

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff/Appellee,

v.

Steven Donald Aune,

Defendant/Appellant.

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Supreme Court No. 202000159

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APPEAL OF CRIMINAL JUDGMENT
DATED JUNE 9, 2020
WALSH COUNTY DISTRICT COURT FILE 50-2019-CR-00117
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE BARBARA L.WHELAN PRESIDING

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED FOR REVIEW

- I. The jury's verdict of manslaughter was not legally inconsistent and was supported by the evidence.
- II. The District Court did not substantially rely on an impermissible factor and did not exceed the statutory sentencing range, therefore the sentence was lawful and appropriate.

STATEMENT OF THE CASE

[¶1] In May 2015, Steven Aune (hereinafter "Aune") was charged with Murder, intentional or knowingly causing the death of another human being, in violation of N.D.C.C. § 12.1-16-01(1)(a) or causing the death of another human being under circumstances manifesting an extreme indifference to the value of human life, in violation of N.D.C.C. § 12.1-16-01(1)(b), in Walsh County District Court. In June 2019, Steve Mottinger, Aune's court appointed attorney requested that Aune be evaluated at the North Dakota State Hospital. In July 2019, the North Dakota State Hospital determined that Aune was fit to proceed to trial and that he did not lack criminal responsibility for the offense charged.

[¶2] On October 10, 2019, Aune waived his right to a preliminary hearing, entered a not guilty plea and proceeded to trial in this matter. The jury trial began on January 14, 2017 and ended on January 17, 2020. Mr. Mottinger, on behalf of Aune, requested that the jury instructions include the lesser included offenses of manslaughter and negligent homicide. The jury returned a verdict finding Aune guilty of manslaughter, a Class B felony.

[¶3] A pre-sentence investigation was ordered by the District Court and sentencing occurred on June 4, 2020. The District Court sentenced Aune to 10 years with the North Dakota Department of Corrections and Rehabilitation, first serve 85% of his sentence and credit for time served in the amount of 401 days. Aune filed his notice of appeal on June 9, 2020.

STATEMENT OF FACTS

[¶4] On May 1, 2019, Aune's twin daughters were living with him on a rural farmstead near Adams, in Walsh County, North Dakota. Trial T. p.144. S.A.'s sister had been living with him for some time, but S.A. had only been staying with him for approximately one week, since the girls celebrated their birthday together. Trial T. p.144, lines 21-24 and p.353. That morning the sisters woke up and had some breakfast downstairs, then went upstairs to their rooms. Trial T. p. 145-147. Aune came upstairs and an argument began between Aune and S.A regarding her pet rats. Trial T. p. 342, line 7 and p. 147-149. Aune was mad about the rats. Trial T. p. 342, lines 8-9. During this argument, Aune picked up a rifle, pulled the trigger and shot S.A. while she was in her bedroom. Trial T. p. 353-354 and p. 149, line 20. Her sister heard the gunshot and heard S.A. say, "Ah! You shot me!" Trial T. p. 149, line 20-21.

[¶5] S.A. went downstairs after she was shot and her sister followed her after a little while. Trial T. p.341, lines 7-25, p.150, lines 1-11, Aune went down a separate staircase into the downstairs. Trial T. p. 341, lines 18-25, p.155, lines 12-21. S.A.'s sister approached her downstairs and observed a bruise to her

back. Tr. p.150, lines 12-13. S.A. said to her sister, "I think it is serious. It really hurts, really bad." Trial T. p. 158, lines 21-22. Aune did not attempt to render any aid to S.A., but did allow them to take his pickup to drive to the nearest hospital in Park River, ND. Trial T. p. 349 and p.150, line 17. The two sisters left in the pickup for the hospital. Trial T. p.150-51. Aune never called 911 or for any medical assistance for S.A. Trial T. p. 350 lines 10-18. Instead, Aune made phone calls to his brother and his "social worker", Tara, an individual at the Domestic Violence and Abuse Center in Grafton, ND. Trial T. p. 167, 350-51. During the phone call, Aune advised Tara he was going to commit suicide and he had a gun. Trial T. p.162, lines 24-5; p.163 lines 13-20; and p. 351.

