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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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NOV 27 2007

State of North Dakota, )  
Plaintiff/Appellee, ) Supreme Court No. 20070172  
vs. )  
Spencer Kelly Brandt, ) District Court No. 05-K-2597  
Defendant/Appellant. )

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APPEAL FROM CRIMINAL JUDGMENT AND  
AMENDED CRIMINAL JUDGMENT  
DATED MAY 17, 2007  
OF NORTHWEST JUDICIAL DISTRICT  
THE HONORABLE DOUGLAS L MATTSON, PRESIDING

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**APPELLEE'S BRIEF**

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ISSUES PRESENTED TO REVIEW

- I. Whether the trial court erred in instructing the jury.
- II. Whether the trial court erred in determining the knife used in this case was a "dangerous weapon."

## ARGUMENT

### I. Whether the trial court erred in instructing the jury.

Jury instructions must be considered as a whole to determine whether they fairly and adequately advise the jury of the applicable law. Hawes v. N.D. Dept. of Trans., 2007 ND 177, ¶4; State v. Schneider, 550 N.W.2d 405, 407 (N.D. 1996), *citations omitted*. Taken as a whole, the instructions “must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury.” Schneider, 550 N.W.2d at 405. The trial court is “not required to instruct the jury in the exact language sought by a party so long as the instructions are not misleading or confusing but fairly advise the jury of the law”. Hawes, 2007 ND 177, ¶4. Jury instructions are sufficient when they correctly advise the jury on the law even though part of the instructions, standing alone, may be insufficient or erroneous. Id., *citations omitted*. The instructions on “Proof Beyond a Reasonable Doubt” and “Presumption of Innocence and Burden of Proof” should be read together for this analysis.

A court must instruct the jury on the state’s burden of proof beyond a reasonable doubt. Schneider, 550 N.W.2d at 407. However, “no particular form of words” is required. Id. Indeed, the United States Constitution does not require or prohibit an instruction defining “reasonable doubt.” Id.

Rather, the instructions must correctly convey the concept of reasonable doubt. Id. It is the State's position that the pattern instructions regarding "Presumption of Innocence and Burden of Proof" and "Proof Beyond a Reasonable Doubt" correctly convey those concepts to the jury.

The proper inquiry in a constitutional challenge to a jury instruction is not whether the instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it. Victor v. Nebraska, 511 U.S. 1, 6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). A mixed verdict, such as in this case, where the jury convicted on two charges, compromised on one and acquitted on another, suggests the jury was not misled or confused about the reasonable doubt standard. State v. Schneider, 550 N.W.2d 405, 409 (N.D. 1996).

Brevity of an instruction alone is not error. U.S. v. Bowman, 798 F.2d 333, 336 (8<sup>th</sup> Cir. 1986). A trial court's clear instruction to the jury that it must regard the defendant as innocent until proven guilty, regardless of how brief, is sufficient. Id. Where the trial court advises the jury that the prosecution bears the burden of proving the defendant's guilt, and repeatedly refers to that burden throughout the instructions, the instructions on presumption of innocence, burden of proof and reasonable doubt have been

found to be sufficient. Id. at 337. The pattern instruction on "Presumption of Innocence and Burden of Proof" given in this case makes three references to the State's burden of proof beyond a reasonable doubt.

The "Proof Beyond a Reasonable Doubt" pattern instruction directs jurors to convict only on a "firm and abiding conviction of the defendant's guilt." (App. 19). The instruction further directs the jury to make a "full and fair consideration of the evidence presented in the case and not from any other source." The United States Supreme Court has expressed its satisfaction that such language is sufficient to "impress upon the fact-finder the need to reach a subjective state of near certitude of the guilt of the accused." Victor, 511 U.S. at 15-16.

The pattern instructions are drafted and reviewed by the instruction committee after consideration of applicable North Dakota and United States Supreme Court precedent. Those precedents have determined instruction language advising the jury "to determine the facts of the case from the evidence received in the trial and not from any other source" in terms of "an abiding conviction as to guilt" (Victor v. Nebraska, 511 U.S. 1, 15-16 (U.S. 1994)), without reference to "mere possible doubt, or an imaginary or fanciful doubt" (State v. Schneider, 550 N.W.2d 405, 408 (N.D. 1996)), to correctly

convey the concept of reasonable doubt to the jury. The North Dakota pattern instructions, employing just such language, correctly convey the concept of reasonable doubt to the jury. Schneider, 550 N.W.2d at 410.

The North Dakota pattern instructions on "Proof Beyond a Reasonable Doubt" and "Presumption of Innocence and Burden of Proof" fairly and adequately advise the jury of these legal concepts. Neither instruction is misleading nor confusing. The jury demonstrated its understanding of the law by voting to convict on three charges and to acquit on one.

