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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20110312

State of North Dakota,

Plaintiff - Appellee,

vs.

Gene C. Kirkpatrick,

Defendant - Appellant.

APPELLEE'S BRIEF

APPEAL FROM CRIMINAL JUDGMENT AND CONVICTION
DATED OCTOBER 17, 2011
EAST CENTRAL JUDICIAL DISTRICT
DISTRICT COURT FILE NO. 09-2009-CR-03845
THE HONORABLE STEVEN L. MARQUART, JUDGE

Birch P. Burdick, NDID #5026
Cass County State's Attorney
Cass County Courthouse
P.O. Box 2806
Fargo, ND 58108-2806
(701) 241-5850
Attorney for Plaintiff-Appellee

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[¶5] II. Whether there was sufficient evidence to find Kirkpatrick guilty of conspiracy to commit burglary.

[¶6] III. Whether the jury instructions were erroneous.

[¶7] IV. Whether the District Court erred in not issuing a jury instruction on extreme emotional disturbance.

[¶8] **STATEMENT OF THE CASE**

[¶9] Appellant Gene C. Kirkpatrick is hereafter referred to as "Kirkpatrick". Appellee State of North Dakota is hereafter referred to as "State".

[¶10] The State generally concurs with Kirkpatrick's Statement of the Case. (Kirkpatrick Brief, ¶¶4 - 6) The State additionally notes that on January 27, 2011, the District Court held a hearing on Kirkpatrick's motion to suppress the statement Kirkpatrick gave to law enforcement investigators in Jones, Oklahoma on October 31, 2009. The District Court denied the motion. State's App.113.

[¶11] STATEMENT OF THE FACTS

[¶12] Kirkpatrick was charged with conspiracy to commit murder and conspiracy to commit burglary. (Kirkpatrick App. 20)

[¶13] The State generally concurs with Kirkpatrick's Statement of the Facts (Kirkpatrick Brief, ¶¶7-13), with the following corrections and clarifications:

[¶14] (1) During the many months that Philip's wife Valerie and their daughter were in Oklahoma, while Valerie was combatting her medical problems, Philip regularly visited them there. He would return to North Dakota because he had a professional dental practice here which was the source of their income and medical insurance.

[¶15] (2) While it is true Michael Nakvinda worked for Kirkpatrick as a handyman, that underrepresents the nature of their relationship. Kirkpatrick said of Nakvinda: "… I know Mike very well, he's a good friend of mine. I love him." State's App. 40, ln.6.

[¶16] (3) During Kirkpatrick's interview, he stated the whole plan to kill Gattuso was about Kirkpatrick, or his family, getting ahold of his granddaughter. State's App. 59, ln.26 – 60, ln.16. After Kirkpartick was advised on October 26 that Gattuso had been murdered, Kirkpatrick drove to Fargo with other family members, picked up his granddaughter and returned to Oklahoma.

[¶17] The State recites other pertinent facts within its brief below.

[¶18] ARGUMENT

[¶19] Kirkpatrick argues his statement to investigators ought to have been suppressed, the jury had insufficient evidence to sustain its verdict of conspiracy to commit burglary, the District Court erred in its jury instructions and in failing to give an instruction on extreme emotional disturbance. The State addresses each below in that same order.

[¶20] I. The District Court did not err in not suppressing Defendant's statement to investigators.

[¶21] Kirkpatrick argues the District Court erred in not suppressing his statement to investigators on October 31, 2009. Kirkpatrick Brief, ¶¶15-26. The State resists that argument.

[¶22] A. Standard of Review/Burden

[¶23] When "reviewing a district court's ruling on a motion to suppress, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance." State v. Graf, 2006 ND 196, ¶7, 721 N.W.2d 381. The district court "is in a superior position to assess credibility of witnesses and weigh the evidence." State v. Woinarowicz, 2006 ND 179, ¶20, 720 N.W.2d 635 (citations omitted). "Generally, a district court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the district court's findings, and if its decision is not contrary to the manifest weight of the evidence. Id. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law.

Graf, at ¶7." State v. Goebel, 2007 ND 4, ¶11, 725 N.W.2d 578. The Supreme Court "do[es] not conduct a de novo review; rather we will reverse a district court's determination on voluntariness only if the court's decision is contrary to the manifest weight of the evidence." State v. Crabtree, 2008 ND 174, ¶13, 756 N.W.2d 189; State v. Pickar, 453 N.W.2d 783, 785 (N.D. 1990).

