

In the Supreme Court of the State of North Dakota

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
MARCH 27, 2020  
STATE OF NORTH DAKOTA

State of North Dakota	)	
Appellee, Plaintiff	)	
	)	
v	)	20190319
	)	
Kevin Kenneth Michel	)	
Appellant, Defendant	)	

**Appellee’s Reply Brief**

Michel appeals the guilty verdict and the Criminal Judgment in case number 47-2018-CR-00850, District Court, Stutsman County, Judge LeFevre presiding.

ORAL ARGUMENT REQUESTED

for Appellee  
Fritz Fremgen  
State’s Attorney, Stutsman County  
511 Second Ave SE, Suite 2  
Jamestown, ND 58401  
(701) 252-6688 ID # 04875  
[ffremgen@stutsmancounty.gov](mailto:ffremgen@stutsmancounty.gov)  
[attorney@stutsmancounty.gov](mailto:attorney@stutsmancounty.gov) e serve

**TABLE OF CONTENTS**

Table of authorities ..... 3

Issues presented for review. .... ¶1

1. Whether the trial court erred in denying Michel's Rule 29 motion.

2. Whether the Defense argued below that the *Criminal Information* did not comply with the requirements of N.D.C.C. § 29-05-01.

3. Whether the phrase *from storage unit belonging to NW Tire & Auto Service* was correctly treated as surplusage.

Argument ..... ¶4

Rule 32(e) of the North Dakota Rules of Appellate Procedure

Certificate of Page Number Compliance ..... ¶15

## TABLE OF AUTHORITIES

### Cases

<i>Berlin v. State</i> , 2000 ND 13, 604 N.W.2d 437. . . . .	¶ 6
<i>City of Grand Forks v. Mata</i> , 517 N.W.2d 626 (N.D. 1994) . . . . .	¶ 14
<i>City of Minot v. Bjelland</i> , 452 N.W.2d 348 (N.D. 1990) . . . . .	¶¶ 12, 14
<i>City of Wahpeton v. Desjarlais</i> , 458 N.W.2d 330 (N.D.1990). . . . .	¶ 14
<i>Crockett v. Uniroyal, Inc.</i> , 772 F.2d 1524 (11th Cir.1985) . . . . .	¶ 13
<i>Dillon v. Nissan Motor Co.</i> , 986 F.2d 263 (8th Cir.1993) . . . . .	¶ 13
<i>Edwardson v. State</i> , 2019 ND 297, 936 N.W.2d 376 . . . . .	¶ 6
<i>Morris v. State</i> , 2019 ND 166, 930 N.W.2d 195, reh'g denied (July 30, 2019) . . . . .	¶ 6
<i>Russell v. United States</i> , 369 U.S. 749 (1962) . . . . .	¶ 14
<i>State v. Grager</i> , 2006 ND 102, 713 N.W.2d 531 . . . . .	¶ 13
<i>State v. Gray</i> , 2017 ND 108, 893 N.W.2d 484. . . . .	¶ 10
<i>State v. Heasley</i> , 196 N.W.2d 896 (N.D. 1972) . . . . .	¶ 14
<i>State v. Lind</i> , 322 N.W.2d 826 (N.D.1982) . . . . .	¶ 14
<i>State v. Niska</i> , 380 N.W.2d 646 (N.D.1986). . . . .	¶ 14
<i>State v. Prince</i> , 75 N.D. 386, 28 N.W.2d 538 (N.D. 1947) . . . . .	¶ 14
<i>State v. Shick</i> , 2017 ND 134, 895 N.W.2d 777. . . . .	¶ 12
<i>State v. Woehlhoff</i> , 473 N.W.2d 446, 448 (N.D.1991) . . . . .	¶ 12
<i>United States v. Ross</i> , 131 F.3d 970 (11th Cir.1997) . . . . .	¶ 13
<i>Wagner v. Miskin</i> , 2003 ND 69, 660 N.W.2d 593 . . . . .	¶ 13

**Statutes**

North Dakota Century Code § 29-05-01 . . . . . ¶¶ 2, 5, 12, 13  
North Dakota Century Code § 31-11-05(7). . . . . ¶ 13

