20160453

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July 25, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| STATE OF NORTH DAKOTA, | ) | |
| | ) | |
| Plaintiff-Appellee; | ) | |
| | ) | |
| -vs- | ) | |
| | ) | |
| CHARLES MAYLAND, | ) | Supreme Court No. 20160453 |
| | ) | |
| Defendant-Appellant. | ) | District Court No. 12-2015-CR-00106 |
| ..... | ) | |

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**BRIEF OF PLAINTIFF-APPELLEE**

APPEAL FROM THE AMENDED CRIMINAL JUDGMENT

Divide County District Court
Northwest Judicial District
Honorable Josh B. Rustad

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Seymour R. Jordan
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## TABLE OF AUTHORITIES



**North Dakota Statutes and Rules**

## STATEMENT OF THE ISSUE(S)

[¶1] Whether the Defendant waived his right to appeal the jury instructions by not objecting at trial.

[¶2] Whether the Defendant waived the requirement to obligate the State to prove this was a fourth offense.

[¶3] Whether the driveway of the Defendant's house constitutes a private area to which the public has access to.

## STATEMENT OF THE CASE

[¶4] The Appellee largely concurs with the Statement of the Case as proposed by the Appellant with the following corrections. Actual physical control was properly identified and that definition was given to the jury in the final jury instructions which included the language, upon a highway or upon a public or private areas to which the public has right of access for vehicular use in this State. Appellant Appendix at 39. The trial court agreed with the Appellant regarding this instruction at the jury trial. Jury Trial Transcript at 166, lines 18-23.

[¶5] The jury was instructed to make a determination as to if the Defendant was under the influence of intoxicating liquor. Appellant Appendix at 39, 40. This is in accordance with North Dakota Century Code §39-08-01(1)b. There was also no objection to this instruction at the jury trial by the Appellant.

## STATEMENT OF FACTS

[¶6] The Appellee again largely concurs with the Statement of Fact's submitted by the Appellant with the following additions. In relation to the jury instructions submitted to the jury it was the State that was supporting the fourth offense language both prior to the jury trial and prior to the Appellant's objection of this instruction at the jury trial. Jury Trial Transcript at 11, lines 1-9, at 12 lines 11-22. The Appellant objected to the fourth offense language at the jury trial. Id. at 11 lines 1-9. The State was ready willing and able to produce certified copies of all the previous offenses to the jury at the jury trial. Id. at 13 lines 15- 25. The Appellant, Appellant's attorney, Appellee and the District Court Judge agreed at the jury trial to have a conviction by the jury result as a conviction for a fourth offense or more. Id. at 14 lines 1-23.

[¶7] The final jury instructions included the appropriate language regarding actual physical control. Appellant Appendix at 39. Further the trial court agreed to use the instructions as submitted by the appellant. Jury Trial Transcript at 168 lines 9-18, at 169 lines 9-10. The jury did make a determination as to if the appellant was under the influence without objection from the appellant at the jury trial. Id. at 171 lines 2-5.

## ARGUMENT

[¶8] It is the Appellee's position that the trial court did not err in denying the motion for acquittal requested by the appellant.

The appellant's lack of objections does not preserve the right to appeal

[¶9] The District Court used the instructions submitted by the Appellant in regards to the actual physical control instruction. This was the pattern instruction and included all the required statutory language. Jury Trial Transcript at 168 lines 9-18, at 169 lines 9-10, N.D.C.C. § 39-08-01. Since there was not an objection to the instructions by the Appellant's attorney at the jury trial, the attorney for the Appellant cannot now object to the instructions because the actions of the attorney at the District Court level constitutes a waiver of any appealable issue. State v. Johnson, 379 N.W.2d 291, 292 (N.D.), cert. denied, 475 U.S. 1141, 106 S. Ct. 1792, 90 L. Ed. 2d 337 (1986); Rule 30(c), N.D.R.Crim.P. To preserve a challenge to a jury instruction, an attorney must specifically object to the contested instruction, regardless of whether the attorney proposed another instruction on the same issue. See Andrews v. O'Hearn, 387 N.W.2d 716, 728 (N.D. 1986), and Matter of Estate of Honerud, 294 N.W.2d 619, 622 (N.D. 1980), construing Rule 51(c), N.D.R.Civ.P., which is identical to Rule 30(c), N.D.R.Crim.P. This would also be the case for the under the influence language used in the jury instructions that were used versus the over at least eight one-hundredths of one percent instruction the Appellant now argues should have been used. Since there was no objection to the under the influence language used in the jury instructions the right to appeal on this point was not properly preserved. See Supra at ¶8.

