit a complaint to be amended at any time before a finding or verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

EXPLANATORY NOTE

Rule 3 was amended, effective January 1, 1995; March 1, 1996; March 1, 2006; March 1, 2007; August 1, 2011.

Subdivision (a) was amended, effective January 1, 1995, to allow a complaint to be subscribed and sworn to outside the presence of a magistrate. An effect of this amendment is to allow facsimile transmission of the complaint. For a listing of officers authorized to administer oaths, see N.D.C.C. § 44-05-01. The amendment does not preclude a magistrate from examining a complainant or other witnesses under oath when making the probable cause determination.

Subdivision (a) was amended, effective March 1, 1996, to clarify that the complaint is the initial document for charging a person with a misdemeanor or felony.

Subdivision (a) was amended, effective March 1, 2007, to specify that the complaint must contain a statement of the facts that establish the elements of the offense charged.

Subdivision (a) was amended, effective August 1, 2011, to eliminate language about the complaint being the initial charging document for all criminal offenses. N.D.C.C. § 29-04-05 was amended in 2011 to specify that "A prosecution is commenced when a uniform complaint and summons, a complaint, or an information is filed or when a grand jury indictment is returned."

Subdivision (c) is similar to Rule 7(e).

Rule 3 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of April 28-29, 2011, pages ____: April 24-25, 2003, pages 25-26; January 26-27, 1995, pages 3-5; April 28-29, 1994, pages 20-22; January 27-29, 1972, pages 4-7; September 27-28, 1968, pages 1-2; November 17-18, 1967, page 2.

Statutes Affected:

Superseded: N.D.C.C. §§ 29-01-13(1), 29-05-02 to the extent that it requires a complaint to be subscribed and sworn to before a magistrate, N.D.C.C. §§ 29-05-03, 33-12-03, 33-12-04, 33-12-05, 33-12-16, 33-12-25.

Considered: N.D.C.C. §§ 12-01-04(12), 29-01-14, 29-02-06, 29-02-07, 29-04-05, 29-05-01, 29-05-05.

Cross References:

N.D.R.Civ.P. 7 (The Indictment and the Information).

Cross References.

Statute of limitations, see N.D.C.C. ch. 29-04.

Uniform traffic complaint and summons, see N.D.C.C. § 29-05-31.

What complaint must state, see N.D.C.C. § 29-05-01.

Who must make complaint, see N.D.C.C. § 29-05-02.

Amendment.

County court, without consent or request of prosecution, had no authority to amend complaint upon motion by defendant where amendment clearly reduced offense and as a result charged a different offense than one set forth in initial complaint. State v. Klose, 334 N.W.2d 647 (N.D. 1983).

Rule 5. Initial appearance before the magistrate.

(a) General.

(1) *Appearance upon an arrest.* An officer or other person making an arrest must take the arrested person without unnecessary delay before the nearest available magistrate.

(2) *Arrest Without a Warrant.* If an arrest is made without a warrant, the magistrate must promptly determine whether probable cause exists under Rule 4(a). If probable cause exists to believe that the arrested person has committed a criminal offense, a complaint or information must be filed in the county where the offense was allegedly committed. A copy of the complaint or information must be given within a reasonable time to the arrested person and to any magistrate before whom the arrested person is brought, if other than the magistrate with whom the complaint or information is filed.

(b) Statement by the magistrate at the initial appearance.

(1) *In all cases.* The magistrate must inform the defendant of the following:

(A) the charge against the defendant and any accompanying affidavit;

(B) the defendant's right to remain silent; that any statement made by the defendant may later be used against the defendant;

(C) the defendant's right to the assistance of counsel before making any statement or answering any questions;

(D) the defendant's right to be represented by counsel at each and every stage of the proceedings;

(E) if the offense charged is one for which counsel is required, the defendant's right to have legal services provided at public expense to the extent that the defendant is unable to pay for the defendant's own defense without undue hardship; and

(F) the defendant's right to be admitted to bail under Rule 46.

(2) *Felonies.* If the defendant is charged with a felony, the magistrate must inform the defendant also of the defendant's right to a preliminary examination and the defendant's right to the assistance of counsel at the preliminary examination.

(3) *Misdemeanors.* If the defendant is charged with a misdemeanor, the magistrate must inform the defendant also of the defendant's right to trial by jury in all cases as provided by law and of the defendant's right to appear and defend in person or by counsel.

(c) Right to preliminary examination.

(1) *Waiver.*

(A) If the offense charged is a felony, the defendant has the right to a preliminary examination. The defendant may waive the right to preliminary examination at the initial appearance if assisted by counsel.