**Rules**

Rule 7(c) North Dakota Rules of Criminal Procedure . . . . . ¶ 14  
Rule 7(d) North Dakota Rules of Criminal Procedure . . . . . ¶ 12  
Rule 7(e) North Dakota Rules of Criminal Procedure . . . . . ¶ 12  
Rule 12(b)(3) North Dakota Rules of Criminal Procedure. . . . . ¶ 10  
Rule 29 North Dakota Rules of Criminal Procedure. . . . . ¶¶ 1, 12, 13  
Rule 7(e) North Dakota Rules of Evidence . . . . . ¶ 11

## Issues Presented for Review

1. Whether the trial court erred in denying Michel's Rule 29 motion.
2. Whether the Defense argued below that the *Criminal Information* did not comply with the requirements of N.D.C.C. § 29-05-01.
3. Whether the phrase *from storage unit belonging to NW Tire & Auto Service* was correctly treated as surplusage.

## Argument

4. During the trial, the Defense argued the evidence was insufficient, not that the *Criminal Information* was insufficient. Transcript on Appeal Felony Jury Trial August 27, 2019 [hereinafter T] at 116, 119.
5. For the first time on appeal, the Defense argues the *Criminal Information* violated the dictates of N.D.C.C. § 29-05-01. Today, the Defense argues

*"A complaint **must** state, among other things, '[t]he person against whom or against whose property, the offense was committed, if known; and [i]f the offense is against the property of any person, a general description of such property.' N.D.C.C. § 29-05-01(5,6)(emphasis added)." . . . "Even if not the desired intent of the State, the language of which describes those **mandatory inclusions of identity of property and person** is definitive as to the scope of charges."*

Appellant's Reply Brief ¶¶ 1, 4 (bold typeface added). First, the Defense has given no authority for its contention that inclusion of identity of the property and person is definitive to the scope of the charges. Second, there is no indication the Defense mentioned N.D.C.C. § 29-05-01 at the contested preliminary hearing or during trial. The Defense never argued to the trial court that the charging

document mislead Michel or failed to fairly apprise Michel of the C felony level of offense charged. The Defense never objected to testimony about tires missing from J & L as irrelevant to or beyond the scope of the charge. The Defense never objected when Detective Gross testified about discovering that the Hercules tires belonged to J&L Service, T 43, when the Hercules tires were received in evidence, T 44, when J&L owner Troy Nelson testified the tires cost him \$160 each, T 86, or during any part of J&L owner Troy Nelson's testimony. T 77-98.

6. This Court has declined to address new theories offered on appeal. *Morris v. State*, 2019 ND 166, ¶ 15, 930 N.W.2d 195, 200, reh'g denied (July 30, 2019). “Arguments raised for the first time on appeal generally will not be considered by this court.” *Edwardson v. State*, 2019 ND 297, ¶ 11, 936 N.W.2d 376, 379 (quoting *Berlin v. State*, 2000 ND 13, ¶ 20, 604 N.W.2d 437).
7. Michel strategically chose to rest on the language of the charging document until the State closed its case.
8. Michel knew from the time the *Criminal Complaint* and *Affidavit in Support of Probable Cause* were filed that the State was alleging a C felony offense comprised of one or more transactions amounting to over \$1,000 and that Andrew Heckelsmiller and Thomas Melland were the source of the stolen property. The *Criminal Complaint* and the *Criminal Information* clearly stated this was a C felony level offense accomplished “. . . from on or about the 4<sup>th</sup> of October 2017 to on or about the 29<sup>th</sup> of August 2018. . .” when “[i]n particular, **the Defendant received one or more tires from Andrew Heckelsmiller and**

**Thomas Melland, valued at more than \$1,000 but less than \$10,000, from storage unit belonging to NW Tire & Auto Service."** 47-2018-CR-00850, Index ## 2, 23.

