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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

June 6, 2012

State of North Dakota, Plaintiff-Appellee, vs. Gene Kirkpatrick, Defendant-Appellant.	District Court No.09-2009-cr-3845 Supreme Court No. 2011-0312

APPEAL FROM DISTRICT COURT, COUNTY OF CASS, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN MARQUART PRESIDING

BRIEF OF APPELLANT

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I. The District Court Erred by not suppressing the Defendant's involuntary statement.

II. Insufficient Evidence for Conspiracy to commit burglary.

III. District Court erred by issuing jury instructions not consistent with the charging document.

IV. District Court Erred by refusing to issue a jury instruction on extreme emotional disturbance.

STATEMENT OF THE CASE

[¶ 4] On November 3, 2009, Gene Kirkpatrick was charged by way of information with conspiracy to commit murder and conspiracy to commit burglary. On November 27, 2009 the State filed an amended information in this case. The amended information was substantially the same as the original; it only added reference to the conspiracy statute under the "penalty section" of count 1.

[¶ 5] On July 28, 2011, Kirkpatrick was convicted at trial on both felony counts. On October 10, 2011, the Honorable Judge Steven Marquart sentenced Kirkpatrick to life in prison without the possibility of parole. (T. at 57-58).

[¶ 6] On October 19, 2011, the Defendant filed his notice of appeal with the district court. This appeal follows.

STATEMENT OF THE FACTS

Facts Prior to finding Phillip Guttuso Dead

[¶ 7] (The following facts are generally undisputed; they develop throughout the course of the trial.) Prior to August 10, 2007, Valarie Guttuso, the daughter of Gene Kirkpatrick was married to Phillip Guttuso. They had a young daughter named K. On August 10, 2007, Valarie Guttuso was to have surgery to replace a defective heart valve. The surgery was supposed to be routine; however it went badly. That night Valerie was rushed to the University of Minnesota for life saving surgery. Over the next 19 months, Valerie's condition worsened. Her heart did not function properly. She had what was described as 4 garden hoses coming out of her chest attached to a machine in order to supply her body with

blood. By all accounts, Valerie's death was extremely long, drawn-out, tragic, and painful to those close to her. Furthermore, by all accounts, Valerie's death was especially difficult for Gene Kirkpatrick.

[¶ 8] During the course of Valerie's illness, Valerie's daughter [K] lived with and was taken care of by Valerie's sister Reagan and her family in Oklahoma. After Valerie's death, Phillip Guttuso traveled to Oklahoma to retake custody of [K] and return to North Dakota. Again, by all accounts, this was especially devastating for Gene Kirkpatrick who had come to think of [K] as his "little Valerie."

Facts Subsequent to finding Phillip Guttuso Dead

[¶ 9] On October 26, 2009, the body of Phillip Guttuso was found in his residence in Fargo, North Dakota. (T at 76-78). Guttuso had apparently been beaten to death with a hammer. (T. at 110-111). Subsequent investigation led law enforcement to believe Michael Nakvinda was the perpetrator of the attack. (T. at 127). Nakvinda was tried for the murder of Guttuso and found guilty. *See generally* State v. Nakvinda, 2011 ND 217, 807 N.W. 2d 204.

[¶ 10] Law enforcement learned that Nakvinda had worked as a handy man occasionally for Kirkpatrick. (T. at 128).

[¶ 11] Law enforcement met with Kirkpatrick in Oklahoma on October 31, 2009. (T. at 129-130). At that meeting law enforcement falsely informed Kirkpatrick that Nakvinda had implicated him in a plot to kill Guttuso. (T. at 134). Kirkpatrick then made statements that could be considered inculpatory.

[¶ 12] During the course of the investigation all the way through trial, Nakvinda made no statements that were presented in the Kirkpatrick case. At trial the State provided adequate evidence to show that Nakvinda did indeed travel to Fargo and commit the murder.

[¶ 13] The only evidence presented at trial linking Kirkpatrick to the murder was the audio recording of the statement Kirkpatrick made to police on October 31, 2009.