[¶6] Chief Deputy Richard Sherlock, of the Walsh County Sheriff's Office, responded to the Aune's farmstead for a suicidal individual based upon a 911 call. Trial T. p. 162-63. Chief Deputy Sherlock made contact with Aune, who asked him a multiple times if he was being arrested. Trial T. p.166-67 and p. 361-62. Chief Deputy Sherlock also observed signs that Aune had been consuming alcoholic beverages. Trial T. p.170, 173-74. Aune testified he had consumed alcoholic beverages the night before and that morning. Trial T. p. 326-28. Chief Deputy Sherlock asked Aune why he wanted to kill himself and Aune responded by telling Chief Deputy Sherlock that the kids had to go, he didn't want to have anything to do with the kids. Trial T. p. 166, 168. When Chief Deputy Sherlock asked where S.A. and her sister were, Aune stated they left around 9:00am and went to Park River. Trial T. p.169, lines 9-21 and p. 362-63. Aune never told Chief Deputy Sherlock that the sisters went to the hospital or that he shot S.A. Id.

[¶7] On the way to the hospital, S.A. was really nervous about the damage that was done to her. Trial T. p. 152, lines 13-14. Upon arrival at the hospital, S.A. was in a tough situation. Trial T. p. 153, lines 8-9. At the hospital, life-saving procedures were attempted, but were unsuccessful and S.A. passed away. Trial T. p. 124-25. An autopsy was completed by Dr. Walter Kemp on May 2, 2019, which determined that the bullet entered into S.A. on the left side of S.A.'s trunk, passed through the liver, small bowel, small intestine, the pancreas, the gall bladder, and the right tenth rib. Trial T. p. 266, lines 11-16 and Appendix p. 10,13. The pathway of the bullet was from left to right, in an upward direction and lodged in the right side of the mid-back. Trial T. p. 266 lines 11-16, p. 269-70, p.348-49 and Appendix p. 10, 13.

[¶8] Aune was placed under arrest on May 1, 2019 and interviewed by Agent Craig Zachmeier of the North Dakota Bureau of Criminal Investigation. Trial T. p.171, lines 5-9 and p. 234-237. During much of the interview, Aune explained to Agent Zachmeier how frustrated and angry he was with his kids, explained he couldn't put up with them anymore and he had to get them out of the house. Trial T. p. 342 and State's Exhibit #54. When asked how the gun got involved, Aune responded that he couldn't put up with them anymore. State's Exhibit #54 and Trial T. p. 343. Aune told Agent Zachmeier, that during the argument with S.A., he picked up a gun that was sitting near the attic, it went off and I killed her. State's Exhibit #54. At trial, Aune testified that he did not check to see if the gun was loaded when he picked it up. Trial T. p. 336, lines 5-6. Aune testified that S.A. was in her bedroom, sitting on a mattress on the floor, he

was standing up and holding his gun at his side and somehow pulled the trigger, shooting S.A. Trial T. p.336-39. Aune disagreed with Dr. Walter Kemp and testified that the bullet went in S.A.'s lower back and entered S.A. downward. Trial T. p.349, lines 1-5, 21-25. Aune testified that you have to put pressure on the trigger in order for the gun to fire and that his gun did not have a hair trigger. Trial T. p. 356, lines 1-9.

[¶9] A search was conducted of Aune's residence on May 1, 2019, pursuant to a search warrant. Trial T. p. 187, 189. During the search, Agent Kraft located a .22 caliber rifle in Aune's bedroom. Trial T. p. 204-05. The firearm was loaded, with one round in the chamber and an additional 12 rounds in the tube. Trial T. p. 205, lines 11-13. The firearm was sent to the forensic laboratory in South Dakota for analysis. Trial T. p. 206. The analysis of the firearm found that the firearm was functioning as it should. Trial T. p. 208.

ARGUMENT

I. The jury's verdict of manslaughter is not legally inconsistent and is supported by the evidence.

A. The standard of review

[¶10] "Under N.D.R.App.P. 35(b)(2), we may review any intermediate order or ruling which involves the merits or which may have affected the verdict or the judgment adversely to the appellant." State v. Coppage, 2008 ND 134, ¶15, 751 N.W.2d 254. The standard for reconciling a jury verdict is whether the verdict is legally inconsistent. State v. Jahner, 2003 ND 36, ¶2, 657 N.W.2d 266.

B. Jury verdict

[¶11] Aune argues that the jury's verdict for manslaughter is legally inconsistent with their finding of not guilty for intentional murder and murder under circumstances manifesting an extreme indifference. Aune requested that the Court instruct the jury on the necessary included offenses of Manslaughter and Negligent Homicide in its jury instructions. Pretrial Conference T. p.21-22 and T. p. 294, lines 6-7. The State did not object. Aune argues that because the culpability for murder under N.D.C.C. § 12.1-16-01(1)(b), includes recklessly and manslaughter's culpability is recklessly, the jury's verdict is inconsistent. The Supreme Court effectively defined inconsistent verdicts as "a situation where...the jury has not followed the court's instructions and the verdicts cannot rationally be reconciled." State v. McClary, 2004 ND 98, ¶6, 679 N.W.2d 455, citing, U.S. v. Powell, 469 U.S. 57, 65, 69 (1984). Here, the jury's verdicts can be rationally reconciled.

