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FOR THE STATE OF NORTH DAKOTA

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State of North Dakota,

Plaintiff-Appellee,

Supreme Court No. 2004002 & 2004003

vs.

Tracy Reimche,

District Court No. 25-03-K-186 and
25-03-K-187

Defendant-Appellant.

APPEAL FROM THE CRIMINAL JUDGMENTS

ENTERED UPON A GUILTY PLEA TO THE DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
PURSUANT TO A PLEA AGREEMENT

(CORRECTED)
BRIEF OF APPELLEE

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State of North Dakota

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I. Whether the section 12.1-32-09, N.D.C.C. notice filed by the State complied with the requirements of section 12.1-32-09, N.D.C.C.?

II. Whether the district court's dangerous special offender finding is clearly erroneous?

STATEMENT OF THE CASE

On September 4, 2003, the State of North Dakota (State) charged the Defendant Tracy Reimche (Reimche) with two counts of the offense of Aggravated Assault, in violation of section 12.1-17-02, N.D.C.C., a Class C felony, by then and there willfully causing serious bodily injury to another human being, namely Clifford Beesley and Dustin Frounfelter, or, in the alternative, with regard to Dustin Frounfelter, one count of the offense of Attempted Murder, in violation of sections 12.1-16-01 and 12.1-06-01, N.D.C.C., a Class A felony, by then and there intentionally engaging in conduct which constitutes a substantial step toward commission of intentionally or knowingly causing the death of another human being, namely Dustin Frounfelter. (*Appendix p. 3).* On November 2, 2003, the State served Reimche with notice that the State is requesting a finding that the defendant is a dangerous special offender who upon conviction for the felony charged in both counts should be subject to the imposition of sentence stated in section 12.1-32-09(2), N.D.C.C. because the defendant used a dangerous weapon in the commission of the offense charged, namely a knife. (*Appendix, p. 5).* On December 3, 2003, Reimche entered into a plea agreement in which he would enter a guilty plea on both counts of Aggravated Assault, in violation of section 12.1-17-02, N.D.C.C. in exchange for the

State dropping the charge of Attempted Murder, in violation of sections 12.1-16-01 and 12.1-06-01, N.D.C.C., with the judge of the McHenry County District Court deciding on whether Reimche be found to be a dangerous special offender and whether there would be reference to a weapon as stated in the motion to amend complaint (*Arraignment & Sentencing Transcript [A & S Tr..], pg. 8, line 3 to pg. 12, line 21*). Pursuant to the plea agreement, Reimche plead guilty to both counts of Aggravated Assault and the McHenry County District Court judge found Reimche to be a dangerous special offender and that Reimche had been adequately notified of the State's intent to request that finding (*A & S Tr. pg. 31, line 25 to pg. 32, line 5*). Since the McHenry County Clerk of Court failed to type that finding in the Criminal Judgment and Commitment dated December 3, 2003 (*Appendix, pg. 6)*, an Amended Criminal Judgment and Commitment With Finding That Defendant is a Dangerous Special Offender was entered December 4, 2003. *Appendix, pg. 8.* Pursuant to a Consent to DNA Sample signed by Reimche waiving entry and notice of an order requiring Reimche to have a sample of blood or other body fluids taken by the DOCR for DNA law enforcement identification purposes and inclusion in the law enforcement identification data bases (*Register of Actions, no. 23*), a Second Amended Criminal Judgment and Commitment with Finding that Defendant is a Dangerous Special Offender was entered December 18, 2003. *Appendix, pg. 10.* Contrary to the plea agreement entered on December 3, 2003, Reimche appealed. *Appendix, pg. 12.*

STATEMENT OF THE FACTS

Facts relevant to the issues presented for review, other than those stated in the Statement of the Case, are that, on August 30, 2003, Reimche retreated into a home, grabbed a knife, and then went back outside where Reimche successively stabbed Clifford Beesley (Beesley) and Dustin Frounfelter (Frounfelter) with the same knife. The stabbing caused both victims to be transported via ambulance to the hospital where both victims were diagnosed with hemopneumothorax, which are sucking chest wounds *(A & S Tr., pg. 13, lines 1 to 23)*. When the district court judge asked Reimche at the arraignment and sentencing hearing if he had anything in dispute or contention of those facts, all Reimche said was that he had some things to add *(A & S Tr., pg. 14, lines 6 to 8)*. Reimche then added, among other facts, that Beesley and Frounfelter were injured by his use of a knife *(A & S Tr., pg. 15, lines 5 to 8)*. The district court then found a sufficient factual basis to accept Reimche's pleas of guilty to the charges (*A & S Tr., pg. 15, lines 9 to 11*). The court then addressed the issue of finding Reimche to be a dangerous special offender, wherein the State argued that Reimche's use of the knife seemed disproportionate to the threat posed and referenced the pre-sentence investigation report stating the defendant's propensity to be mentally abnormally dangerous as relates to his past behavior and criminal history (*A & S Tr., pg. 15, line 19 to pg. 16, line 6*). Reimche then characterized the stabbings as a split-second decision stemming from his schizophrenic girlfriend's scream (*A & S Tr., pg. 16, line 21 to 23*) and that it's inappropriate to tack on the special dangerous offender provision since it wasn't originally charged out in the