9. The *Affidavit in Support of Probable Cause* for the *Criminal Complaint* contained Detective Gross' report in which Gross explained,

Gross told Michel that Andrew Hecklesmiller and Tom Melland have told on themselves and that Gross is trying to recover as many tires as possible. Kevin Michel told Gross that Melland and Hecklesmiller brought him several tires, some that he still has and at least four that he (Michel) sold to a Mexican man. . . . Kevin asked Gross if he (Gross would wait at the shop and that Michel would have to run a short distance away and get Gross the tires he has left. Kevin told Gross that both Melland and Hecklesmiller brought him several tires and that about 3 or 4 months ago Melland brought Michel a set of 4 Hercules tires. Kevin left in his pickup . . . and returned about 15 minutes later . . . with 7 new truck tires in the box of his pickup. Four of the tires were a match; all Hercules, one was a Mud Claw and the other two were Duck Commanders, all brand new tires.

47-2018-CR-00850, Index #1, p3. Also contained in the *Affidavit* was the invoice from American Tire Distributors to J & L Service that listed the 265/65 18 Terra Trac AT II tires Troy Nelson testified were the Hercules Tera Trac II tires he was missing. 47-2018-CR-00850, Index #1, p 8; T 83:15-18.

10. If the Defense thought the State was improperly grouping two thefts into one charge to illegitimately support a felony level offense or that the language of the charge lacked specificity, the Defense should have filed a Rule 12(b)(3)(B) pre-trial motion arguing there was "a defect in the indictment, information, or

complaint . . ." because it "joined two or more offenses in the same count (duplicity)" or "lacked specificity." *State v. Gray*, 2017 ND 108, ¶ 10, 893 N.W.2d 484, 488; Rule 12(b)(3) North Dakota Rules of Criminal Procedure. Rather than making a pretrial motion arguing the grouping of the two victims in one count was duplicitous or that failing to name both victims was a lack of specificity, the Defense chose to wait until the State's case was closed and argue the State had failed to show \$1,000 or more had been stolen from Northwest Tire and Auto. T 116.

11. The Defense neglected to argue to the trial court that the charging document was vague or failed to fairly apprise the Defense of the allegations, but now argues "*The State has a remedy in the case of its error in the charging documents, it may unless additional or different offense is charged or substantial right of the defendant is prejudiced, motion to amend the information at any time before the verdict or finding. N.D.R.Evid.7(e) No such motion was ever made. The State through its inaction was in acceptance of the scope of the charges as alleged.*" Appellant's Reply Brief ¶ 7 (bold typeface added). First, Michel provides no authority for his contention that the State's case presentation was limited by the language of the complaint. Second, not until the Appellant's Reply Brief was there any call for the State to implement a *remedy*.
12. Had the Defense raised the N.D.C.C. § 29-05-01 argument it does today, the trial court may have ruled that the phrase was either surplusage, or that the State may amend the charge. *State v. Shick*, 2017 ND 134, ¶ 10, 895 N.W.2d 773, 777 ("The



court ruled Volochanskiy's name was either surplusage under N.D.R.Crim.P. 7(d), or the State could amend the complaint at any time before the verdict or finding and remove Volochanskiy's name under N.D.R.Crim.P. 7(e)."). This Court has explained: "We note that Rule 7(d), NDRCrimP, provides that unnecessary allegations may be disregarded as surplusage and the court, on motion of either party or upon its own motion, may strike that surplusage from the information or indictment." *City of Minot v. Bjelland*, 452 N.W.2d 348, 350 (N.D. 1990). At trial, the State responded to Michel's Rule 29 motion by arguing that phrase about Northwest Tire was mere *surplusage*. T 116-118. The State quoted to the trial court, "If words appear in an information or complaint which, if stricken, do not cause omission of any of the essential elements of the offense, those words may be treated as surplusage and wholly disregarded." *State v. Woehlhoff*, 473 N.W.2d 446, 448 (N.D.1991). The trial court denied Michel's rule 29 motion noting ". . . this Information cites the statute number, and the important part is the allegation that he received stolen property from Mr. Heckelsmiller and Mr. Melland. Again, valued at at least a thousand but less than 10,000." T 121:4.

13. In this case, the Defense strategically chose to wait to spring its argument of insufficient evidence until the State had rested its case. Even then, the Defense failed to argue that the Criminal Information had a N.D.C.C. 29-05-01 flaw. The Defense cannot wait in the bush holding its criticism of the charging document, raise a sufficiency of the evidence argument at the close of the State's case, and now argue the *Criminal Information* was flawed and the trial court erred in failing

to grant the Defendant's Rule 29 motion.