II. Whether the trial court erred in determining the knife used in this case was a "dangerous weapon."

The defendant was charged, in count one, with aggravated assault, in violation of N.D.C.C. 12.1-17-02, for inflicting bodily injury with a dangerous weapon. The Information in this case was not defective in that it advised the defendant of each of the essential elements of the offense of aggravated assault, including culpability requirement (knowingly), attendant circumstances (use of a knife indicating an intent or readiness to inflict serious bodily injury), required result (bodily injury) and forbidden conduct (caused said injury). State v. Gwyther, 1999 ND 15, ¶15, 589 N.W.2d 575.

The jury was instructed as to the definition of "dangerous weapon" consistent with N.D.C.C. 12.1-01-04(6), with the added definition of "knife with a blade of five



inches" coming from N.D.C.C. 62.1-01-01. The definition includes "stiletto" and "dagger," both of which are different style knives. Defendant failed to object to the instruction. (Tr. 642-643).

Section 12.1-01-04(6), N.D.C.C., provides that the list of items constituting a dangerous weapon "is not limited to" the items enumerated. It would be impossible to list every conceivable weapon in a definition. An ice pick, a hammer, a chair, a baseball bat and a cast iron skillet could all be used as weapons. In State v. Wika, the weapon was a butcher knife which is not listed in the criminal code definition of "dangerous weapon", nor is it designed to be used as a weapon, but as a kitchen utensil. State v. Wika, 574 N.W.2d 831 (N.D. 1998). A toy weapon and an unloaded weapon have subjected defendants to aggravated penalties under N.D.C.C. 12.1-32-02.1. See State v. Clinkscales, 536 N.W.2d 661 (N.D. 1995), State v. Meier, 447 N.W.2d 506 (N.D. 1986).

An object need not be inherently dangerous or a "weapon" by definition to be found to be a dangerous and deadly weapon. See U.S. v. Moore, 846 F.2d 1163, 1166 (8<sup>th</sup> Cir. 1988) (decision based on definition in federal code of dangerous weapon as an object "used in a manner likely to endanger life or inflict serious bodily harm"). What makes an object a weapon is not necessarily that the object used is designed to

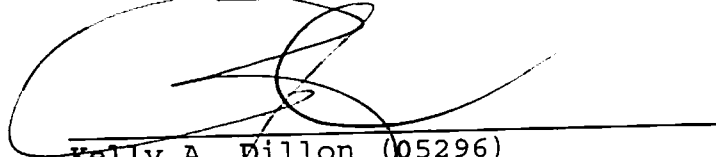
inflict serious bodily injury, but rather the manner in which it is used. Id. Similarly, the ultimate injury inflicted is not determinative of whether an instrument, as used, constitutes a dangerous weapon. See U.S. v. Johnson, 324 F.2d 264, 266 (4<sup>th</sup> Cir. 1963). A nick or graze wound caused by a bullet fired from a rifle does not make the use of the firearm any less an aggravated assault.

Whether the defendant used a "dangerous weapon" is a question for the trier of fact. State v. Schweitzer, 510 N.W.2d 612, 614 (N.D. 1994), State v. Clinkscales, 536 N.W.2d 661, 665 (N.D. 1995). The defendant did not object to the introduction of the knife into evidence. (Tr. 524). Nor did he argue at the trial level that it did not constitute a "dangerous weapon." The jury in this case found the defendant used a dangerous weapon as evidenced by the verdict. Sentencing under N.D.C.C. 12.1-32-02.1 is mandatory when an essential element of the offense is the use of a weapon. Wika, 1998 ND 33, ¶10. Thus, the sentence imposed was mandatory.

#### CONCLUSION

WHEREFORE, the State requests that Judgment be in all things affirmed.

Respectfully submitted this 27<sup>th</sup> day of November, 2007.



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STATE OF NORTH DAKOTA

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State of North Dakota, )  
 Plaintiff/Appellee, ) Supreme Court No. 20070172  
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 vs. ) District Court No. 05-K-2597  
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 Spencer Kelly Brandt, ) AFFIDAVIT OF SERVICE BY MAIL  
 Defendant/Appellant.)

LeAnn Westereng, being first duly sworn, deposes and says:

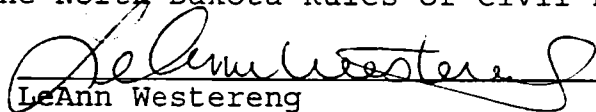
That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 27<sup>th</sup> day of November, 2007, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

APPELLEE'S BRIEF

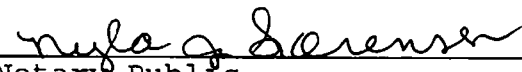
That said envelope was addressed to the following person at his address as follows:

JESSICA J AHRENDT  
ATTORNEY AT LAW  
PO BOX 475  
VALLEY CITY ND 58072-0475

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

  
 \_\_\_\_\_  
 LeAnn Westereng

Subscribed and sworn before me this 27<sup>th</sup> day of November, 2007 by LeAnn Westereng.

  
 \_\_\_\_\_  
 Notary Public