[¶12] Murder under N.D.C.C. § 12.1-16-01(1)(b), requires that the jury not only find the culpability element of willfully, which includes, intentionally, knowingly or recklessly, they must also find that the death occurred under circumstances manifesting an extreme indifference to human life. The rational explanation of the jury's verdicts is that the jury found Aune not guilty of murder, because they did not find the death occurred under circumstances manifesting extreme indifference to the value of human life. "Recklessly" is part of the statutory definition of 'willfully' and the distinction between murder and manslaughter is maintained by the requirement that to sustain a murder

conviction the conduct must be done ‘under circumstances manifesting extreme indifference to the value of human life.’” State v. Halvorson, 346 N.W.2d 704, 708 (N.D. 1984) citation omitted. Here, the rational and logical explanation for the jury’s verdict is the jury found Aune’s conduct was reckless, but did not find that S.A.’s death occurred under circumstances manifesting extreme indifference to the value of human life.

[¶13] “We reconcile a claimed inconsistent verdict by examining both the law of the case and the evidence to ascertain whether the verdict represents a logical and probable decision on the relevant issues submitted to the jury.” McClary, at ¶13, citing, State v. Klose, 2003 ND 39, ¶43, 657 N.W.2d 276. Aune claims that manslaughter in this case was not available as a lesser included offense because of the way the jury was instructed to deliberate. However, Aune’s argument neglects to discuss the element of under circumstances manifesting extreme indifference to the value of human life, which is required, in addition to recklessly, in order to convict for murder. This additional element which was clearly laid out in the District Court’s closing instructions to the jury.

[¶14] “Unchallenged jury instructions become the law of the case.” Coppage at ¶23, citing, State v. Rogers, 2007 ND 68, ¶10, 730 N.W.2d 859. The only objection Aune made to the closing jury instructions was to the forms of verdict. Trial T. p. 293-94, 297-304, 306-08 and Trial T. p. 375-378. Aune requested that six forms of verdict be sent back to the jury instead of the four the court decided on. Trial T. p. 297-300, 377-78. Aune did not object to the Necessarily Included Offenses closing instruction, which describes in detail to the

jury how deliberations will proceed. Trial T. p. 299-300 and Trial T. p. 375, line 16, see also Appendix p.5-6. In addition, the closing instructions to the jury clearly advised the jury what the law was with respect to the crimes of both Murder and Manslaughter. See Appendix p. 3-9. The closing instructions made clear to the jury that they needed to find the additional element of under circumstances manifesting extreme indifference to the value of human life in order to convict for murder under N.D.C.C. 12.1-16-01(1)(b). See Appendix p. 3-9. Aune does not argue on appeal that the verdict forms resulted in the inconsistent verdict by the jury, therefore the closing instructions by the District Court become the law of the case because neither party objected to the closing instructions. This Court has held that an “instruction must require an acquittal of the offense charged before consideration of lesser included offenses.” State v. Keller, 2005 ND 86, ¶31, 695 N.W.2d 703. The District Court’s closing instructions properly advised the jury that they must find Aune not guilty of murder prior to moving on to the necessarily included offenses of manslaughter and negligent homicide.

[¶15] The evidence in this case supports the verdict of manslaughter as a logical decision by the jury. “Even if a jury fails to convict a defendant on a charge having a similar element to a charge on which the defendant is convicted, there is no legal inconsistency if there is substantial evidence to support the charge on which he is convicted.” Jahner at ¶21. In this case, the jury was presented with substantial evidence that Aune committed the offense of manslaughter, by recklessly causing the death of S.A. Aune was arguing with