The Appellant's and his trial attorney properly waived essential element

[¶10] The parties have the right to stipulate to nearly every piece of evidence that is to be introduced. Here in this case it was stipulated to by the parties that if the jury found the Appellant guilty of the offense of actual physical control it would constitute a fourth offense. The Appellant's objection to the fourth offense language be included was based on the concern the jury might become prejudiced after being made aware it was a fourth offense. Jury Trial Transcript at 11, lines 1-9. The Appellee and the trial court understood and ultimately stipulated and ordered that language be removed.

[¶11] The Appellee submits to this Court that it is a fundamental right to have the prosecution prove each and every element of the offense charged in a criminal case. Much like it is a fundamental right to have a jury trial in a criminal proceeding. A defendant is authorized to waive a fundamental right as this Court has explained.

> "This court has repeatedly defined waiver as 'the voluntary and intentional relinquishment or abandonment of a known existing right, advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed.' Meyer v. National Fire Insurance Co., 67 N.D. 77, 269 N.W. 845 (1936); Sjoberg v. State Automobile Insurance Ass'n, 78 N.D. 179, 48 N.W.2d 452 (1951); Kessler v. Thompson, N.D., 75 N.W.2d 172 (N.D. 1956). While the above citations are to civil cases substantially the same definition is applicable to a waiver by defendant in a criminal action. See Wharton's Criminal Law and Procedure, Anderson, Sec. 1951. The waiver of a right is its intentional relinquishment and does not ordinarily imply the

> acquisition of a substitute or reciprocal right and in the absence of a statute indicating that such a further right is acquired the effect of a waiver is relinquishment and not substitution."

State v. Pandolfo, 98 N.W.2d 161, 8-9 (N.D. 1959). The defendant in a criminal case has the authority to waive any and all their rights as this Court has rationalized. It is the same logic that allows a defendant to plead guilty without any trial so long as they are properly informed of their rights and they knowingly and voluntarily waive those rights. N.D.R. Crim.P. 11. Since this case was charged as a felony a preliminary hearing was required. N.D.R. Crim.P. 5.1. That hearing was held on July 23, 2015, where the Appellant heard all his rights read to him by the District Court. After hearing all of his rights he and his attorney waived the requirement of the State having to prove all the essential elements of actual physical control a fourth offense or more.

A person can be found guilty of actual physical control in a private driveway

[¶12] This Court has ruled that a person can be found guilty of actual physical control while in a private driveway or other private property. The real purpose of the actual physical control statute is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers. State v. Ghylin, 250 N.W.2d 252, 255 (N.D. 1977). The Appellee submits to this Court that the Appellant was going to leave his private drive in his vehicle. He had his clothes with him and had the keys to the vehicle with him. When he saw the law enforcement officer he exited his vehicle and he tossed the keys. There is no denying that this vehicle was located on private property but as this Court has ruled that does not mean that the jury could not find that the offense of actual physical control can still be committed. The language "elsewhere" found in subsection (2) of N.D.C.C. § 39-10-01 extended this section to private property. This

extension included the offense of being in actual physical control. Wiederholt v. Director, N.D. Dep't of Transp., 462 N.W.2d 445, 1990 N.D. LEXIS 219 (N.D. 1990). This section applies to physical control of a vehicle on private property. Fetzer v. Director, North Dakota Dep't of Transp., 474 N.W.2d 71, 1991 N.D. LEXIS 150 (N.D. 1991). State v. Novak, 338 N.W.2d 637 (N.D. 1983) affirmed conviction of DUI in field. In all of the aforementioned cases this Court held that a person could be found guilty of actual physical control on private property.

[¶13] The North Dakota Legislature has not modified the actual physical control statute despite the interpretation this Court has construed from the language set forth in chapter thirty nine of the North Dakota Century Code. If the North Dakota Legislature determined that this Court was interpreting this part of the North Dakota Century Code in a way they did not see fit they could most certainly amend chapter thirty nine in a way that would exclude private property from the actual physical control definition.

## CONCLUSION

[¶14] For all of the aforementioned reasons the Appellee respectfully requests that this Court adhere to the previous cases that have been decided by this Court and hold that the issues regarding the jury instructions were not properly preserved. Additionally, that the Appellee and his attorney waived their right to have the Appellant prove each and every element of the offense as charged and lastly to continue to hold as this Court has done previously that a person can be found guilty of actual physical control on private property.

Dated this 20th day of July, 2017.

Respectfully submitted,

/s/ Seymour Jordan

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**CERTIFICATE OF SERVICE**

[¶1] I, Seymour Jordan, being first duly sworn, hereby certify that on the 25th day of July, 2017 notified the Appellant's attorney that I will be withdrawing my appendix and correcting the brief to reflect the same and said brief was served electronically via email upon:

Danny Lee Herbel, Appellant, at herbellawfirm@yahoo.com.

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