[¶24] B. The Law

[¶25] Kirkpatrick's suppression argument relates solely to the voluntariness of his statement to investigators. At the suppression hearing his trial counsel was clear he was not arguing Kirkpatrick's statement was made in a custodial setting. Motion Hearing Tr. 63, ln.25 - 64, ln.9. Kirkpatrick advances the same approach on appeal.

[¶26] "When a confession is challenged on due process grounds, the ultimate inquiry is whether the confession was voluntary." Goebel, 2007 ND 4, ¶16, 725 N.W.2d 578. "A confession is voluntary if it is the product of the defendant's free choice rather than the product of coercion." Id., at ¶16. "Voluntariness is determined by examining the totality of circumstances surrounding the confession." Pickar, at 785. A voluntariness inquiry "focuses on two elements: (1) the characteristics and conditions of the accused at the time of the confession including age, sex, race, education level, physical and mental condition and prior experience with police; and (2) the details of the setting in which the confession was obtained, including the duration and conditions of detention, police attitude toward the defendant, and the diverse pressures that sap the accused's powers of resistance or

self-control." Goebel, at ¶16 (citations omitted). "No single factor is determinative." Crabtree, at ¶12 (citing Pickar at 785). "The voluntariness of a confession depends upon questions of fact to be resolved by the District Court." Crabtree, at ¶13.

[¶27] C. Analysis

[¶]28 The District Court judge had an ample opportunity to review and understand the circumstances surrounding Kirkpatrick's statement to law enforcement officers in October 2009. Kirkpatrick's statement was audio-recorded. The State prepared a written transcript of that recording. Both the recording and the transcript were filed with the District Court in advance of the hearing. Docket ID#177 and 178. The transcript was also accepted as Exhibit 3 at the hearing, without objection. Motion Hearing Tr. 20-22. Both counsel filed briefs in advance of the hearing. At the hearing the judge heard from the State's sole witness, Fargo Police Detective Paul Lies who participated in taking Kirkpatrick's statement, received three exhibits, and listened to the arguments of counsel. Kirkpatrick did not submit any evidence at the hearing. Motion Hearing Tr. 62, ln.22 – 23. The judge acknowledged having read the transcripts and briefs, and having listened to the recorded statement. Motion Hearing Tr. 71, ln.20-23.

[¶29] Although the judge's Order denying the suppression motion is one page long, it references his reasoning articulated on the record at the hearing. State's App. 113. That reasoning is contained within the hearing transcript. State's App. 128 - 133. The judge explained that under Pickar the State had the

burden of proving the voluntariness of Kirkpatrick's statement, and that he must consider the totality of circumstances and the two-part test. State's App. 129, ln.5-15. As to characteristics and conduct in Kirkpatrick's case the judge stated: (1) Kirkpatrick was a 63-year old white male; (2) he was very well-educated with a bachelor's degree, an MBA and with or working on a Ph.D.; (3) Kirkpatrick was well-spoken and in good health; (4) Kirkpatrick did not indicate to officers that he was too tired or too hungry to continue his interview; (5) Kirkpatrick did not state he needed a break, but investigators gave him a break during the interview and a chance to have water; (6) the Court was not provided information indicating Kirkpatrick was too hungry or tired in a manner depriving him of his free will; (7) Kirkpatrick may have been grieving the death of his daughter (7 months earlier), but he did not appear to be under "any great or very emotional distress because of that" during the interview; (8) Kirkpatrick may have been somewhat despondent at the completion of his interview, and hinted he may want to harm himself, but those emotions emerged at the conclusion of the interview and he was, up until that point, "emotionally balanced and in good mental condition"; (9) although Kirkpatrick may not have had prior experience with police, that was only one factor to consider; (10) nothing in Kirkpatrick's age, sex, race, education level, physical or mental condition during the interview suggested that his statement was involuntary. State's App. 129 - 131. In reviewing the setting of the interview the judge noted that: (1) the interview began at about 6:00 p.m. and continued for about 2 hours and 47 minutes; (2) it occurred near Kirkpatrick's home, for his convenience, at either

