

RECEIVED BY CLERK
SUPREME COURT

AUG - 7 '00

ORIGINAL

20000126

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG 7 2000

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)
)
 Plaintiff-Appellee,)
)
 -vs-)
)
 Tanya Renee Glass,)
)
 Defendant-Appellant.)
)

Supreme Court No.
20000126

STATE OF NORTH DAKOTA

BRIEF OF PLAINTIFF-APPELLEE

Appeal from Judgment of Conviction
Burleigh County District Court
South Central Judicial District
The Honorable Burt L. Riskedahl, Presiding

Rick L. Volk
Assistant Burleigh County State's Attorney
Courthouse, 514 East Thayer Avenue
Bismarck, North Dakota 58501
Phone No: (701)222-6672
BAR ID. No: 04913
Attorney for Plaintiff-Appellee

Benjamin C. Pulkrabek
Attorney at Law
P.O. Box 155
Mandan, North Dakota 58554
Phone No: (701)663-1929
BAR ID. No: 02908
Attorney for Defendant-Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

TABLE OF CONTENTS

Page No.

Table of Cases	i
Table of Statutes and Authorities . . .	ii
Statement of the Issues	6
Statement of the Case	1
Argument	7
Conclusion	18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

TABLE OF CASES

Page No.

City of Bismarck v. Towne, 1999 ND 49,
590 NW2d 893 (1999) 13

State v. Eldred, 1997 ND 112 ¶ 31,
564 NW2d, 283, 290-291 (1997) 11

State v. Goulet, 1999 ND 80,
593 NW2d 345 (1999) 8,9

State v. Jensen, 2000 ND 23,
606 NW2d 507 (2000) 9,17

State v. Johnson, 379 NW2d 291 (ND),
cert. denied, 475 US 1141, 106 S.Ct. 1792,
90 L.Ed.2d 337 (1986) 14, 15

State v. Potter, 452NW2d 71 (ND 1990). 14

Woehlhoff v. State, 531 NW2d 566
(ND 1995) 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

TABLE OF STATUTES AND AUTHORITIES

Page No.

North Dakota Century Code §39-08-01 . . . 10,12,17

North Dakota Century Code
§39-08-01(1)(b) 10

North Dakota Century Code §12.1-02-02 . . 10,11

North Dakota Century Code §12.1-02-02(2). 11,12

N.D.R.Crim.P. Rule 12.2(a) 7

N.D.R.Crim.P. Rule 12.2 7,8

N.D.R.Evid. Rule 103(a) 9

N.D.R.Crim.P. Rule 30(c) 12,13

N.D.R.Crim.P. Rule 52(b) 14

1
2
3 **STATEMENT OF THE CASE**

4 **A. Proceedings in trial court.**

5 The Appellant, Tanya Renee Glass, was charged
6 by Uniform Summons and Complaint with the offense of
7 Driving a Motor Vehicle While Under the Influence of
8 Intoxicating Liquor, a 3rd offense, on October 16,
9 1999. See Appendix, p. 2. Ms. Glass entered a Not
10 Guilty plea, and requested a Jury Trial. See
11 Appendix, pp. 4 - 6. Jury Trial was held on March
12 1, 2000. The Jury returned a verdict of Guilty.
13 See Appendix, p. 1. Ms. Glass was sentenced by the
14 trial court on April 20, 2000. See Appendix, p. 27.
15 Her Notice of Appeal, dated April 25, 2000, was
16 filed April 26, 2000. See Appendix, pp. 1, 28.

17 **B. Statement of the Facts.**

18 On October 16, 1999, at approximately 1:30
19 a.m., Bismarck Police Officer Brian Weigel was
20 patrolling eastbound on Boulevard Avenue within the
21 City of Bismarck, near the intersection of 15th
22 Street. TR. 8. At that time, Officer Weigel
23 observed a silver pickup traveling southbound on 15th
24 Street drive through a stop sign at the intersection
25 at approximately 25 to 30 miles per hour and nearly
26 collide with another motor vehicle traveling
27 eastbound on Boulevard Avenue directly ahead of
Officer Weigel. TR. 9. The silver pickup continued

1 through the intersection without stopping or
2 slowing, and headed southbound on 15th Street at a
3 high rate of speed again without slowing for any
4 subsequent intersections. TR. 10. Officer Weigel
5 initiated a traffic stop of this vehicle. TR. 10.