complaint (*A & S Tr., pg. 17, line 5 to 9*). The district court judge then stated that the fact that Reimche used a knife was undisputed and found that a knife is, obviously, a dangerous weapon and was not being used in self-defense or anything of that nature (*A & S Tr., pg. 17, line 20 to pg. 18, line 7*). Reimche then objects based upon the special dangerous offender provision not being charged out in the original complaint and asserts the defense of defense of another *(A & S Tr., pg. 18, lines 8 to pg. 19, line 2)*, to which the State argues about the propriety of the defense of another defense (*A & S Tr., pg. 19, line 3 to pg. 20, line 2)*. The district court stated its findings that Reimche used a dangerous weapon and that the statute requires no more than that to find that Reimche is a special dangerous offender (*A & S Tr., pg. 20, lines 3 to 20)*. Reimche ironically argues that he has taken responsibility for his actions by entering the guilty pleas (*A & S Tr., pg. 27, lines 16 to 17*) and then blames alcohol and drugs for his actions *(A & S Tr., pg. 31, lines 3 to 7)*. The district court then states its strong concern that a dangerous weapon was used and that a death "was a definite possibility here" *(A & S Tr., pg. 31, line 25 to pg. 32, line 5)*.

Argument

I. Whether the section 12.1-32-09, N.D.C.C. notice filed by the State complied with the requirements of section 12.1-32-09, N.D.C.C.?

The first issue Reimche presents is whether the section 12.1-32-09, N.D.C.C. notice filed by the State complied with the requirements of section 12.1-32-09, N.D.C.C., an issue not raised at the trial level. It is fundamental that a trial court must be given an opportunity to rule on issues, except jurisdictional issues, before

they can be made issues on appeal. State v. Wells, 265 N.W.2d 239, 242 (ND 1978), citing State v. Haakenson, 213 N.W.2d 394 (N.D. 1973). "One who fails to raise an appropriate objection at the trial court level waives his right and cannot raise the issue for the first time on appeal". State v. Palmer, 2002 ND 5, P8; 638 N.W.2d 18. See State v. Olander, 1998 ND 50, P11, 575 N.W.2d 658 and N.D.R.Crim.P. 12(f). More specifically, the court has "repeatedly held that defendants who voluntarily plead guilty waive the right to challenge defects that occur before the entry of the guilty plea", State v. Mora, 2000 ND 179, P22, 617 N.W.2d 478, including alleged violations of constitutional rights, Id. at P22, citing State v. Slapnicka, 376 N.W.2d 33 (N.D. 1985). The section 12.1-32-09, N.D.C.C. notice was filed before the entry of the guilty plea. (*Register of Actions, No.* 15). Reimche objected to the section 12.1-32-09, N.D.C.C. notice not being in the complaint (A & S Tr., *pg. 17, line 5 to 9*) but section 12.1-32-09, N.D.C.C. does not require that it be put in the complaint. Reimche at no time objected to the wording of the notice at the trial level. Since Reimche voluntarily plead guilty and did not raise this grammar issue at the trial court level, questioning it should not be allowed. (*A & S Tr., pg. 15, lines 9 to 11*).