JURISDICTIONAL STATEMENT

[¶ 14] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI, § 8, N.D.C.C. §§ 27-05-06 (4), and 40-18-19. This Court has jurisdiction over this appeal under N.D. Const. art. VI, § 6, N.D.C.C. §§ 29-28-06 (1), and 29-28-06 (2). This appeal is timely under N.D.R.App.P. 26 and N.D.R. App. P. 4(b)(1).

LAW AND ARGUMENT

I. The District Court Erred by not suppressing the Defendant's involuntary statement.

[¶ 15] The standard of review of a district court's denial of a motion to suppress evidence is well established. State v. Hayes, 2012 ND 9, ¶11, 809 N.W.2d 309. The Supreme Court "defer[s] to the district court's findings of fact and resolve[s] conflicts in testimony in favor of affirmance." State v. Smith, 2005 ND 21, ¶11, 691 N.W. 2d 203. The Supreme Court will affirm a district court's decision if "there is sufficient competent evidence fairly capable of supporting the

trial court's findings, and the decision is not contrary to the manifest weight of the evidence." City of Fargo v. Thompson, 520 N.W. 2d 578, 581 (N.D. 1994).

[¶ 16] An involuntary statement may be attacked under the Fifth Amendment either under the privilege against self-incrimination or under the Due Process Clause. It is well settled that a statement or confession being challenged on due process grounds is examined for voluntariness. *See, e.g.* State v. Crabtree, 2008 ND 174, ¶ 12, 756 N.W.2d 189, 192. The Supreme Court has stated that "a confession is voluntary if it is the product of the defendant's free choice, rather than a product of coercion." Id. Moreover, "voluntariness is determined by examining the totality of the circumstances surrounding the confession." Id. The Court has stated that "a voluntariness inquiry focuses on two elements: '(1) the characteristics and condition of the accused at the time of the confession and (2) the details of the setting in which the confession was obtained.'" Id. (citing State v. Pickar, 453 N.W.2d 783, 785 (N.D. 1990). But as the Court stated in Crabtree, "no single factor is determinative." 2008 ND 174, ¶ 12, 756 N.W.2d at 192. Furthermore, the Court has further developed the two elements of an involuntary confession; stating that "among the relevant factors related to the characteristics of the accused are the age, sex and race of the suspect, his or her education level, physical or mental condition and prior experience with the police" and " the traditional incidences of coercive police misconduct" which are "an important component of the details of the setting in which the confession was obtained, . . . includ[ing] the duration and conditions of detention, the attitude of the police

toward the defendant and the diverse pressures which sap the accused's powers of resitance or self-control." Pickar, 453 N.W.2d at 785-786. In State v. Discoe the Supreme Court affirmed the trial court's suppression based on its findings that during the questioning the defendant: "had been awake for well over 24 hours, . . . had participated in substantial drinking prior to being questioned, . . . was in some pain as a result of a laceration to one of his hands . . . was suffering from the after-effects of drinking . . . [and because] the interview was conducted at the . . . police department . . . and the defendant was not prepared to embark on an interview at that time . . . and he was never told that he could remain or could leave, but the balance of the circumstances were such as to cause him to infer that he could not leave." In summation, the trial court stated that the "Defendant's self-determination was critically impaired" and that "Defendant was the victim of unequal confrontation." State v. Discoe, 334 N.W.2d 466, 469-470 (ND 1983).

[¶ 17] In Connelly the United States Supreme Court reversed the district court's and the state supreme court's decisions that "the mental state of the defendant, at the time he made the confession, interfered with his 'rational intellect' and his 'free will'" and therefore his confession should be suppressed. Colorado v. Connelly, 479 U.S.157, 159 (1986). In so ruling however, the Court reasoned that "by virtue of the Due Process Clause 'certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.'" Id. at 163 (citing Miller v. Fenton, 474 U.S. 104, 109 (1985)). In

fact, the Court went so far as to note "that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." Id. at 164.