6 Weigel identified the lone occupant and driver
7 of this vehicle as Tanya Renee Glass from an
8 identification card. TR. 10 - 11. Ms. Glass had
9 great difficulty retrieving the identification card,
10 eventually dropping the same onto the floorboard of
11 the vehicle. TR. 12. As Officer Weigel spoke with
12 Ms. Glass, he detected a strong odor of alcoholic
13 beverage coming from her breath. TR. 12. He also
14 observed that her eyes were bloodshot and glassy.
15 TR. 12. Her movements were slow and jerky. TR. 12.
16 When asked to exit the vehicle, Ms. Glass lost her
17 balance and had to grab the door of the vehicle to
18 regain her composure. TR. 13, 21.

19 Once outside of the vehicle, Ms. Glass was
20 asked to perform some field sobriety tests by
21 Officer Weigel. TR. 13 - 15. A series of tests,
22 including the horizontal gaze nystagmus, one-leg
23 stand, and walk and turn, were either performed or
24 attempted. TR. 13 - 15. Upon being asked to
25 perform the walk and turn, Ms. Glass stated "No.
26 I've done wrong and you're going to arrest me
27 anyway, so just take me in." TR. 15. Based upon

1 the erratic driving observed, Ms. Glass' lack of
2 dexterity, coordination and balance, the odor of
3 alcoholic beverage upon her breath, her bloodshot
4 and glassy eyes, her failed performance on field
5 sobriety tests, and her jerky movements, Officer
6 Weigel arrived at the opinion that Ms. Glass was
7 under the influence of intoxicating liquor, and he
8 arrested her for driving while in that condition.
9 TR. 16 - 17.

10 Officer Weigel transported Ms. Glass to St.
11 Alexius Hospital in an effort to obtain a blood draw
12 from Ms. Glass. TR. 17. Weigel requested Ms. Glass
13 submit to the blood draw on three occasions. TR. 17
14 - 18. Ms. Glass refused. TR. 17. Weigel then
15 transported her to the Bismarck Police Department
16 for processing, and the Burleigh County Detention
17 Center for booking into jail. TR. 18. While at the
18 jail, Ms. Glass was very emotional. TR. 18. Her
19 mood would swing, from crying to laughing, which
20 Officer Weigel testified gave him further reason to
21 believe Ms. Glass was under the influence. TR. 18.

22 At trial, Officer Weigel was questioned by
23 defense counsel about his knowledge of bipolar
24 disorder. Defense counsel asked, "And do you have
25 any idea what it means when they say people are
26 bipolar?" TR. 27. Weigel responded, "I have a
27 small amount of training in that." TR. 27. At that

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

point, the State requested a sidebar. TR. 27.

At the sidebar, the State objected to the presentation of evidence pertaining to bipolar disorder as the defense had not notified the State of an intention to introduce such evidence pursuant to Rule 12.2 of the North Dakota Rules of Criminal Procedure. See Appendix, pp. 31 -33. Defense counsel advised the trial judge that he did not believe any such notice was required. Id. Defense counsel did not provide the trial judge with any explanation why the evidence pertaining to bipolar disorder was being introduced, nor did he make or request to make an offer of proof as to the evidence he desired to introduce on this issue. The trial judge sustained the State's objection, ruling that bipolar disorder was a defense to be disclosed pursuant to Rule 12.2 of the North Dakota Rules of Criminal Procedure, and that since the information had not been disclosed by the defense, no further testimony about bipolar disorder would be allowed at trial. Id.

At trial, Ms. Glass provided an explanation for her emotional condition at the detention center. Ms. Glass stated that she was worried when she was arrested by Officer Weigel, as she believed she was in a lot of trouble with her boyfriend, who was very jealous and sometimes physical with her, since she

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

had given another male friend a ride home when this event occurred. TR. 42 - 43. Ms. Glass did not testify that suffered from any mental illness or disorder of any kind, nor did she make or attempt to make an offer of proof demonstrating the same.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

ISSUES PRESENTED FOR REVIEW

- I. DID THE TRIAL COURT ERR BY EXCLUDING EVIDENCE ABOUT BIPOLAR DISORDER?
- II. DID THE TRIAL COURT ERR BY NOT INSTRUCTING THE JURY ON CULPABILITY?
- III. DID THE TRIAL COURT COMMIT OBVIOUS ERROR BY EXCLUDING EVIDENCE OF BIPOLAR DISORDER OR BY NOT INSTRUCTING THE JURY ON CULPABILITY?