What makes the appellate review of this issue even more questionable is whether Reimche can raise this issue not raised at the trial court level when Reimche acknowledged the section 12.1-32-09, N.D.C.C. notice as valid pursuant to a plea agreement. "Under our rules, a plea agreement includes situations in which the defendant agrees to plead guilty in exchange for dismissal of charges or the

non-binding recommendation of a particular sentence. State v. Farrell, 2000 ND 26, P16, 606 NW.2d 524, citing N.D.R.Crim.P. 11(d)(1). "Accepting the guilty plea without accepting the plea agreement is not an option because the plea itself is predicated on the acceptance of the binding plea agreement. The viability of the plea agreement controls the viability of the plea." State v. Klein, 1997 ND 25, 560 N.W.2d 198, 202. The plea agreement into which the State and Reimche entered was that the State would move to dismiss the attempted murder charge in exchange for Reimche pleading guilty to the two counts of aggravated assault with the State making the sentencing recommendation it did, which included the applicability of section 12.1-32-09, N.D.C.C., with sentencing being decided by the trial court. *(A & S Tr., pg. 8, line 3 to pg. 12, line 21)* By entering into a plea agreement where Reimche acknowledged his awareness of the section 12.1-32-09, N.D.C.C. notice, Reimche waived his right to claim lack of notice or deficient notice. By agreeing to have the section 12.1-32-09, N.D.C.C. decided by the trial court as part of the plea agreement, Reimche waived his right to appeal the trial court's decision. For the appellate court to consider this wording issue and allow Reimche to invalidate the terms of the plea agreement without invalidating the guilty plea is prejudicial and creates a manifest injustice to the State, thereby warranting a remand rejecting the guilty plea if the appellate court accepts Reimche's plea agreement rejection.

Reimche is, however, arguing that this verb issue is jurisdictional, thereby making it possible for the court to review it for the first time, despite the terms of

the plea agreement, because Reimche feels the notice was insufficient to notify him that he is a dangerous special offender subject to sentencing as such upon conviction for a felony. In essence, what Reimche is arguing is he failed to receive notice because the verbs the State used in the section 12.1-32-09, N.D.C.C. notice were those generally used in a motion rather than those used in a pleading allegation despite the fact that N.D.R.Crim.P. Rule 12(a) limits pleadings in criminal proceedings to the indictment, information, and complaint in district court and the pleas of not guilty and guilty. The applicable standard of review for a jurisdictional issue is whether the deferential wording of the State's 12.1-32-09, N.D.C.C. notice is erroneous and, if so, whether such error is harmless error or obvious error affecting the defendant's substantial rights in the action of the trial court. Obvious error is one which is "prejudicial or affects the outcome of the proceedings." State v. Gleeson, 2000 ND 205 P8, 619 N.W.2d 858, citing N.D.R.Crim.P. Rule 52(b). "The appellate court exercises its power to notice obvious error cautiously and only in exceptional circumstances where the accused has suffered serious injustice. In analyzing obvious error, the prior decisions require examination of the entire record and the probable effect of the alleged error in light of all the evidence. The appellate court has rarely noticed obvious error under N.D.R.Crim.P. Rule 52(b)." Olander, 1998 ND 50 P12, 575 N.W.2d 658. "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." N.D.R.Crim.P. Rule 52(a). "To be a jurisdictional defect, any irregularity in the notice must be an essential part of

proving no notice... was given". Peplinski v. County of Richland, 2000 ND 156, P14, 615 N.W.2d 546. The court further states that no substantial right is affected if a defendant has notice of what the State was seeking because there is no legitimate basis for a claim of surprise. Mora, 2000 ND 179, P15, 617 N.W.2d 478. The verbs Reimche attacks in the State's 12.1-32-09, N.D.C.C. notice are not erroneous because only the trial court, not the State, is empowered by section 12.1-32-09(4)(a), N.D.C.C. to make the determination of whether Reimche *is* a dangerous special offender who upon conviction for the felony *is* subject to the imposition of a sentence under section 12.1-32-09(2), N.D.C.C. after finding that Reimche used a dangerous weapon in the commission of the aggravated assaults to which he plead guilty. Unlike the complaint challenged in State v. Gahner, 413 N.W.2d 359, 361 (N.D. 1987) that Reimche cites, the State's section 12.1-32-09, N.D.C.C. notice adequately notified Reimche of the State's intentions and the verbs attacked were not an essential part of providing such notice. The variance in the unambiguous wording did not prejudice Reimche in a way that made him unable to prepare his defense or otherwise failed to inform him of the exact nature of finding the State sought, thereby providing him with sufficient notice. The State's respect for the judiciary's powers inherent in the notice's wording did not affect the outcome of the proceedings or cause Reimche serious injustice. Without such a showing of prejudice or an affect upon the proceeding's outcome, any error found in the notice's wording variance is harmless.