[¶ 18] In Spano v. New York, the U.S. Supreme Court reversed the Defendant's conviction based on his involuntary confession. In reaching that conclusion, the Court noted the following: (1) law enforcement officers tried to befriend Spano; (2) Spano was repeatedly lied to by officers; (3) Spano was questioned by more than one law enforcement officer; (4) the questioning was not conducted during normal business hours; and (5) mounting fatigue influenced Spano's statement. Spano v. New York, 360 U.S. 315, 322-323(1959). The Court held, "[w]e conclude that petitioner's will was overborne by official pressure, fatigue, and sympathy falsely aroused after considering all the facts." Id. at 323.

[¶ 19] In Pickar, the Supreme Court focused on the two elements of the totality of circumstances test for voluntariness. In affirming the trial court's suppression, the Court first considered the characteristics of the accused and noted that the defendant was "emotionally distressed at eth time of the interrogation" as was shown by his "suicidal state." 453 N.W.2d at 786. Moreover, the defendant had been "a close personal friend of the two deceased [victims] and [the defendant] had tears in his eyes or was whimpering." Id. Additionally, there was "nothing in the record to indicate that [the defendant[had prior experiences with police practices." Id. Finally, the Court considered the fact that the defendant was

suffering from injuries sustained during the accident in question and that the record showed that the officers were aware of this at the time of the interrogation. Id.

[¶ 20] Next, the Court looked at the setting of the confession by examining the police conduct. The Court examined the trial court's reliance on the duration of the questioning, one hour forty-five minutes, the psychological pressure exerted by the officers on the defendant, they urged the defendant to put his conscience at ease and confess for himself and everyone else, and they promised benefits offered by the officers in exchange for a confessions, including that he could "derive solace from easing the minds of the families" and that officers were not out to get him. Id. at 786-787. In its consideration of these factors, the Court noted that "psychological pressure is not examined in a vacuum, without consideration of its impact on the defendant or tis cumulative effect when used in combination with other interrogation techniques." Id. at 787.

[¶ 21] In Tallion, the Supreme Court was again faced with the voluntariness of a confession and again the Court affirmed the trial court's decision to suppress. State v. Tallion, 470 N.W.2d 226, 228 (ND 1991). Examining the record, the Court noted that the "district court emphasized the defendant's education level and mental condition" and that the defendant "expressed considerable anxiety over his pregnant wife's reaction to his involvement in the murder investigation." Id. at 228-229. The Court also noted the district court's reliance on the conditions under which the confession was given;

an hour and fifteen minute session in a small room with the defendant's back against the wall, the door closed and the interrogator in close proximity. Id at 229. Coupling those factors with the interrogator's methods, including his constant prodding that the defendant "would feel better once he told the truth," the continual reassurances that he as only there to help the defendant, repeatedly telling the defendant that he was lying, and the use of "extreme sympathy and paternalism," the Supreme Court summarily found that the evidence was sufficient to support the district court's ruling that the voluntariness requirement of the Fifth Amendment had not been met. Id.

[¶ 22] In yet another voluntariness case, the Supreme Court in Bjornson, simplified the voluntariness test by stating that "a confession is the product of coercion if the defendant's will is overborne when the confession is given." State v. Bjornson, 531 N.W. 2d 315 (ND 1995). The Court went on to find that he defendant's will was not overborne because he was not "suffering from a physical or mental condition at the time of questioning," "he was not found to be immature or uneducated," and "there was no finding he was deprived of food or sleep." Id. at 318-319.

[¶ 23] On January 27, 2011, a motion hearing was held on this issue. The State called Detective Lies, one of the interviewers, as its only witness. The court delivered its opinion orally at the close of the motion hearing. (T. of Motion Hearing at 71-76).

[¶ 24] In its ruling the court simply disregards any testimony that should have been construed in favor of the Defendant. (T. of motion hearing at 71-76). The facts of this case more closely resemble the facts of Pickar. In Pickar the defendant was suffering from extreme emotional distress. In this case Detective Lies testified that Kirkpatrick was very distraught over losing first his daughter over a period of 19 months and then losing his granddaughter. Detecive Lies even testified that Kirkpatrick "choked up" during the interview.

[¶ 25] In Pickar, the Court found that Mr. Pickar had no prior experience with law enforcement; the same is true of Kirkpatrick. Pickar was suffering from the physical injuries of an accident. In this case there are no physical injuries, however, Kirkpatrick had traveled over 14 hours from Fargo to Oklahoma, there was testimony that Kirkpatrick had eaten only prior to leaving for his trip.