the Jones, Oklahoma police department or Jones City Hall; (3) Kirkpatrick reported to the interview voluntarily; (4) Kirkpatrick was told several times during the interview that he was free to leave; (5) he was free to return home at the conclusion of the interview; (6) officers' demeanors during the interview appeared cordial and polite, not raising their voices; (7) Kirkpatrick himself said during the interview that officers had "totally done your job in a very kind and gracious way"; (8) Kirkpatrick did most of the talking during the interview, with few questions being asked of him; (9) officers were not putting words in Kirkpatrick's mouth; and (10) officers told Kirkpatrick that Michael Nakvinda (who was later convicted of committing the actual murder of Kirkpatrick's son-in-law Phillip Gattuso, see State v. Nakvinda, 2011 ND 217, 807 N.W.2d. 204) made a statement incriminating Kirkpatrick, and although the statement by officers was untrue the statement did not deprive Kirkpatrick of his own free will and he did not confess involvement because of the deception. State's App. 131 - 132. The judge concluded Kirkpatrick's interview did not violate his 5th Amendment due process rights. State's App. 132 – 133.

[¶30] This Court gives "great deference" to the district court's fact finding and voluntariness determination, resolves testimonial conflicts in favor of affirmance (there was no conflicting testimony here), does not conduct a de novo review and will not reverse if there is sufficient competent evidence capable of supporting the district court's findings, so long as its decision is not contrary to the manifest weight of the evidence. Crabtree, at ¶13. The State asserts the District Court's findings and Order were well-supported by the evidence. However, to the

extent this Court wishes to delve further into the evidence, the State has provided a diagram of the interview room used at the suppression hearing (State's App. 4), a copy of the interview transcript (State's App. 5 – 111) and a copy of the interview recording (see comments at State's App. 112, and see separately provided CD). In addition, the State submits the following additional facts as to the context of the Kirkpatrick's interview:

> [¶31] (1) On October 28, 2009, a couple of days prior to the Oklahoma interview, Fargo Police Detective Kjonaas spoke with Kirkpatrick at the Fargo Police Department. Trial Tr. 477 – 478; State's Motion to Suppress (redacted), Docket ID#180.
>
> [¶32] (2) Detective Kjonaas and Kirkpatrick continued that conversation the following day. Kirkpatrick's daughter Valerie suffered an extended illness from 2007 through 2009, resulting in her death. During the interview Kirkpatrick indicated he had lost respect for Philip Gattuso (Valerie's husband) during Valerie's extended illness. Kirkpatrick denied knowing anyone who may want to harm Philip. He also denied knowing anyone in Fargo, Oklahoma or New Orleans who drove a black GMC or Chevy pickup truck, which was a vehicle of interest in the ongoing investigation. Trial Tr. 479; State's Response to Motion to Suppress (redacted), Docket ID# 180.
>
> [¶33] (3) On October 31, 2009, prior to the interview with Kirkpatrick in Oklahoma, investigators determined that Michael Nakvinda was Kirkpatrick's handyman. Nakvinda was arrested that day. Investigators

then contacted Kirkpatrick by telephone and he agreed to meet investigators at the Jones, Oklahoma City Hall, near his residence. Motion Hearing Tr. 10 – 12; State's Response to Motion to Suppress (redacted), Docket ID#180.

[¶34] (4) Kirkpatrick arrived at City Hall with his wife Sharon at about 6:00 p.m. Kirkpatrick was interviewed with Fargo Police Detective Paul Lies and Oklahoma Bureau of Investigations Agent Jerry Cusick. Sharon Kirkpatrick was not a part of that interview. Motion Hearing Tr. 12 – 14.

[¶35] (5) During the October 31 interview, Detective Lies indicated Kirkpatrick did not seem overly tired or hungry. Motion Hearing Tr. 18, 60.

[¶36] (6) A simple diagram of the interview room was provided to the court during the suppression hearing. State's App. 4. The room contained tables and chairs. Within that diagram "JC" stands for Agent Jerry Cusick, "PL" stands for Detective Paul Lies and "GK" stands for Kirkpatrick. Kirkpatrick sat adjacent to the room's doorway.