(B) If the defendant is assisted by counsel and waives preliminary examination and the magistrate is a judge of the district court, the defendant may be permitted to plead to the offense charged in the complaint or information at the initial appearance.

(C) If the defendant waives preliminary examination and does not plead at the initial appearance, an arraignment must be scheduled.

(D) The magistrate must admit the defendant to bail under the provisions of Rule 46.

(2) *Non-waiver.* If the defendant does not waive preliminary examination, the defendant may not be called upon to plead to a felony offense at the initial appearance. A magistrate of the county in which the offense was allegedly committed must conduct the preliminary examination. The magistrate must admit the defendant to bail under the provisions of Rule 46.

(d) Interactive television. Interactive television may be used to conduct an appearance under this rule as permitted by N.D. Sup. Ct. Admin. R.52.

(e) **Uniform Complaint and Summons.** Notwithstanding Rule 5(a), a uniform complaint and summons may be used in lieu of a complaint and appearance before a magistrate, whether an arrest is made or not, for an offense that occurs in an officer's presence or for a motor vehicle or game and fish offense. When a uniform complaint and summons is issued for a felony offense, the prosecuting attorney must also subsequently file a complaint that complies with Rule 5(a). An individual held in custody must be brought before a magistrate for an initial appearance without unnecessary delay.

EXPLANATORY NOTE

Rule 5 was amended effective March 1, 1990; January 1, 1995; March 1, 2006; June 1, 2006; March 1, 2010; August 1, 2011.

Rule 5 is derived from Fed.R.Crim.P. 5. Rule 5 is designed to advise the defendant of the charge against the defendant and to inform the defendant of the defendant's rights. This procedure differs from arraignment under Rule 10 in that the defendant is not called upon to plead.

Subdivision (a) provides that an arrested person must be taken before the magistrate "without unnecessary delay." Unnecessary delay in bringing a person before a magistrate is one factor in the totality of circumstances to be considered in determining whether incriminating evidence obtained from the accused was given voluntarily.

Subdivision (a) was amended, effective January 1, 1995, to clarify that a "prompt" judicial determination of probable cause is required in warrantless arrest cases.

Subdivision (b) is designed to carry into effect the holding of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). Because the Miranda rule is constitutionally based, it applies to all officers whether state or federal. One should note that the protections required by Miranda apply as soon as a person "has been taken into custody or otherwise deprived of his freedom of action in any significant way", while the requirement that an accused be taken before a magistrate is applicable only to an "arrested person". The Miranda decision is based upon the Fifth Amendment privilege against self-incrimination and holds that no statement obtained by interrogation of a person in custody is admissible, unless, before the interrogation begins, the accused has been effectively warned of the accused's rights, including the right not to answer questions and the right to have counsel present.

Subdivision (b) specifies the action which must be taken by the magistrate. Subparagraphs (b)(1)(A), (b)(1)(B), and (b)(1)(C) are stated by Miranda to be absolute prerequisites to interrogation and cannot be dispensed with on even the strongest showing that the person in custody was aware of those rights.

Paragraph (b)(1) was amended, effective June 1, 2006, to remove a reference to court appointment of counsel for indigents. Courts ceased appointing counsel for indigents on January 1, 2006, when the North Dakota Commission on Legal Counsel for Indigents became responsible for defense of indigents.

Paragraph (b)(2) provides an additional requirement to the instructions given by the magistrate in paragraph (b)(1) when the charge is a felony. It requires the magistrate to inform the defendant of the right to a preliminary examination. The Sixth Amendment right to counsel applies to a preliminary examination granted under state law because the preliminary examination is a critical stage of the state's criminal process.

Subdivisions (b) and (c) were amended, effective March 1, 1990. The amendments track the 1987 amendments to Fed.R.Crim.P. 5, which are technical in nature, and no substantive change is intended.

Subdivision (c) was amended, effective January 1, 1995, in response to elimination of county courts and to ensure that a defendant is not called upon to waive the preliminary examination or to plead without the assistance of counsel at the initial appearance.

Subdivision (d) was amended, effective March 1, 2004, to permit the use of interactive television to conduct initial proceedings. Subdivision (d) was amended, effective March 1, 2006, to reference N.D.Sup.Ct.Admin.R. 52, which governs proceedings conducted by interactive television.

Subdivision (e) was added, effective March 1, 2010, to provide a procedure for using the uniform complaint and summons. Statutory provisions governing the uniform complaint and summons, which is commonly referred to as the "uniform citation," are in N.D.C.C. §§ 20.1-02-14.1 and 29-05-31.