[¶ 26] In this case an interview took place in a small room where Kirkpatrick was seated against the far wall from the door with two police officers sitting between him in the door. One officer was in full uniform and the other with his gun and badge on his belt. The room was so small that in order for one person to leave, Detective Lies had to stand up and move to allow exit. Furthermore, officers lied to Kirkpatrick and used other interrogation techniques such as displaying empathy and appealing to Kirkpatrick's conscience. Surely the extent of the outside influence overbore Kirkpatrick's will. This interview had clearly changed from voluntary to prior to Kirkpatrick making any statements that could

be considered incriminating. Because of that, the districts court ruling was erroneous and the recorded statement should be suppressed.

II. Insufficient Evidence for Conspiracy to commit burglary.

[¶ 27] The Supreme Court's standard of review for claims of insufficiency of evidence is well established. State v. Nakvinda, 2011 ND 217, ¶ 12, 807 N.W. 2d 204.

> When the sufficiency of evidence to support a criminal conviction is challenged, [the Supreme Court] merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. When considering insufficiency of the evidence, [the Supreme Court] will not reweigh conflicting evidence or judge the credibility of witnesses. . . . A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty.

State v. Kinsella, 2011 ND 88, ¶ 7, 796 N.W.2d 678. When the verdict is attacked and the evidence is legally sufficient to sustain the verdict, [the Supreme Court] will not disturb the verdict and judgment even though the trial included conflicting evidence and testimony. Hochstetler v. Graber, 78 N.D. 90, 93, 48 N.W.2d 15, 18 (1951).

[¶ 28] In the case at hand, the only evidence linking Kirkpatrick to the actions of Nakvinda is the audio recording of the statement made by Kirkpatrick on October 31, 2009. In the recording Kirkpatrick maintained that the talk between him and Nakvinda was akin to "locker room talk." However, when viewed in the light most favorable to the jury verdict, the recording can be

interpreted as evidence of an agreement between the two to kill Guttuso. However, there is absolutely nothing in the tape that indicates that a burglary of any sort is to take place.

N.D.C.C. 12.1-22-02 defines burglary in North Dakota. It states,

> A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited or otherwise privileged to enter or remain as the case may be, with the intent to commit a crime therein.

[¶ 29] In the case at hand there was no evidence presented that Nakvinda entered the premises in question without license. In fact no there was testimony that there was no evidence whatsoever of a forced entry. It is perfectly conceivable that Nakvinda did receive license from Guttuso prior to murdering him through guile or other means. While that idea is no less repugnant to society, it is true that it just isn't a burglary. In its closing the State explained the situation,

> There's no testimony here as to how Michael Nakvinda got into Phillip Guttuso's home. It could - - but I think Detective Lies indicated that there were no signs of a break-in. In other words, Locks weren't broken, windows weren't broken, doors weren't broken. It could be that he left his garage door open and he got in there. It could be that he knocked on the door and said, hi, I'm a friend of Gene Kirkpatrick's. I'm passing through. Could I use your toilet? I don't know what it was.

(T. at 806-807). As the State correctly points out, there is absolutely no evidence in this case that Nakvinda entered Guttuso's dwelling without license. To say he did would only be an assumption. Furthermore, the State argues that once Nakvinda killed Guttuso, any activity thereafter serves to satisfy the "surreptitiously remains" portion of the burglary statute. Once again, the State

relies on assumption for this premise. Surely the surreptitiously remained prong of the burglary statute is designed in reaction to one who would hide in a home or business in order to commit a crime therein later, not those who are leaving premises from where they have just committed a crime. Furthermore, there is absolutely no testimony about whether Nakvinda actually did surreptitiously remain after the murder. There was no testimony offered about the actions taken during that timeframe whatsoever.

[¶ 30] Moreover, there is even less evidence that there was a conspiracy to commit burglary. N.D.C.C. 12.1-06-04 states,

> [a] person commits conspiracy if he agrees with one or more persons to engage in or cause conduct which, in fact, constitutes an offense or offenses, and any one or more of such persons does an overt act to effect an objective of the conspiracy. The agreement need not be explicit but may be implicit in the fact of collaboration or existence of other circumstances.