“It is ‘a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.’ ” *United States v. Ross*, 131 F.3d 970, 988 (11th Cir.1997) (quoting *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 n. 4 (11th Cir.1985)). Our judicial maxims, which aid in the application of the law, support this position: “[a]cquiescence in error takes away the right of objecting to it.” N.D.C.C. § 31–11–05(7). Our caselaw recognizes, “ ‘[i]t is “fundamental that where [a litigant] ‘opened the door’ and ‘invited error’ there can be no reversible error.” ’ ” *Wagner v. Miskin*, 2003 ND 69, ¶ 16, 660 N.W.2d 593 (quoting *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 269 (8th Cir.1993)).

*State v. Grager*, 2006 ND 102, ¶ 7, 713 N.W.2d 531, 534.

14. The *Criminal Information* satisfactorily notified Michel of the C felony charge against him and protected him from being recharged for receiving or retaining stolen property from Heckelsmiller and Melland.

To satisfy sixth amendment standards, a criminal information is sufficient if it is specific enough to advise the defendant of the charge against him, to enable him to prepare for trial, and to plead the result in bar of a subsequent prosecution for the same offense. *Russell v. United States*, 369 U.S. 749, 763–764, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962); *State v. Niska*, 380 N.W.2d 646, 648 (N.D.1986); *State v. Lind*, 322 N.W.2d 826, 844 (N.D.1982). The provisions of N.D.R.Crim.P. 7(c) are intended to implement the sixth amendment notice requirement. Explanatory Note to N.D.R.Crim.P. 7. The information must contain a plain, concise, and definite written statement of the essential elements of the offense. *City of Minot v. Bjelland*, 452 N.W.2d 348, 350 (N.D.1990). In considering the sufficiency of a criminal information, technicalities have been abolished, and it is only necessary to plead an offense in its usually designated name in plain, ordinary language. *City of Wahpeton v. Desjarlais*, 458 N.W.2d 330, 333 (N.D.1990). Mere defects, inaccuracies, or omissions in an information do not affect the subsequent proceedings, unless as a result, no offense is charged.

*City of Grand Forks v. Mata*, 517 N.W.2d 626, 628 (N.D. 1994).

Where a criminal information is not challenged in the trial court by a motion to set aside, a motion to quash or a motion in arrest of judgment and the question of its sufficiency is raised for the first time on appeal, the information will be construed with less strictness than if its sufficiency had been questioned in the court below.

*State v. Prince*, 75 N.D. 386, 386, 28 N.W.2d 538, 539 (1947); *State v. Heasley*, 196 N.W.2d 896, 902 (N.D. 1972). The Defendant's trial strategy failed. The trial court properly ruled on the sufficiency of the evidence motion before it, and now the Defense would like to change arguments.

**Rule 32(e) of the North Dakota Rules of Appellate Procedure Certificate of Page Number Compliance.**

15. This *Appellee's Reply Brief* complies with the 12 page limit in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. This brief is 12 pages.

Dated 27 March 2020.

Fritz Fremgen  
State's Attorney, Stutsman County  
511 Second Ave SE, Suite 2  
Jamestown, ND 58401  
(701) 252-6688 ID # 04875  
[ffremgen@stutsmancounty.gov](mailto:ffremgen@stutsmancounty.gov)  
[attorney@stutsmancounty.gov](mailto:attorney@stutsmancounty.gov) e serve

### CERTIFICATE OF SERVICE

16. On 27 March 2020, the *Appellee's Reply Brief* was electronically served to Mary DePuydt, attorney for the Appellant, at [depuydt.m@gmail.com](mailto:depuydt.m@gmail.com).
17. On 27 March 2020, the *Appellee's Reply Brief* was electronically filed with the Clerk of the Supreme Court North Dakota.

Fritz Fremgen  
State's Attorney, Stutsman County  
511 Second Ave SE, Suite 2  
Jamestown, ND 58401  
(701) 252-6688 ID # 04875  
[ffremgen@stutsmancounty.gov](mailto:ffremgen@stutsmancounty.gov)  
[attorney@stutsmancounty.gov](mailto:attorney@stutsmancounty.gov) e serve