[¶37] (7) Investigators used a conversational tone of voice and did not utilize any show of force during the interview. Motion Hearing Tr. 16 – 17.

[¶38] (8) About one hour into the interview, investigators left Kirkpatrick alone in the room for a few minutes, in part so they could speak to one another and in part so Kirkpatrick could reflect on what was happening during the interview and suggested to him that he take that time to compose himself. Motion Hearing Tr. 27 – 28; State's App. 56 – 57. When they returned they advised him he was free to go, and he acknowledged that but he

stayed and continued talking to investigators. State's App. 57, ln.24 - 58, ln.5; Motion Hearing Tr. 27 – 28. Later they again offer Kirkpatrick something more to drink, but he said he would finish what he had. State's App. 95, ln.11 – 15.

[¶39] (9) Investigators allowed Kirkpatrick to take a cell phone call from his family during the interview. State's App. 7, ln.19 – 27; Motion Hearing Tr. 13.

[¶40] (10) When asked if Kirkpatrick felt he had been entrapped to give his statements, he replied "[you] all have totally done your job in a very kind and gracious way". State's App. 90, ln.26-27. When asked if the investigators had harassed him during the interview, Kirkpatrick responded "… heavens no, you, you, you're, you've been very good at what you did and you got everything out of me. …. And, but no, you two have come in here in a very manly, respectable, honorable way." State's App. 91, ln.1 – 5.

[¶41] (11) When asked if Kirkpatrick felt investigators had kept him forcibly in the interview room, he replied "Well, good grief you guys, I feel, I like you two guys. You tried to help me in my opinion. I mean, I don't want, you know, you're doing your job and you've done it well and you've wormed everything out of me, but, but it had to come out. And, and you caught Mike and the show's over. You're just doing your job." State's App. 100, ln.5 – 10.

[¶42] (12) The first third of the interview was primarily family background information and Kirkpatrick's lack of approval of Philip's parenting skills. Investigators then tell Kirkpatrick they have arrested "Mike", and they know Kirkpatrick is very familiar with Mike, and Mike has implicated Kirkpatrick. State's App. 38 - 42. During the remaining two thirds of the interview Kirkpatrick relates his involvement in the events leading to Philip's death.

[¶43] (13) At the end of the interview, Kirkpatrick made some statements, with his wife at his side, about not caring what happened to him. However, he assured the investigators he would not hurt himself, he didn't have the nerve to do so and he could not do that to his family. Motion Hearing Tr. 61; State's App. 104 - 105, 108 - 109.

[¶44] (14) At the conclusion of the interview, Kirkpatrick left with his wife. He was not placed under arrest. State's App. 110, ln.15-16; Motion Hearing Tr. 61.

[¶45] (15) As she was leaving City Hall, after hearing what her husband told the investigators, Kirkpatrick's wife Sharon said "I just want to thank you all for being so gracious. … You've really been kind. The whole, the Fargo Police Department, I can't say enough for 'em." State's App. 111, ln.7 – 8.

[¶46] (16) The interview with Kirkpatrick lasted approximately two and one-half hours. State's App. 101, ln.19 and 102, ln.5 The entire transcript and recording lasted approximately two hours and forty-eight minutes,

which included the added time that Kirkpatrick and Sharon were jointly speaking with the investigators. State's App. 111, ln.13.

[¶47] Considering the Goebel and Pickar dual-element voluntariness analysis and the totality of circumstances surrounding Kirkpatrick's statement, the District Court found, and the State asserts the evidence supports, that Kirkpatrick's statement was the product of his free choice, not the product of coercion.

[¶48] D. Distinguishing Kirkpatrick's Argument

[¶49] Although Kirkpatrick refers to various cases in his argument, it is on Pickar that he relies for a comparison to own interview situation. Kirkpatrick Brief, ¶¶24 – 26. He argues the District Court failed to adequately weigh factors favoring Kirkpatrick. The judge articulated many factors in his findings. Without repeating them all again here, he found Kirkpatrick was an educated and articulate white male who was in good health and who was provided water and a break in the midst of the interview. In Pickar, the trial court found the defendant was "emotionally unbalanced" and suffering from "severe emotional stress". Pickar, at 785. In Kirkpatrick's case, the judge acknowledged Kirkpatrick may have been experiencing some continued grief due to the death of his daughter (some seven months earlier), but found he was not in "great or very emotional distress" because of that during the interview. The judge also acknowledged that Kirkpatrick hinted at wanting to harm himself, but that only arose at the close of the interview. As noted above, Kirkpatrick rejected that characterization or likelihood. In Pickar, the defendant was charged with two counts of manslaughter for driving a vehicle that