In the case at hand, there is absolutely no evidence of an agreement between Nakvinda and Kirkpatrick to commit burglary. The agreement is essential to the crime charged. Without at least some showing of evidence of an agreement there is simply no evidence capable of sustaining the verdict of the jury for this charge.

III. District Court erred by issuing jury instructions not consistent with the charging document.

[¶ 31] The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy right to be informed of the nature and cause of the accusation," and is made applicable to the states through the fourteenth amendment. *See* Gannett Company, Inc. v. DePasquale, 443 U.S. 368, 379 (1979).

In addition, the due process clause of the Fourteenth Amendment itself provides the accused with a "clearly established" right to notice of the charges and a "chance to be heard in a trial of the issues raised by that charge." *See* Cole v. Arkansas, 333 U.S. 196, 201 (1948). The Supreme Court applies a "de novo standard of review to a claim of a constitutional violation. State v. Aguero, 2010 N.D. 210, ¶16, 791 N.W.2d 1.

[¶ 32] The State filed an information November 3, 2009, charging Kirkpatrick, in part, with conspiracy to commit burglary. (The State filed an amended information on November 27, 2009, however, the amended information did not alter the conspiracy to commit burglary count in any way.) The amended information charges Kirkpatrick with what appears to be conspiracy to commit what would be commonly known as "felony murder". The document states in part

> The above named defendant, agreed with one or more people, explicitly or implicitly, to engage in or cause conduct, which in fact constitutes the crime of murder, and any one or more of such persons does an overt act to effect an object of the conspiracy by willfully committing or attempting to commit robbery and/or burglary and in the course of and in furtherance of such crime or of immediate flight therefrom, the person ar any other participant in the crime willfully caused the death of any person.

The murder language in the indictment mimics the "felony murder" language found in N.D.C.C. 12.1-16-01(1)(c). Ordinarily a charge of "felony murder" is a much easier charge to prove than intentional murder. This would explain why the state would choose to use such complicated, obscure language in its charging document. It would certainly take more time and effort to fashion the information in this way than just using the plain language of N.D.C.C. 12.1-16-01(1)(a) which

states, “a person is guilty of murder . . . if the person intentionally or knowingly causes the death of another human being.

[¶ 33] At the close of the State’s evidence the court visited the subject of jury instructions. (T. at 575-581). At that time the State asks that the jury instruction with the “felony murder” language be omitted and substituted with the language of intentional murder. (T. at 575 – 577). Basically, the State admitted that they did not prove their case of conspiracy to commit felony murder and at the close of their case requested a substantive change in the process to make their case easier for the jury to convict.

[¶ 34] The Defense in its objection made the problem very clear.

> Your Honor, on November 25, 2009 the State filed this amended information. They didn’t ask for my input. They did it on their own. They chose the language, and the language quite candidly is conspiracy to commit felony murder. Today is July 20 . . . 2011, a year and a half later, a little over a year and a half, and they’ve called 18 witnesses. I didn’t tell them who to call. I didn’t tell them what questions to answer. They knew their burden of proof was to prove what was in this information. Not what they wanted to prove. If you charge someone with DUI, you don’t come to court and prove they committed murder. They’ve charged my client with conspiracy to commit felony murder. I know that’s what [the State] wants. [The State] wants less border on [it]because the case they’ve proved is not what they’ve alleged. Or the case they think they’ve proved. It’s up to the jury to decide what’s been proved. . . . I have been prejudiced because I intend to stand in front of the jury, hold up this document and say they didn’t prove conspiracy to commit felony murder. And what [the State] is asking you to do is jerk . . . the chair out from under [me], have [me] fall down so [I] can’t make that argument now because, oops, we messed up. That’s not the law, your Honor. The law is they get to draft it. That’s why it is. We are severely prejudiced because they’ve - - they’ve rested. We’re at a point in the trial where they’ve put on all their evidence. They’ve rested. I don’t have to call one witness. I mean, I don’t have to straighten out their mistake. And I don’t - - I think the instructions you’ve given are the instructions relating to conspiracy to commit felony murder. I’m sorry they

don't like them, but that's the way it is. We're substantially prejudiced. We would object to any change.