Rule 5 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Rule 5 was amended, effective August 1, 2011, to include new language indicating that either "the complaint or information" can be used as a charging document. N.D.C.C. § 29-04-05 was amended in 2011 to specify that "A prosecution is commenced when a uniform complaint and summons, a complaint, or an information is filed or when a grand jury indictment is returned."

Sources: Joint Procedure Committee Minutes of April 28-29, 2011, pages ____; May 21-22, 2009, pages 2-10; April 27-28, 2006, pages 2-5, 15-17; January 29-30, 2004, pages 22-23; September

over to district court did not deprive the trial court of jurisdiction. State v. Lennick, 47 N.D. 393, 182 N.W. 458 (1921).

A trial court's instruction that "the magistrate's commitment of the accused is evidence that the person initiating the proceedings had probable cause", was proper. Weisenberger v. Mueller, 89 N.W.2d 559 (N.D. 1958).

A review by certiorari to the district court of an order of a committing magistrate holding a defendant to answer was limited to a determination of whether the magistrate pursued regularly the authority vested in him by statute. Green v. Whipple, 89 N.W.2d 881 (N.D. 1958).

County judge fulfilled statutory guidelines on finding that it appeared that the crime of obtaining money by false pretenses had been committed and that there was sufficient cause to believe that the defendant was guilty thereof. State v. Persons, 201 N.W.2d 895 (N.D. 1972).

Record.

It was error for the trial court to admit in evidence and to permit the jury to take to their room on retiring the transcript of the justice's docket which held the defendant to answer to the grand jury. Territory v. Jones, 6 Dak. 85, 50 N.W. 528 (1888).

Where defendant stipulated that proceedings in preliminary hearing be taken down in shorthand but made no demand that the notes be transcribed or that the testimony be signed, he could not challenge the propriety of the preliminary examination, for the first time, on arraignment in the district court. State v. Schook, 57 N.D. 401, 222 N.W. 267 (1928).

Sufficiency of Evidence.

To authorize a committing magistrate to hold one accused of crime for trial, it is not required that the evidence submitted be of such convincing character as to establish the guilt of the accused beyond a reasonable doubt. State ex rel. Germain v. Ross, 39 N.D. 630, 170 N.W. 121 (1918); Green v. Whipple, 89 N.W.2d 881 (N.D. 1958).

Collateral References.

Right of person accused of crime to exclude public from preliminary hearing or examination, 31 A.L.R.3d 816.

Law Reviews.

Some Phases of 1927 Legislation in North Dakota, 1 Dak. L. Rev. 65 (Issue No. III).

III. INDICTMENT AND INFORMATION.

Rule 6. Grand jury.

[Reserved for reference and possible future use. See Ch. 29-10.1]

EXPLANATORY NOTE

The Committee recommends that no rule be adopted pertaining to grand juries.

The Committee doubts whether any changes in statutory grand jury procedure can be made by Rule in view of Section 8 of the North Dakota Constitution which provides that "the legislature" may change, regulate or abolish the grand jury system.

The 1971 Legislature upon recommendation of this Committee enacted a complete revision of the grand jury statutes (N.D.C.C. ch. 29-10.1).

Sources: Joint Procedure Committee Minutes of March 23-25, 1972, page 2; September 16-18, 1971, pages 2-4.

Statutes Affected:

Considered: Chapter 29-10.1.

Rule 7. The indictment and the information.

(a) **When used.**

(1) *Felony.* All felony prosecutions in the district court must be by indictment or by information after grand jury inquiry or information after preliminary examination.

(2) *Misdemeanor.* All misdemeanor and other prosecutions in the district court, including appeals, must be by indictment, information, or complaint.

(b) **Waiver of indictment.** [Intentionally omitted.]

(c) **Nature and contents.**

(1) *In general.* The indictment or the information must name or otherwise identify the defendant, and must be a plain, concise, and definite written statement of the essential facts constituting the elements of the offense charged. It must be signed by the prosecuting attorney. All prosecutions except appeals from municipal courts must be carried on in the name and by the authority of the State of North Dakota and must conclude "against the peace and dignity of the State of North Dakota." Except as required by this

rule, the indictment or information need not contain a formal commencement, a formal conclusion, or any other matter not necessary to the statement. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specific means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged to have violated.

(2) *Citation error.* Unless the defendant was prejudicially misled, neither an error in the citation nor its omission is a ground to dismiss the indictment or information or to reverse a conviction.

(d) **Surplusage.** On motion of either party or on its own motion, the court may strike surplusage from the information or indictment.