rolled-over, causing the deaths of two of his close friends. Id. In Kirkpatrick's case he was not grieving the recent loss of his son-in-law (Philip Gattuso), whom he had conspired to kill. To the contrary, with Gattuso out of the picture Kirkpatrick believed he would be able to raise his granddaughter amidst his own family in Oklahoma.

[¶50] In Pickar the record did not show the defendant had experience with police practices. Pickar, at 786. In Kirkpatrick's case, the record does not reflect any criminal history. However, in his suppression motion Kirkpatrick's counsel stated Kirkpatrick had been in the military for 20 years, a portion of which was spent with the military police in a prisoner of war camp. Motion to Suppress Involuntary Statement, p.8, Docket ID#174.

[¶51] In Pickar the trial court found the defendant was suffering physical injuries from the vehicle accident, so much so that he was holding his side during the interview, and officers knew he was in pain. Pickar, at 786. In Kirkpatrick's case, the trial court did not find such a situation. It gave due consideration to the defendant's suppression argument that he was tired and hungry. Where a trial court has considered such factors and their effect on the defendant's free will, this Court will defer to those findings. Id.

[¶52] Kirkpatrick mistakenly states that one of the investigators was in full uniform during the interview. Kirkpatrick Brief, ¶26. Detective Lies testified that he was in jeans and a shirt, wearing a badge and weapon on his belt, and Agent Cusick had on khaki pants and a polo shirt with a logo. Motion Hearing Transcript,

16. Having made that clarification, the State does not argue Kirkpatrick thought Detective Lies or Agent Cusick were anything other than law enforcement officers.

[¶53] In Pickar the police promised the defendant a benefit in exchange for his confession, the implied benefit being that he would not be prosecuted for the crime and could ease the minds of the victims' families that their loved ones were not driving. Pickar, at 787. Similar circumstances did not exist in Kirkpatrick's case.

[¶54] This Court's conclusion in Pickar was that the trial court's determination of involuntariness was not against the manifest weight of the evidence and so affirmed. Id. The State asserts the trial court's determination of voluntariness in Kirkpatrick's case was also not against the manifest weight of the evidence and ought to be affirmed.

[¶55] **II. The jury had sufficient evidence to find Defendant guilty of conspiracy to commit burglary.**

[¶56] Kirkpatrick claims there was insufficient evidence to support a guilty verdict on conspiracy to commit burglary. Kirkpatrick Brief, ¶¶27-30. The State disagrees.

[¶57] A. Standard of Review/Burden

[¶58] This court's standard of review for challenges to sufficiency of the evidence is well established. "When the sufficiency of evidence to support a criminal conviction is challenged, this 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, we 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. Nakvinda, 2011 ND 217, ¶12, 807 N.W.2d 204 (citations omitted).

[¶59] B. The Law

[¶60] Kirkpatrick verbally moved for a N.D.R.Crim.P. 29 judgment of acquittal at the close of the State's case in chief, which the State resisted and the District Court verbally denied. Trial Tr. 567 – 568. Kirkpatrick proceeded to submit testimony and other evidence in his defense, although did not testify himself. By so doing, Kirkpatrick permits this Court to review the entire record to determine whether sufficient evidence exists to sustain the guilty verdict. State v. Kinsella, 2011 ND 88, ¶11, 796 N.W.2d 698.

[¶61] A conviction may be based upon circumstantial evidence alone "if the circumstantial evidence has such probative force as to enable the trier of fact to find the defendant guilty beyond a reasonable doubt." State v. Noorlun, 2005 ND 189, ¶20, 705 N.W.2d 819. A verdict based upon circumstantial evidence carries the same presumption of correctness as other verdicts. Kinsella, at ¶14; State v. Christian, 2011 ND 56, ¶9, 795 N.W.2d 702. A defendant's conduct may be

considered circumstantial evidence of the required criminal intent. Kinsella, at ¶14.