(T. at 577-578).

[¶ 35] Ultimately the court decided not to treat the State's request as a motion to amend the information in accordance with N.D.R.Crim P. 7(e). The court did however, agree to amend the jury instructions to reflect the language in 12.1-16-01(1)(a) rather than 12.1-16-01(1)(c). (T. at 579-580).

[¶ 36] Even though the court did not treat this as a motion to amend the information the issue is somewhat the same as if it had. The actions of the court implicate the Sixth Amendment.

[¶ 37] The Supreme Court has stated, "Sixth Amendment notice requirements are satisfied, provided a criminal information is sufficiently specific to provide the defendant with notice of the pending charges and to enable the defendant to prepare a defense. City of Grand Forks v. Mata, 517 N.W.2d 626 at 628 (ND 1994). "An information must contain a "written statement of the essential elements of the offense." State v. Gwyther, 1999 ND 15, ¶ 15, 589 N.W.2d 575 (quoting Mata, 517 N.W.2d at 628 and City of Wahpeton v. Desjarlais, 2008 ND 13, 458 N.W.2d 330); N.D.R.Crim.P. 7(c) (an information must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged"). North Dakota has legislatively established the term "element of an offense" to mean:

a. The forbidden conduct;

b. The attendant circumstances specified in the definition and grading of the offense;
c. The required culpability;
d. Any required result; and
e. The nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue.

N.D.C.C. 12.1-01-03(1). State v. Frankfurth, 2005 ND 167, ¶ 7, 704 N.W.2d 564.

[¶ 38] In the case at hand, the jury was given instructions for a crime that was never charged. The charging document remained as conspiracy to commit felony murder; however, the jury was given instructions on conspiracy to commit intentional murder. In this case the Defense had over a year and a half to prepare a defense against conspiracy to commit felony murder. The case had an equal amount of time to prepare their case for the same charge. However, when the evidence did not go as the State intended, they attempted to change the charge in order to ease their way to getting a conviction. Certainly the Defense was prejudiced by this sudden change of events.

[¶ 39] The Supreme Court has held that a defendant is not prejudiced when an information is amended after the close of the State's evidence to charge a lesser included offense. *See* State v. Vance, 537 N.W.2d 545 (ND 1995). "An information may be appropriately amended to charge a lesser included offense of the offense initially charged, provided substantial rights of the defendant are not prejudiced." Id. at 547-548, *citing* Government of Virgin Islands v. Bedford, 671 F.2d 758, 765 (3rd Cir. 1982). "A lesser included offense 'would never constitute a

"different" offense, and seldom an "additional" offense within the meaning of Rule 7(e).'" Id.

[¶ 40] Again here, we do not have a Rule 7(e) issue exactly, however, it is useful to examine. The Supreme Court points out that an allowable amendment would never constitute a different offense. In the case at hand, 12.1-16-01(1)(a) and 12.1-16-01(1)(c) most certainly are different offenses. Just as an amendment would not be allowed under Rule 7(e) one should not be allowed by way of changing the jury instructions to not comport with the substance of the information charged.

[¶ 41] In short, Kirkpatrick began this trial having to defend against one crime and ended it having to defend against another. That fact goes against the very nature of the Sixth Amendment. Kirkpatrick did suffer extreme prejudice and the action should not be allowed to stand.

IV. District Court Erred by refusing to issue a jury instruction on extreme emotional disturbance.

[¶ 42]The Supreme Court reviews

> jury instructions as a whole to determine whether they fairly and adequately advise the jury of the applicable law. A defendant is entitled to a jury instruction on a defense if there is evidence that creates a reasonable doubt about an element of the charged offense. [The Supreme Court] view[s] the evidence in the light most favorable to the defendant to determine whether there is sufficient evidence to support a jury instruction.

State v. Ness, 2009 ND 182, ¶ 13, 774 N.W.2d 254.