(e) **Amending an information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.

(f) **Bill of particulars.** The court may direct the filing of a bill of particulars. The defendant may move for a bill of particulars before arraignment or within one day after arraignment or at a later time if the court permits. The motion must be in writing and must specify the particulars sought by the defendant. A bill of particulars must be granted if the court finds it necessary to protect the defendant against a second prosecution for the same offense or to enable the defendant to adequately prepare for trial. A bill of particulars may be amended at any time subject to such conditions as justice requires.

(g) **Names of witnesses to be endorsed on indictment or information.** When an indictment or information is filed, the names of all the witnesses on whose evidence the indictment or information was based must be endorsed on it before it is presented. The prosecuting attorney, at a time the court prescribes by rule or otherwise, must endorse on the indictment or information the names of other witnesses the prosecuting attorney proposes to call. A failure to endorse those names does not affect the validity or sufficiency of the indictment or information, but the court in which the indictment or information was filed must direct the names of those witnesses to be endorsed on application of the defendant. The court may not allow a continuance because of the failure to endorse any of those names unless the application was made at the earliest opportunity and then only if a continuance is necessary in the interests of justice.

EXPLANATORY NOTE

Rule 7 was amended effective March 1, 1990; January 1, 1995; March 1, 1996; March 1, 2006; March 1, 2007; August 1, 2011.

Rule 7 is an adaptation of Fed.R.Crim.P. 7 and controls all indictments and informations. Although North Dakota provides that a defendant may be prosecuted by indictment or information, indictments are seldom used.

Subdivision (a) was amended, effective January 1, 1995, in response to county court elimination. The amendment allows misdemeanors to be charged by complaint in district court, and for the inclusion of misdemeanor charges with felony charges in an indictment or information.

Subdivision (a) was amended, effective March 1, 1996, to clarify that even though a felony is initially charged by complaint, the subsequent prosecution must be by indictment or information.

Subdivision (a) was amended, effective August 1, 2011, to delete language indicating that a preliminary examination was required before commencing a prosecution on an information. N.D.C.C. § 29-04-05 was amended in 2011 to specify that "A prosecution is commenced when a uniform complaint and summons, a complaint, or an information is filed or when a grand jury indictment is returned."

Subdivision (b) entitled "Waiver of Indictment" is retained in title and number only to conform with the outline and form of Fed.R.Crim.P. 7. Article I, Section 10 of the North Dakota Constitution provides that an individual must be prosecuted by indictment in cases of felony unless otherwise provided by the legislature, but in all cases either by information or indictment. Since the

graph, see N.D.C.C. § 29-05-23.
Indictment, see U.S. Const. amend. V; N.D. Const. art. I, § 10.
Information, prosecution on, in what cases, see N.D.C.C. § 29-09-02.
Probable cause for warrants, see U.S. Const. amend. IV; N.D. Const. art. I, § 8.

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL.

Rule 10. Arraignment.

(a) **In general.** Arraignment must be conducted in open court and consists of:

(1) ensuring the defendant has a copy of the indictment, information, or complaint;

(2) reading the indictment, information, or complaint to the defendant or stating to the defendant the substance of the charge; and then

(3) asking the defendant to plead to the indictment, information or complaint.

If the defendant appears at the arraignment without counsel, the defendant must be informed of the right to counsel as provided in Rule 44.

(b) **Interactive television.** Interactive television may be used to arraign a defendant as permitted by N.D. Sup. Ct. Admin. R 52.

EXPLANATORY NOTE

Rule 10 was amended, effective March 1, 1990; March 1, 2004; March 1, 2006.

Rule 10 follows Fed.R.Crim.P. 10 in substance and controls with respect to all arraignments which arise within the state.

Rule 10 is designed both to safeguard important rights of the defendant as well as to protect proper administration of criminal law. The arraignment is an appearance before the court, intended to inform the accused of the charge against the accused and to obtain an answer from the accused. It is an important step in the criminal case, since it formulates the issue to be tried.

Failure to comply with the requirements of a proper arraignment is an irregularity that does not warrant a reversal of a conviction if not raised before trial. Under the rule, no specific time for the arraignment is set and no precise ceremonial or verbal formality need be followed.

Rule 10 was amended, effective March 1, 2004. The existing text of the rule was divided into subdivisions to improve clarity.

Subdivision (b) was added effective March 1, 2004, to permit the use of interactive television to conduct the arraignment. Subdivision (b) was amended, effective March 1, 2006, to reference N.D.Sup.Ct.Admin.R. 52, which governs proceedings conducted by interactive television.