[¶62] C. Conspiracy to Commit Burglary and Related Essential Elements

[¶63] Kirkpatrick was convicted of both conspiracy to commit murder and conspiracy to commit burglary. As for the murder conspiracy, Kirkpatrick argues there was no evidence linking him to Nakvinda's actions aside from Kirkpatrick's own statement. The State contests the simplicity of that characterization, but acknowledges that his statement to investigators was a very important part of the evidence. As argued above, the State asserts the District Court's determination that his statement was voluntary was supported by fact and law and ought to be affirmed. Kirkpatrick acknowledges that if his statement is considered, then if taken in the light most favorable to the verdict the statement reflects a conspiracy to commit murder. Kirkpatrick Brief, ¶28.

[¶64] Kirkpatrick primarily contests the sufficiency of the conspiracy to commit burglary. Kirkpatrick advances his argument by stating there is no evidence Nakvinda entered Gattuso's premises without license to do so. Although the State considers it unlikely Gattuso invited him in his home, the evidence did not reflect that Nakvinda broke into the premises. Trial Tr. 116, ln.7 – 19. However, when Gattuso failed to pick up his daughter at daycare on October 26, neighbors went to check on him. They were able to climb over his backyard fence and enter his garage and then his home, all without benefit of a key. Trial Tr. 77 - 78.

Perhaps Nakvinda did the same thing. However, even assuming Gattuso invited Nakvinda into his home, that does not mean a burglary did not occur. Aside from the routine elements of jurisdiction and limitations timing, the essential elements of that charge are: a person willfully enters or surreptitiously remains in a building or occupied structure when the premises were not open to the public and that actor was not licensed, invited or otherwise privileged to enter or remain with the intent to commit a crime therein, and while there inflicted bodily injury on another (for a B felony). N.D.C.C. §12.1-22-02. The medical examiner testified that Gattuso was beaten many times in the head with a hammer-like object and left to die over a period of hours. Trial Tr. 241 – 249, 256 - 258. Gattuso was found dead in his bedroom, but there was evidence of a fight, with a broken mirror in the bedroom/bath area, blood spots in other rooms and the house was a shambles. Trial Tr. 110 – 112. Even if Gattuso had invited Nakvinda to enter his home, the evidence and common sense would allow the jury to infer that once Nakvinda began attacking Gattuso, and while he was beating Gattuso to death, Nakvinda was no longer privileged to remain in Gattuso's home, regardless of whether Gattuso ever uttered words such as "I now revoke any permission I previously granted you to be in my home."

[¶65] As for conspiracy, the essential elements are an agreement with another to engage in or cause conduct constituting an offense, and someone willfully acts overtly to effect an objective of the conspiracy. N.D.C.C. §12.1-06-04. As for an agreement, Nakvinda and Kirkpatrick had multiple

discussions about murdering Gattuso. The last two thirds of the interview were about that. State's App. 38 – 111. In particular here are some examples: State's App. 65, ln.1 – 2; 72, ln.9 – 13; 73, ln.4 – 6; 79, ln.9 – 80, ln.19. Kirkpatrick knew that Nakvinda wanted to ransack the house, take things including the Porsche, to make it look like a robbery. State's App. 79 – 80. Obviously Nakvinda undertook numerous overt acts in furtherance of the conspiracy including, among others, renting a trailer in Oklahoma, driving to Fargo, entering Gattuso's home, beating him to death, taking many things belonging to Gattuso including his Porsche, trailering the Porsche and driving it back to Oklahoma and storing it. Trial Tr. 117 – 128. Kirkpatrick also took several steps in furtherance of the conspiracy including, among others: a few weeks before the murder he videotaped Gattuso's home and gave the videotape to Nakvinda so he would be familiar with the premises (State's App. 59, ln.1 – 60, ln.3); reviewed Gattuso's calendar and told Nakvinda when Gattuso would be home (State's App. 62, ln.19 – 23); gave Nakvinda Gattuso's address (State's App. 47, ln.8 – 19); and although they had agreed on a fee of $10,000 for murdering Gattuso, a few days before Gattuso's death Kirkpatrick met Nakvinda at a McDonalds restaurant and gave him $3,000 for expenses (State's App. 49, ln.8 – 9; 67, ln.19 – 68, ln.19; 75, ln.5 – 6).