[¶ 43] In the case at hand, the trial court refused to issue an instruction concerning the level of offense, even though Kirkpatrick was entitled to one. At

trial the Defense called Dr. David Tiller, a psychiatrist and professor from the University of Oklahoma. (T. at 584.) Although the State agreed that Tiller was well qualified, the State objected to the testimony that was to be offered. (T. at 588-589).

[¶ 44]Outside the presence of the jury, the Defense explains that Tiller will offer testimony in part that Kirkpatrick was suffering from extreme emotional distress during the period in question, including the time frame of the conspiracy. (T. at 590).

[¶ 45] In its objection the state says that Kirkpatrick's mental state is irrelevant and states that there is "no mental health defense of extreme emotional distress that is applicable to this crime." (T. at 591).

[¶ 46] The Court sustained the State's objection in part and overruled it in part. The Court did permit Tiller to testify in relation to Kirkpatrick's emotional state as it related to his emotional state at the time of marking the statement to law enforcement on October 31, 2009. However, the Court sustained the State's objection by barring Tiller from testifying that Kirkpatrick was actually under extreme emotional disturbance at the time. (T. at 594.) At the same time the court states, " I can tell you now that you're not going to get an emotional - - extreme emotional distress instruction." Id.

[¶ 47] After the close of all evidence the following conversation was had:

> [The Defense]: First of all, Your Honor, we have submitted to the Court, I believe, an extreme emotional distress instruction. . . . And just so the record's clear we're requesting that. I know the Court's not going to give it.

> The Court: No. And under North Dakota law, if you make a requested jury instruction and I don't give it, that's an automatic exception to the same.
>
> [The Defense]: Very well.
>
> The Court: And I'll just state my reasoning and the same is I do not think that extreme emotional disturbance is a defense to conspiracy.

(T. at 762-763).

In North Dakota the murder statute is found in N.D.C.C. 12.1-16-01. It states, in part,

> 2. A person is guilty of murder, a class A felony, if the person causes the death of another human being under circumstances which would be class AA felony murder, except that the person causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse must be determined from the viewpoint of a person in that person's situation under the circumstances as that person believes them to be. An extreme emotional disturbance is excusable, within the meaning of this subsection only, if it is occasioned by substantial provocation, or a serious event, or situation for which the offender was not culpably responsible.

[¶ 48] The Court appeared to treat N.D.C.C. 12.1-16-01(2) as an affirmative defense to the crime of murder. That section does have similarities to an affirmative defense, but it doesn't quite fit that description perfectly. That section is also a penalty section setting the level of the crime.

[¶ 49] The laws on conspiracy can be problematic. The criminality or level of the crime depends on the substantive crime. According to N.D.C.C. 12.1-06-04(6) "[c]onspiracy is an offense of the same class as the crime which was the objective of the conspiracy."

[¶ 50] The fact that the Murder statute gives us two classes of crimes for identical conduct is important. It stands to reason that the trier of fact will have to determine the level of the substantive crime based on the facts it deems appropriate. In this case, Kirkpatrick was denied that right. Kirkpatrick made a prima facie showing that 12.1-16-.01(2) could apply to the facts of this case. This decision is one that should have been made by the jury.

[¶ 51] It is simply ridiculous that had Kirkpatrick been charged with traveling to Fargo and beating the victim to death with a hammer himself, he would have the right to receive the instruction. But because he did not commit that crime, because all he was convicted of was using words, he is in a worse position. In this case the criminality of the conspiracy depends on the criminality of the conduct, and that should have been a question that the jury answered. Kirkpatrick was denied his right to have a jury answer that question. Because of that the case should be remanded for a new trial.

CONCLUSION

[¶ 52] For the above stated reasons the Appellant requests that this Court reverse the rulings of the lower court and dismiss the action against the Defendant or remand for additional proceedings.

Dated this the 5th day of June, 2012.

___/s/_____

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[¶ 53] CERTIFICATE OF SERVICE

A copy of this document and the Appendix to Brief of Appellant in pdf format were e-filed with the North Dakota Supreme Court and served upon Birch Burdick, pursuant to Administrative Order 14 on the 6th day of June, 2012. Specifically, this document and the Appendix to Brief of Appellant were electronically filed and served as follows:

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