Rule 10 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of April 29-30, 2004, pages 26-28; September 26-27, 2002, page 13; April 20, 1989, page 4; December 3, 1987, page 15; March 23-25, 1972, pages 20-23; May 3-4, 1968, pages 8-9; Fed.R.Crim.P. 10.

Statutes Affected:

Superseded: N.D.C.C. §§ 29-11-56, 29-12-01, 29-13-01, 29-13-03, 29-13-04, 29-13-05, 29-13-06, 29-13-07, 29-13-08, 29-13-09, 33-12-15.

Cross Reference: N.D.R.Crim.P. 5 (Initial Appearance Before the Magistrate); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right to and Assignment of Counsel); N.D.Sup.Ct.Admin.R. 52 (Interactive Television).

Cross-References.

Bail, see U.S. Const. amend. VIII; N.D. Const. art. I, § 11.
Defendant to be informed of charge against him, see U.S. Const. amend. VI.
Rights of defendant, see N.D.C.C. § 29-01-06.
Right to and assignment of counsel, see N.D.R.Crim.P. 44.
Self-incrimination, see U.S. Const. amend. V; N.D. Const. art. I, § 12.

Absence of Defendant.

This rule is modified by N.D.R.Crim.P. 43(c)(2) to permit arraignment in the defendant's absence, with the written consent of the defendant, for offenses punishable by imprisonment for not more than one year. City of Fargo v. Bommersbach, 511 N.W.2d 563 (N.D. 1994).

Advisement of Rights.

When a trial judge fairly advises a defendant of his constitutional rights at arraignment, he

Rule 30. Jury instructions.

(a) **Requests.**

(1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests.

(2) After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 30(a)(1), and

(B) with the court's permission file untimely requests for instructions on any issue.

(3) The court may require each request to be written on a separate sheet. North Dakota pattern jury instructions may be requested by reference to the instruction number.

(b) **Instructions.**

(1) The court:

(A) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(B) must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered.

(2) The court may instruct the jury at any time after trial begins and before the jury is discharged.

(3) Immediately after the jury is sworn the court may give instructions concerning:

(A) jury duties and conduct;

(B) the order of proceedings; and

(C) elementary legal principles governing the proceedings.

(4) The court's instructions must be in writing unless the parties otherwise agree.

(A) If written instructions are given, they must be signed by the court and provided to the jury for use during deliberations.

(B) If oral instructions are given, they may be provided to the jury for use during deliberations only if they are transcribed and the court orders them provided.

(C) All instructions used by the jury during deliberations must be returned to the court when the verdict is submitted.

(c) **Objections.**

(1) a party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 30(b)(1), objects at the opportunity for objection required by Rule 30(b)(2); or

(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 30(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) **Preserving objections; plain error.**

(1) A party may assign as error:

(A) an error in an instruction actually given if that party made a proper objection under Rule 30(c), or

(B) a failure to give an instruction if that party made a proper request under Rule 30(a).

(2) A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 30(d)(1)(A) or (B).

EXPLANATORY NOTE

Rule 30 was amended, effective March 1, 1986; March 1, 1990; March 1, 1999; March 1, 2006. This rule is based on N.D.R.Civ.P. 51.

Rule 30 was amended, effective March 1, 2006, in response to the March 1, 2005, revision of N.D.R.Civ.P. 51. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) was amended, effective March 1, 1999, to provide for preliminary jury instructions.

Sources: Joint Procedure Committee Minutes of January 27-28, 2005, pages 24-25; September 25-26, 1997, pages 16-17; April 20, 1989, page 4; December 3, 1987, page 15; November 29, 1984, page 6; June 21, 1984, page 6; April 24-26, 1973, page 12; October 17-20, 1972, pages 38-41; September 26-27, 1968, pages 14-15; Fed.R.Crim.P. 30.

Statutes Affected:

Superseded: N.D.C.C. §§ 29-21-30, 29-21-31, 29-21-33, 33-07-17.

Considered: N.D.C.C. §§ 29-22-04, 29-22-05, 29-22-06, 33-12-20.

Cross-References:

N.D.R.Civ.P. 51 (Instructions to Jury).

In General.

Although the judge is initially responsible to present jury instructions concerning the issues, attorneys may request specific instructions on points of law in order that the jury may be fully informed as to all the law governing the case. State v. Kraft, 413 N.W.2d 303 (N.D. 1987); State v. Johnson, 417 N.W.2d 365 (N.D. 1987).

Adequate Instructions.