S.A. and angry with her because she brought rats into the house. Trial T. p. 342, line 7-9, p. 147-49. Aune had been consuming alcoholic beverages the night before and that morning. Trial T. p. 170, 173-74, 326-28. Aune wanted the kids out of the house and he could not take them anymore. Trial T. p. 166, 168, 342 and State's Exhibit #54. Aune picked up a gun during the argument, did not check to see if the gun was loaded and pulled the trigger, shooting S.A. Trial T. p. 149, line 20, p. 336, lines 5-6, p. 353-54. Aune testified that he was standing up, with the gun at his side, when the trigger was pulled. Trial T. p.336-39. Aune testified S.A. was seated on a mattress on the floor. Trial T. p. 336, lines 14-15. Aune testified that the bullet entered her back and took a downward path. Trial T. p. 349, lines 1-5 and 21-25. However, Dr. Kemp's autopsy report indicated that the bullet entered on the left side of the abdomen and the pathway of the bullet was left to right, upward, front to back. Trial T. p.266, lines 11-16 and Appendix p. 10. The firearm was tested and was found to be working properly. Trial T. p. 206 and 208. In order for the gun to fire, pressure had to be placed on the trigger. Trial T. p. 356, lines 1-9. After Aune shot S.A., he made no attempt to help her or call for medical assistance. Trial T. p. 350, lines 10-18. After S.A. and her sister left in the vehicle, Aune called an advocate at domestic violence and threatened to commit suicide. Trial T. p. 163, 167 and p. 350-51.

[¶16] A court does not second-guess a jury's verdict and the Court "must assume that the jury believed the evidence that supports the verdict and disbelieved any contrary evidence." *Id.*, citing, State v. Purdy, 491 N.W.2d 402, 410 (N.D. 1992). The evidence presented by the State at trial supports the jury's

verdict of manslaughter. Therefore, this Court should conclude that the jury's verdict was not legally inconsistent.

II. The District Court did not substantially rely on an impermissible factor and did not exceed the statutory sentencing range, therefore the sentence was lawful and appropriate.

A. Standard of review

[¶17] The standard for reviewing a criminal sentence, as set forth in State v. Corman, 2009 ND 85, ¶15, 765 N.W.2d 530, is as follows:

*A trial judge is allowed the widest range of discretion in fixing a criminal sentence; this court has no power to review the discretion of the sentencing court in fixing a term of imprisonment within the range authorized by statute. **Appellate review of a criminal sentence is generally confined to whether the [district] court acted within the sentencing limits prescribed by statute, or substantially relied upon an impermissible factor.** Statutory interpretation, however, is a question of law fully reviewable on appeal. State v. Shafer-Imhoff, 2001 ND 146, ¶29, 632 N.W.2d 825 (internal citations and quotation omitted); see State v. Ennis, 464 N.W.2d 378, 382 (N.D. 1990) (holding trial judge has widest possible range of discretion in fixing sentences). [emphasis supplied]*

This Court has held that issues, including those at sentencing, “not raised to the district court will not be addressed for the first time on appeal unless the alleged error rises to the level of obvious error under N.D.R.Crim.P. 52(b).” State v. Henes, 2009 ND 42, ¶7, In order to “establish obvious error, a defendant must show: (1) error; (2) that is plain; and (3) affects substantial rights.” Id. at ¶8.

B. The sentencing factors

[¶18] The sentencing factors are found in the North Dakota Century Code at § 12.1-32-04. Both parties addressed these sentencing factors in their arguments to the District Court at sentencing. The District Court addressed some of the sentencing factors, but not all, noting that there was very little disagreement in the factors as set forth by counsel. Sentencing T. p.35, lines 12-17. The sentencing factors allow a court to consider whether a defendant's conduct was the result of circumstances unlikely to recur, as well as whether the character, history and attitudes of the defendant indicate he is unlikely to commit another crime. N.D.C.C. § 12.1-32-04(8) and (9). In addition, the court can consider whether it is likely or not that a defendant will respond to probationary treatment. N.D.C.C. § 12.1-32-04(10).

[¶19] A presentence investigation was prepared and filed with the District Court prior to sentencing and pursuant to N.D.C.C. § 12.1-32-02(11) and N.D.R.Crim.P. 32(c). The presentence investigation included a criminal history for Aune. The State referred to this criminal history, prepared as part of the presentence investigation, at sentencing. Sentencing T. p. 11-12, lines 20-25 and 1-14. Aune was given an opportunity to review the presentence investigation with his attorney and they indicated to the District Court they had reviewed it and had "no corrections." Sentencing T. p.3, lines 10-12. During the sentencing hearing, Aune never objected to any of his prior convictions being considered at sentencing and never indicated that any of his prior convictions had been uncounseled. In fact, during the hearing, Aune admitted he had a significant criminal record, had not done well on probation in the past and referred to his

conviction for menacing in his own statement to the District Court. Sentencing T. p. 19, lines 6-18, p. 25, lines 20-22.