1
2 ARGUMENT

3 I. THE TRIAL COURT DID NOT ERR BY EXCLUDING
4 EVIDENCE OF BIPOLAR DISORDER

5 Rule 12.2(a) of the North Dakota Rules of
6 Criminal Procedure provides, in part, as follows:

7 "If a defendant intends to rely upon the
8 defense of lack of criminal responsibility by reason
9 of mental disease or defect at the time of the
10 alleged offense, the defendant, within the time
11 provided for the filing of pretrial motions or at
12 such later time as the court may direct, shall
13 notify the prosecuting attorney of that intention in
14 open court or in writing and file the notice. If
15 there is a failure to comply with the requirements
16 of this subdivision, the defense of lack of criminal
17 responsibility may not be raised"

18 Rule 12.2(a), N.D.R.Crim.P.

19 In this case, the defense raised the
20 possibility of introduction of the defense of lack
21 of criminal responsibility by reason of mental
22 disease or defect at trial by counsel's inquiry of
23 Officer Brian Weigel's knowledge or awareness of
24 bipolar disorder. At a sidebar called immediately
25 upon this inquiry, the prosecution informed the
26 trial judge that it had not been presented with any
27 notice of this defense pursuant to Rule 12.2 of the
North Dakota Rules of Criminal Procedure, and

1 requested the judge exclude the evidence for this
2 failure of notification. Defense counsel simply
3 responded that he did not believe notice was
4 required. He did not provide any other explanation
5 during the course of the sidebar why he was seeking
6 introduction of this evidence. In accordance with
7 the terms of Rule 12.2, N.D.R.Crim.P., the trial
8 judge was correct in sustaining the State's
9 objection and excluding further testimony as to
10 bipolar disorder.

11 In her appeal to this Court, Ms. Glass argues
12 that she was seeking introduction of evidence
13 pertaining to bipolar disorder to explain her
14 emotional condition at the Burleigh County Detention
15 Center following her arrest. This argument was
16 never presented to the trial judge. The parties
17 have the primary duty to bring to the court's
18 attention the proper rules of law applicable to a
19 case. State v. Goulet, 1999 ND 80, 593 N.W.2d 345
20 (1999). The trial judge's ruling on the issue was
21 correct, given the information he was presented with
22 at trial. If Ms. Glass believed evidence regarding
23 bipolar disorder was admissible for another purpose,
24 it was her obligation to present those reasons to
25 the trial judge. The trial judge could not and
26 should not be expected to guess at the reasons why a
27 party offers certain evidence.

1 "Just as judges are not expected to be ferrets,
2 obligated to engage in unassisted searches of the
3 record for evidence to support a litigant's
4 position, neither are they expected to be psychics,
5 with the ability to divine a party's true intentions
6 in mislabeled and misleading documents."

7 Goulet, 1999 ND 80 at ¶10, 593 N.W.2d at 348.

8 Furthermore, Ms. Glass has failed to properly
9 preserve this issue for review. Error cannot be
10 predicated upon a ruling which excludes evidence
11 unless (a) substantial rights of a party are
12 affected, and (b) the party offering the evidence
13 makes an offer of proof, or the substance of the
14 evidence is apparent from the context in which the
15 question is asked. State v. Jensen, 2000 ND 23, 606
16 N.W.2d 507 (N.D. 2000); see also Rule 103(a),
17 N.D.R.Evid. Glass made no offer of proof, and the
18 context of the question asked by counsel, nor any of
19 the discussions surrounding the same, could have
20 alerted the trial judge to any reason why the
21 evidence regarding bipolar disorder would be
22 relevant. Without an offer of proof or other
23 explanation as to the relevance of the proposed
24 evidence, the *record* of the trial proceeding is
25 absent of any information from which this Court may
26 determine whether the trial court's exclusion of the
27 proposed evidence was prejudicial to Ms. Glass.

1 Ms. Glass' argument to *this* Court why the
2 evidence may have been relevant and admissible was
3 not presented to the trial court, and should not be
4 considered in this Court's decision. The trial
5 court was not given any opportunity to hear these
6 arguments, and could not have committed error based
7 upon the same.

8
9 **II THE TRIAL COURT DID NOT COMMIT ERROR BY FAILING**
10 **TO INSTRUCT THE JURY ON CULPABILITY DURING**
11 **TRIAL OF A CHARGE OF D.U.I. UNDER CHAPTER 39-08**
12 **OF THE NORTH DAKOTA CENTURY CODE.**

13 Ms. Glass was charged with Driving a Motor
14 Vehicle While Under the Influence of Intoxicating
15 Liquor pursuant to section 39-08-01 of the North
16 Dakota Century Code. See Appendix, p. 2. That
17 section makes it illegal for an individual to "drive
18 . . . any vehicle upon a highway or upon public or
19 private areas to which the public has a right of
20 access for vehicular use in this state if . . . that
21 person is under the influence of intoxicating
22 liquor." See §39-08-01(1)(b), N.D.C.C. The statute
23 does not provide any level of culpability.