In defendant's trial for possession of explosives in violation of N.D.C.C. § 62.1-02-11, the trial court's refusal to give defendant's requested jury instructions was not error where the court did instruct the jury as to the essential elements of the offense and the instructions were adequate enough to properly apprise the jury as to the applicable law. State v. Johnson, 417 N.W.2d 365 (N.D. 1987).

Cautionary Instruction.

Trial court properly denied defendant's request for a cautionary instruction regarding credibility of testimony of victim in a sex offense case; complainant's testimony should not be subjected to a greater standard of scrutiny than testimony of other witnesses. State v. Gross, 351 N.W.2d 428 (N.D. 1984).

Contents of Instruction.

Jury instruction on issue of self-defense, which quoted the statute and had been selected from the standard North Dakota Jury Instructions, was nonetheless incomplete and misleading. State v. Jacob, 222 N.W.2d 586 (N.D. 1974).

Failure to Object.

An attorney's failure to object at trial to instructions which he had the opportunity to object to before they were given to the jury operates as a waiver of his right on appeal to complain of instructions that either were or were not given. State v. Johnson, 379 N.W.2d 291 (N.D.1986), cert. denied, 475 U.S. 1141, 106 S.Ct. 1792, 90 L. Ed. 2d 337 (1986).

An attorney's failure to object at trial to instructions, when given the opportunity, operates as a waiver of the right to complain on appeal of instructions that either were or were not given. State v. McNair, 491 N.W.2d 397 (N.D. 1992).

An attorney's failure to object at trial to instructions which he had the opportunity to object to before they were given to the jury, operates as a waiver of his right on appeal to complain of instructions that either were or were not given. Woehlhoff v. State, 531 N.W.2d 566 (N.D. 1995).

When a defendant is given a copy of proposed jury instructions and subsequently does not raise any objections, appellate review is limited to reviewing for obvious error under N.D.R.Crim.P. 52(b). City of Bismarck v. Towne, 1999 ND 49, 590 N.W.2d 893 (1999).

Where the defendant did not object to an aggravated assault instruction, nor to the trial court's failure to instruct the jury on lesser included offenses, the reviewing court's inquiry was limited to whether the trial court's jury instructions were obvious error affecting substantial rights. State v. Mathre, 1999 ND 224, 603 N.W.2d 173 (1999).

The defense attorney's failure to object to the trial court's refusal to define reasonable doubt in instructions limited appellate review to whether the court's actions affected the defendant's substantial rights. State v. Jahner, 2003 ND 36, 657 N.W.2d 266 (2003).

In a case involving gross sexual imposition, a trial court's failure to instruct a jury on the age of the victim was reviewed for obvious error because defendant failed to object; after applying the plain error framework of Fed.R.Crim.P. 52(b) to the case, a reversal was not required because the only evidence of inappropriate

the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of April 28-29, 2005, page 10; February 20-23, 1973, page 11; November 18-20, 1971, pages 23-24; 18 U.S.C.A., Fed.R.Crim.P. 50; Wright, Federal Practice and Procedure: Criminal, §§ 831-832 (1969); 8A Moore's Federal Practice and Procedure, Chapter 50 (Cipes, 2d Ed. 1972); Barron, Federal Practice and Procedure: Criminal, § 2251 (1951); A.B.A. Standards for Criminal Justice, Standards Relating to Speedy Trial, §§ 1.1-1.2 (Approved Draft, 1968).

Statutes Affected:

Considered: N.D.C.C. § 27-08-22, ch. 29-19.

Cross Reference: N.D.R.Civ.P 40. (Assignment of Cases for Trial).

Cross-References.

Assignment of cases for trial, see N.D.R.Civ.P. 40.

Rule 51. Preserving Claimed Error.

(a) **Preserving a Claim of Error.** A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by N.D.R.Ev. 103.

(b) **Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary.

EXPLANATORY NOTE

Rule 51 was amended, effective March 1, 2006.

Subdivision (a) was added to Rule 51, effective March 1, 2006. The subdivision is based on Fed.R.Crim.P. 51(b) and reflects longstanding North Dakota practice. To preserve a point on appeal, a party must make an objection, based on proper grounds, to the evidence or other matters put before the court for consideration. An appropriate objection lets the court know the action the party desires the court to take or the party's objection to the court's action and the grounds for the objection. The purpose of making an objection to a ruling known is to enable the court to correct its error, if any, or to enable the opposing party to correct an alleged defect.

Subdivision (b) makes clear that exceptions to rulings of the court are not necessary. Under former practice in North Dakota, when a party's objection was overruled the party was required to make an exception to preserve the point on appeal.