[¶20] The District Court considered many factors in determining what Aune's sentence should be. One of those factors was Aune's long and considerable struggle with alcohol and drug abuse, which was supported by his criminal history, but also by his own testimony at trial and statements made during the presentence investigation. Trial T. p.326, lines 13-14, Sentencing T. p.32, lines 4-5; p.34 lines 11-17. In addition, the District Court considered whether Aune's criminal conduct was likely to recur and considered Aune's motivation for making changes in his life. Sentencing T. p. 34, lines 9-14, p.36, lines 1-6. The District Court also considered Aune's health. Sentencing T. p.34, lines 18-25, p.35, lines 1-6, p.37, lines 4-7. Most importantly, the District Court considered what would be justice for S.A. Sentencing T. p.33, lines 15-25, p.34, lines 1-8, p. 35, lines 7-24. There is nothing in the sentencing record that supports Aune's argument that the District Court substantially relied upon an impermissible factor in sentencing Aune.

[¶21] Aune now argues on appeal that the District Court impermissibly relied on Aune's prior convictions when it sentenced Aune. Aune relies on the Court's decision in State v. Cummings, in arguing that the District Court relied on an impermissible factor in sentencing Aune. 386 N.W.2d 468 (N.D. 1986). However, in that case there was no dispute by either party that Cummings prior DUI conviction was uncounseled and the trial judge knew the prior conviction was uncounseled. Id. at 469. Aune never raised the issue of any of his prior

convictions being uncounseled and there is nothing in the record to indicate that Aune's prior convictions were uncounseled. The District Court has no obligation to inquire if Aune had been represented by counsel with respect to his past convictions. Aune was provided with plenty of opportunity during the sentencing hearing to raise any issues or objections. The sentence imposed by District Court was well reasoned and was clearly within the court's discretionary limits and statutory authority.

C. Obvious error

[¶22] In Henes, the State offered certified copies of criminal convictions at sentencing for the court to consider and Henes did not object or raise the issue to the district court. ¶7. Due to Henes' failure to object this Court reviewed the sentencing decision for obvious error. Henes at ¶7. Here, Aune failed to object or raise the issue of any of his prior convictions being uncounseled, therefore this Court reviews the sentencing decision in this case for obvious error. "This court cautiously exercises its authority to notice obvious error and does so only in exceptional circumstances in which a party has suffered serious injustice." Henes at ¶8. [citations omitted]. The burden is on Aune to establish obvious error and Aune has failed to show the District Court erred, that the error was plain and that it affected substantial rights.

[¶23] Aune was convicted of Manslaughter, a Class B felony. The maximum sentence for a Class B felony is 10 years imprisonment. There is a mandatory minimum sentence for armed offenders of four years imprisonment per N.D.C.C. § 12.1-32-02.1(2)(a). The District Court sentenced Aune to ten

years imprisonment. Sentencing T. p. 37, lines 11-13. The District Court spoke from the bench regarding her decision making process. The sentencing transcript evidences the District Court's thorough understanding of the sentencing parameters, the factors and the wide discretion in sentencing a district court has. The District Court's sentence does not fall outside the statutory limits, nor did it substantially rely on an impermissible factor.

CONCLUSION

[¶24] The jury's verdict of guilty of manslaughter in this case was legally consistent and logical. Aune's sentence was within the statutory sentencing range and the District Court did not substantially rely on an impermissible factor. For these reasons, the State respectfully requests that the North Dakota Supreme Court AFFIRM the judgment of the District Court. The State requests oral argument to answer any questions the Court may have.

[¶25] Dated this 30th day of October, 2020.

Respectfully submitted,

/s/

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IN THE SUPREME COURT STATE OF NORTH DAKOTA

Steven Donald Aune,

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Defendant/Appellee.

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Supreme Court Nos. 20200159

Walsh County Court # 50-2019-CR-117

CERTIFICATE OF COMPLIANCE

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

Dated this 4th day of November, 2020.

Respectfully submitted:

/s/ Kelley M.R. Cole

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Supreme Court Nos. 20200159

Walsh County Court # 50-2019-CR-117

CERTIFICATE OF SERVICE

[1] Kelley M.R. Cole, Walsh County State's Attorney, hereby certifies that on the 30th date of October, 2020, she served a copy of the following documents:

- Brief of Appellee, Oral Argument Request;
- Appendix
- Certificate of Compliance;
- Certificate of Service.

Upon the attorney for the Appellant, Kiara Costa Kraus-Parr, by sending an electronic copy to her E-service email service@kpmwlaw.com

Dated this 30th day of October, 2020.

Respectfully submitted:

/s/ Kelley M.R. Cole

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Upon the attorney for the Appellant, Kiara Costa Kraus-Parr, by sending an electronic copy to her E-service email service@kpmwlaw.com

Dated this 4th day of November, 2020.

Respectfully submitted:

/s/ Kelley M.R. Cole

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