24 Ms. Glass argues that the culpability level is
25 "willful" pursuant to section 12.1-02-02 of the
26 North Dakota Century Code, and that the trial court
27 erred by failing to instruct the jury on this

1 culpability level. This argument ignores the plain
2 language of section 12.1-02-02, N.D.C.C., as well as
3 the case law interpreting that section.

4 Section 12.1-02-02 of the North Dakota Century
5 Code provides:

6 "1. For purposes of this title, a person
7 engages in conduct:

8 . . .

9 e. 'Willfully' if he engages in the conduct
10 intentionally, knowingly, or recklessly.

11 2. If a statute or regulation thereunder
12 defining a crime does not specify any culpability
13 and does not provide explicitly that a person may be
14 guilty without culpability, the culpability that is
15 required is willfully."

16 N.D.C.C. §12.1-02-02 (emphasis added).

17 The plain language of this section limits its
18 application to offenses contained with Title 12.1 of
19 the North Dakota Century Code. This Court has
20 interpreted the statute in this fashion as well.

21 See State v. Eldred, 1997 ND 112, ¶31, 564 N.W.2d
22 283, 290 - 291 (1997) ("section 12.1-02-02(2) is
23 only applicable to Title 12.1, and the willful
24 culpability level will not be read into other
25 chapters unless the legislature specifically states
26 as such"). The North Dakota Legislature has not
27 indicated that section 12.1-02-02(2) is applicable

1 to Title 39 of the North Dakota Century Code. Ms.
2 Glass has cited no other authority or made any new
3 argument which would or should cause this Court to
4 reverse its prior decisions with respect to section
5 12.1-02-02(2), N.D.C.C.

6 It is unquestionably clear from the foregoing
7 that there is no culpability level required to be
8 established during the prosecution of an offense
9 charged under Section 39-08-01 of the North Dakota
10 Century Code. Therefore, the trial court did not
11 err in this case by not instructing the jury as to
12 culpability.

13 In addition, Ms. Glass, similar to her first
14 issue, has again failed to preserve this issue for
15 appeal. Ms. Glass neither requested an instruction
16 on culpability levels, nor objected to the trial
17 court's failure to include an instruction on
18 culpability in its instructions to the jury.
19 Defense counsel specifically advised the trial judge
20 that the defense had no objection to both the
21 opening and closing instructions. TR. 2, 56.

22 Rule 30(c) of the North Dakota Rules of
23 Criminal Procedure specifically requires exceptions
24 to the proposed jury instructions be noted when a
25 copy of the proposed instructions are given to
26 counsel. That Rule states in part:

27 "The giving of instructions and the failure to

1 instruct the jurors are deemed excepted to unless
2 the court, before instructing the jurors, submits to
3 counsel the written instructions it proposes to give
4 to the jurors and asks for exceptions to be noted.
5 Thereupon, counsel shall designate the parts or
6 omissions counsel considers objectionable.
7 Thereafter, only the parts or omissions so
8 designated are deemed excepted to by the counsel
9 designating the same. . . . "

10 Rule 30(c), N.D.R.Crim.P.

11 From the context of the transcript, it is clear
12 that the written instructions were provided to
13 defense counsel prior to instruction of the jurors.
14 The content of those instructions was discussed with
15 counsel for the defense and state prior to their
16 reading to the jurors. Defense counsel indicated no
17 objection to the same. An attorney's failure to
18 object at trial to the instructions which he had the
19 opportunity to object to before they were given to
20 the jury operates as a waiver of his right on appeal
21 to complain of instructions that either were or were
22 not given. Woehlhoff v.State, 531 N.W.2d 566 (N.D.
23 1995). Appellate review in such a case is limited
24 to reviewing for obvious error under Rule 52(b) of
25 the North Dakota Rules of Criminal Procedure. City
26 of Bismarck v. Towne, 1999 ND 49, 590 N.W.2d 893
27 (1999).

1 By failing to object to the proposed
2 instructions in this case, Ms. Glass did not
3 preserve this issue for appellate review.
4

5 **III. THE TRIAL COURT DID NOT COMMIT OBVIOUS ERROR.**

6 Ms. Glass argues that the trial court committed
7 obvious error by excluding evidence of bipolar
8 disorder and by failing to instruct the jurors on
9 culpability. Obvious errors or defects affecting
10 substantial rights may be noticed although they were
11 not brought to the attention of the court. See Rule
12 52(b), N.D.R.Crim.P.