Sources: Joint Procedure Committee Minutes of April 28-29, 2005, page 10; February 20-23, 1972, pages 11-12; November 18-20, 1971, pages 24-26; Fed.R.Crim.P. 51.

Statutes Affected:

Superseded: N.D.C.C. §§ 28-18-01, 29-21-32, 29-21-33, 29-23-05, 29-23-06.

Cross References: N.D.R.Crim.P. 30 (Jury Instructions); N.D.R.Ev. 103 (Rulings on Evidence).

Cross-References.

Exceptions to instructions, see N.D.R.Crim.P. 30(c).

Objection.

Any articulated objection for the purpose of resisting any untimely, unsupported motion to close a trial to the public fulfills this evidentiary rule. State v. Klem, 438 N.W.2d 798 (N.D. 1989).

Defendant's general objection to a motion by the state to close the courtroom during the testimony of a child victim of gross sexual imposition was valid even though he offered no grounds upon which the objection was based, where the state did not make a pretrial motion, it framed its midtrial motion in only the most general terms and it failed to provide the court with specific facts sufficient to justify closure. State v. Klem, 438 N.W.2d 798 (N.D. 1989).

DECISIONS UNDER PRIOR LAW

Exceptions to Instructions.

Exceptions in writing waived all objectionable 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 and obvious error.

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

(b) **Obvious error.** An obvious error or defect that affects substantial rights may be considered even though it was not brought to the court's attention.

EXPLANATORY NOTE

Rule 52 was amended, effective March 1, 2006.

Rule 52 is adapted from Fed.R.Crim.P. 52 and differs 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.

Subdivision (a) provides that any error, defect, irregularity or variance that does not affect substantial rights of an accused must 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. Generally, it may be said that the defendant has the burden of showing that a technical error has affected his substantial rights, 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.

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.

Rule 52 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of April 28-29, 2005, pages 10-11; February 20-23, 1973, page 11; December 10-12, 1970, pages 15-17; Fed.R.Crim.P. 52.

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).

Defendant contended his due process rights were violated because the State was allowed to amend its information, and the amended information was never properly filed and a preliminary hearing and arraignment were not held. Defendant did not raise this issue before the district court, and defendant was not prejudiced by the amendment because the amendment merely sought to correct a clerical mistake. State v. Foreid, 2009 ND 41, 763 N.W.2d 475, 2009 N.D. LEXIS 47 (Apr. 2, 2009).

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 direct evidence implicating defendant with the crime, and the remaining evidence was largely circumstantial and, in one respect, may have approached improper comment on defendant's constitutional right to remain silent, under the totality of the circumstances of the case, the failure of the trial court to give and the parties to request a jury instruction limiting the use of the prior inconsistent statement for impeachment purposes constituted error so fundamental that a new trial, or other relief, was required even though defendant did not object to the

Rule 103. Rulings on evidence.

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Errors affecting substantial rights.** Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.

EXPLANATORY NOTE

The purpose of subdivision (a) is to give the trial court an adequate basis for making a ruling, and to create a record which will permit informed appellate review. See generally Signal Drilling Co. v. Liberty Petroleum Co., 226 N.W.2d 148 (N.D. 1975). See also State v. Haakenson, 213 N.W.2d 394 (N.D. 1973); Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964).

As to rulings made by a court in nonjury cases, the North Dakota Supreme Court has stated that "the introduction of allegedly inadmissible evidence in a nonjury case will rarely be reversible error." Signal Drilling, supra, at 153, quoting Schuh v. Allery, 210 N.W.2d 96, 99 (N.D. 1973).

Subdivision (b) encourages the trial court to add to the record any statement that may aid the appellate court in its review of evidentiary rulings. See the related discussion of Rule 43(c), NDRCivP, in Signal Drilling, supra, at 153.

Subdivision (d) is a statement of the doctrine of plain error, but omits the word "plain." The omission was meant to signify that errors affecting substantial rights should be corrected whether or not they are "plain" or "obvious." Cf. Rule 52, NDRCrimP and Rule 61, NDRCivP.

Sources: Joint Procedure Committee Minutes: April 8, 1976, page 14; October 1, 1975, page 2. Rule 103, Federal Rules of Evidence; Rule 103, SBAND proposal.

Rules:

Considered: Rules 43(c), 46, 51(c), and 61, NDRCivP; Rules 30(c), 51, and 52, NDRCrimP.

Cross-References.

Harmless error, see N.D.R.Civ.P. 61; N.D.R.Crim.P. 52(a).

Claim of Error Waived.