Regarding Reimche's citation of State v. Sheldon, 312 N.W.2d 367, 369 (ND

1981), Reimche omits from his argument that the Supreme Court was addressing the legislature's "obligation to state its intentions as clearly as possible", i.e. void for vagueness issues, in strictly construing penal statutes. Id. at 369-370. The State's section 12.1-32-09, N.D.C.C. states that it "provides notice that the State is requesting a finding that a defendant is a dangerous special offender who upon conviction for the felony charged should be subject to the imposition of a sentenced stated in section 12.1-32-09(2) N.D.C.C. because the defendant used a dangerous weapon in the commission of the offense charged, namely a knife". *Appendix, pg. 5.* The State's section 12.1-32-09, N.D.C.C. notice or the statute prompting it is not vague or ambiguous for the reasons Reimche states.

II. Whether the district court's dangerous special offender finding is clearly erroneous?

The second issue Reimche presents is whether the district court's fact finding that a knife he used to perpetrate an aggravated assault on two people was a dangerous weapon so that Reimche could be sentenced as a dangerous special offender pursuant to section 12.1-32-09(1)(e), N.D.C.C. The applicable standard of review of this issue is the clearly erroneous standard. "A finding of fact is clearly erroneous when it is induced by an erroneous view of the law, when there is no evidence to support it, or when, although there is some evidence, on the entire evidence, the appellate court is left with a definite and firm conviction a mistake has been made." State v. Schmitt, 2001 ND 57, P12, 623 N.W.2d 409. Section 12.1-01-04(6), N.D.C.C. states that a dangerous weapon "means, but is

not limited to, any switchblade or gravity knife, machete, scimitar, stiletto, sword, or dagger...." Words used in a statute should be construed in their plain, ordinary, and commonly understood sense. Section 1-02-02, N.D.C.C. The Oxford American dictionary definition of dangerous means "causing danger", with the definition of danger being "1. liability or exposure to harm or to death; 2. a thing that causes this". Oxford American Dictionary, 160 (Oxford University Press, Inc., 1980). Although the knife itself was never introduced into evidence, when the State and Reimche stated the sufficient factual basis supporting his pleas of guilty to two counts of Aggravated Assault, in violation of section 12.1-17-02, N.D.C.C., a class C felony, Reimche never disputed that he used a knife as described in section 12.1-01-04(6), N.D.C.C. to stab Beesley and Frounfelter, which stabbing caused them to be taken by ambulance to the hospital where they both were diagnosed with hemopneumothorax, more commonly known as a sucking chest wound. (*A & S Tr., pg. 13, line 9 to pg. 15, line 12*). A knife that causes a sucking chest wound, under the dictionary definition, clearly causes exposure to harm or to death, since the victims were essentially inhaling their own blood, which facts alone made introduction of the knife itself superfluous. Moreover, section 12.1-32-09(4)(a), N.D.C.C. does not require an evidentiary hearing subsequent to a finding of guilt when the section 12.1-32-09, N.D.C.C. notice alleges only subdivision e of subsection 1, which makes sufficient the facts stated in order for the court to accept Reimche's guilty plea. The trial court's finding of fact that the knife was a dangerous weapon clearly was not erroneous.

CONCLUSION

Because no reversible error of law appears, the judgment of the district court is based upon findings of fact that are not clearly erroneous, the judgment is supported by substantial evidence, and the appeal is frivolous and completely without merit, the State requests the summary affirmation of the McHenry County District Court's Second Amended Criminal Judgment And Commitment With Finding That Defendant is a Dangerous Special Offender.

Respectfully submitted this 28th day of May, 2004.

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STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF MCHENRY NORTHEAST JUDICIAL DISTRICT

State of North Dakota, Case number: 03-K-186.187

Plaintiff. 20040002

AFFIDAVIT OF SERVICE BY MAIL

Vs.

Tracy Reimche.

Defendant.

I, Delores Gardner, being duly sworn, do state the following:

I am a citizen of the United States of America, over the age of eighteen years, and am not a party to nor interested in the above-captioned action, and June 1 2004, I served the attached corrected Appellee's Brief dated May 28, 2004, this affiant deposited in the mailing department of the United States Post Office in Towner, ND, a sealed envelope with postage prepaid.

That said envelope was addressed to the following person(s) at this last known address as follows: Bill Hartl
PO Box 319
Rugby, ND 58368

Dated June 2, 2004.

Delores Gardner

Subscribed and sworn to before me this 2nd day of June, 2004.

Notary Public

LORRAINE MYERS
Notary Public
State of North Dakota
My Commission Expires Jan. 30, 2010

McHENRY COUNTY
STATES ATTORNEY
Towner, North Dakota 58788