13 When an issue has not been properly preserved
14 for review, this Court's inquiry is limited to
15 determining whether the alleged error constitutes
16 obvious error affecting substantial rights of the
17 defendant under Rule 52(b) of the North Dakota Rules
18 of Criminal Procedure. State v. Potter, 452 N.W.2d
19 71 (N.D. 1990). The power to notice obvious error
20 is exercised cautiously and only in exceptional
21 circumstances and only where a serious injustice has
22 been done to the defendant. State v. Johnson, 379
23 N.W.2d 291 (N.D.), cert. denied, 475 U.S. 1141, 106
24 S.Ct. 1792, 90 L.Ed.2d 337 (1986). In assessing the
25 possibility of error concerning substantial rights
26 under Rule 52(b), N.D.R.Crim.P., this Court examines
27 the entire record and the probable effect of the

1 actions alleged to be error in light of all the
2 evidence. Id.

3 In this case, there was substantial evidence
4 for the jury to find Ms. Glass committed the offense
5 of D.U.I. Officer Weigel testified that (1) Glass
6 drove through a stop sign at a speed of 25 - 30
7 miles per hour without braking or slowing, almost
8 colliding with another vehicle; (2) Glass continued
9 to drive through unmarked intersections without
10 yielding or slowing and without any regard to other
11 traffic in the area; (3) Glass had a strong odor of
12 alcoholic beverage on her breath, and had bloodshot
13 and glassy eyes; (4) Glass was extreme difficulty
14 producing her identification card and, in fact,
15 dropped the same on the floorboard of her vehicle
16 while attempting to retrieve it; (5) Glass lost her
17 balance exiting her vehicle; (6) Glass failed the
18 H.G.N. field test; (7) Glass admitted to having
19 "done wrong" upon Weigel's request to perform the
20 walk and turn field test; and, (8) Glass refused to
21 submit to a blood draw to determine her alcohol
22 concentration on three occasions.

23 Glass, herself, admitted she had consumed five
24 beers between 7:00 p.m. and 12:30 a.m., and that she
25 was an infrequent drinker. TR. 36, 44. While she
26 initially denied driving through the intersection in
27 the direction and manner described by Officer

1 Weigel, she later acknowledged having done so by
2 testifying "he said I didn't brake completely to a
3 stop, but I did brake and then went through it."
4 TR. 38, 45. Given this contradiction, Ms. Glass'
5 credibility was certainly questionable to the jury.

6 The above facts gave the jurors substantial
7 evidence from which they could convict Ms. Glass of
8 D.U.I. Her argument to this Court focuses upon her
9 inability the present evidence on bipolar disorder.
10 Even if such evidence was allowed before the jury,
11 the verdict would not have changed. Ms. Glass did
12 provide an explanation for her emotional condition
13 at the detention center. She claimed she was
14 worried about ramifications from her jealous and
15 abusive boyfriend. TR. 42 - 43. Furthermore, that
16 emotional condition was only one factor which the
17 officer testified led him to believe Ms. Glass was
18 under the influence, and that factor was almost an
19 afterthought. Officer Weigel had already arrested
20 Ms. Glass for D.U.I., having formed his opinion as
21 to her level of sobriety based upon his observations
22 of her physical condition and behavior prior to
23 arriving at the detention center. Even if Ms. Glass
24 had testified to having bipolar disorder, that
25 testimony would not have explained her erratic
26 driving, her strong odor of alcohol on her breath or
27 her admitted consumption of five beers, her lack of

1 balance and coordination, her refusal to submit to
2 the blood draw, or her admission that she had "done
3 wrong".

4 Obvious error is noticed only in exceptional
5 circumstances where the defendant has suffered
6 serious injustice, and the burden is upon the
7 defendant to show the alleged error was prejudicial.
8 State v. Jensen, 2000 ND 28, ¶18, 606 N.W.2d 507,
9 513 (2000). Ms. Glass has failed to meet this
10 burden with respect to the trial court's exclusion
11 of evidence related to bipolar disorder.

12 With respect to the lack of instruction on
13 culpability levels, as noted above, there is no
14 culpability level to prove in a prosecution for
15 Driving a Motor Vehicle Under the Influence of
16 Intoxicating Liquor pursuant to section 39-08-01,
17 N.D.C.C. The trial court's lack of instruction on
18 culpability level could not have been error in any
19 form, obvious or otherwise.
20
21
22
23
24
25
26
27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CONCLUSION

Based upon the foregoing, the State of North Dakota respectfully requests that this Court affirm the Judgment of the District Court, South Central Judicial District, Burleigh County.

Dated this 7th day of August, 2000.

Rick L. Volk

Rick L. Volk, Assistant
Burleigh County State's Attorney
514 E. Thayer Avenue
Bismarck, ND 58501
(701) 222-6672
N.D. Bar I.D. # 04913
Attorney for Appellee