Defendant's conviction for gross sexual imposition was upheld because defendant could not claim error for evidence that defendant elicited without objection during cross-examination of witnesses; defendant neither objected to nor moved to strike the evidence pursuant to N.D.R.Ev. 103(a)(1). State v. Buchholz, 2004 ND 77, 678 N.W.2d 144 (2004).

In a medical malpractice action, the court rejected the patient's claim that the trial court abused its discretion by excluding evidence of a surgeon's licensing status because the patient waived any objection to exclusion of evidence about the surgeon's license status by failing to object or properly raise the issue in the trial court. Furthermore, the patient failed to show that the refusal to allow introduction of the evidence affected his substantial rights, which was necessary for the court to analyze the issue under N.D.R.Ev. 103(d). Davis v. Killu, 2006 ND 32, 710 N.W.2d 118 (2006).

Obvious Error.

The failure to object operates as a waiver of the issue on appeal, but the error may provide a basis for reversal if it constitutes obvious error affecting substantial rights of the defendant. Supreme Court has power to notice obvious error; however, it is exercised cautiously and only in exceptional situations where the defendant has suffered serious injustice. State v. Dymowski, 459 N.W.2d 777 (N.D. 1990).

In a sexual abuse case, the admission of a statement of sexual abuse under N.D.R.Ev. 803(24) was reviewed for obvious error because no objection was made at trial; the record showed that an objection was only made at a pre-trial hearing. State v. Krull, 2005 ND 63, 693 N.W.2d 631 (2005).

to the therapists' letters prior to the court ruling on her motion for family therapy. Helfenstein v. Schutt, 2007 ND 106, 735 N.W.2d 410 (2007).

Collateral References.

Right of indigent defendant in state criminal case to assistance of expert in social attitudes, 74 A.L.R.4th 330.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, or similar nonmedical specialist in substance analysis, 74 A.L.R.4th 388.

Right of indigent defendant in state criminal prosecution to ex parte in camera hearing on request for state-funded expert witness, 83 A.L.R.5th 541.

Rule 707. Analytical report admission; Confrontation.

(a) **Notification to defendant.** If the prosecution intends to introduce an analytical report issued under N.D.C.C. chs. 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20 in a criminal trial, it must notify the defendant or the defendant's attorney in writing of its intent to introduce the report and must also serve a copy of the report on the defendant or the defendant's attorney at least 30 days before the trial.

(b) **Objection.** At least 14 days before the trial, the defendant may object in writing to the introduction of the report and identify the name or job title of the witness to be produced to testify about the report at trial. If objection is made, the prosecutor must produce the person requested. If the witness is not available to testify, the court must grant a continuance.

(c) **Waiver.** If the defendant does not timely object to the introduction of the report, the defendant's right to confront the person who prepared the report is waived.

(d) **Juvenile proceedings.** This procedure applies to juvenile proceedings that involve analytical reports issued under N.D.C.C. chs. 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20.

EXPLANATORY NOTE

Rule 707 was adopted effective February 1, 2010. Rule 707 was amended, effective March 1, 2011.

Rule 707 requires the prosecution to notify a defendant if it intends to introduce an analytical report in a criminal trial. If the defendant objects to the admission of the report, the defendant must identify the witness it seeks to examine about the report at trial and the prosecution must produce the witness.

Some examples of analytical reports include: a certified copy of an analytical report of a blood, urine, or saliva sample from the director of the state crime laboratory or the director's designee; a certified copy of the checklist and test records from a certified breath test operator; or a certified copy of an analytical report signed by the director of the state crime laboratory or the director's designee of the results of the analytical findings involving the analysis of a controlled substance or sample.

Under North Dakota law, if the person who prepared the report does not testify at trial, a certified copy of an analytical report must be accepted as prima facie evidence of the results of a chemical analysis. See N.D.C.C. §§ 19-03.1-37(4), 20.1-13.1-10(6), 20.1-15-11(8), 39-20-07(8), and 39-24.1-08(6).

Sources: Joint Procedure Committee Minutes of September 23-24, 2010, pages 10-13; *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009)

Statutes Affected:

Superseded: N.D.C.C. §§ 19-03.1-37(5), 20.1-13.1-10(7), 20.1-15-11(9), 39-20-07(9), and 39-24.1-08(7).

Considered: N.D.C.C. §§ 19-03.1-37(4), 20.1-13.1-10(6), 20.1-15-11(8), 39-20-07(8), and 39-24.1-08(6).

VIII. HEARSAY.

Rule 801. Definitions.

The following definitions apply under this Article:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.