[¶66] The State asserts there was ample evidence to allow the jury to find a conspiracy between Kirkpatrick and Nakvinda to murder Gattuso, and with Kirkpatrick giving Nakvinda information about Gattuso's schedule, a photo of his home, information about his address, and money, and with the murder happening

within Gattuso's home and knowing the house would be ransacked and items taken to make it look like a "robbery", the elements of conspiracy to commit burglary were met. Kirkpatrick has not born his burden of showing the evidence revealed no reasonable inference of guilt when viewed in the light most favorable to the verdict.

[¶67] **III. The District Court did not err in its jury instructions.**

[¶68] Kirkpatrick claims the jury instructions did not match the crime charged and he was extremely prejudiced thereby. Kirkpatrick Brief, ¶¶31-41.

[¶69] A. The Law

[¶70] According to the 6th Amendment, U.S. Constitution, in all criminal proceedings the accused has a right to be informed of the nature and cause of the accusation against him. N.D.R.Crim.P. 7(c)(1) requires that an information be a "plain, concise and definite written statement of the essential facts constituting the elements of the offense". For each count, the information must give the official or customary citation of the statute which the defendant is alleged to have violated. Id. "When words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential elements of the offense, they may be treated as surplusage and wholly disregarded." State v. Woehlhoff, 473 N.W.2d 446, 448 (N.D. 1991).

[¶71] B. Analysis

[¶72] Count 1 of the Amended Information states, in part, "Count 1: **CONSPIRACY TO COMMIT MURDER** in violation of N.D.C.C. §12.1-16-01

and 12.1-06-04 in that on or between September 1, 2009 and October 31, 2009, 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 …". Kirkpatrick App. 20. The State offers this partial recitation of the claim to point out that it was clear that the charge was a conspiracy to commit murder. After the "…" shown above came the following language, in part, "… 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 or any other participant in the crime willfully caused the death of any person, to-wit: …". Kirkpatrick App. 20. At the close of the State's case, when reviewing a draft set of jury instructions, the State suggested amending the Information, under N.D.R.Crim.P 7(e), to clarify that the charge was conspiracy to intentionally or knowingly murder Gattuso, under N.D.C.C. §12.1-16-01(1)(a), and the jury instructions should reflect intentional or knowing murder. Trial Tr. 575 – 579. Kirkpatrick objected, arguing the judge was required to instruct the jury on felony murder under N.D.C.C. §12.1-16-01(2). Trial Tr. 577 – 578. After listening to the arguments of counsel, the judge chose not to treat the discussion as a motion to amend. Instead, the judge found the essence of the criminal charge was that the defendant agreed with one or more people, explicitly or implicitly, to engage in conduct which in fact constituted a crime of murder and that one or more such person did an overt act. He wrote the jury instructions to suit. Trial Tr. 579 – 580.

[¶73] The State asserts the judge got the jury instructions right. "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 subsequent prosecution for the same offense." City of Grand Forks v. Mata, 517 N.W.2d 626, 628 (N.D. 1994)(defendant was charged via a traffic citation). The information identified N.D.C.C. §12.1-16-01 (murder) and 12.1-06-04 (conspiracy) as the statutes pertaining to the charge. The reference to the murder statute was to the overarching murder provision, not to a specific subsection. The jury instructions issued by the judge were consistent with those statutes, albeit containing the murder definition relating to N.D.C.C. §12.1-16-01(1)(a). This level of specificity in a murder charge was found acceptable in State v. Frohlich, 2007 ND 45, ¶24, 729 N.W.2d 148 (finding the defendant had sufficient notice of the elements of the offense). Kirkpatrick was well aware he was charged with conspiracy to commit murder in Count 1. He was well aware of the factual foundation of the case which was, in significant part, his own statement to investigators. He put on a substantial number of defense witnesses. There is no reasonable argument, nor does Kirkpatrick advance one, that his conviction may not serve as a bar to a subsequent prosecution for the same offense. Kirkpatrick had the notice requirement intended under the 6th Amendment. The remaining language in the information regarding robbery and/or burglary is essentially surplusage. Furthermore, it is unnecessary for the State to prove each and every allegation set forth in a criminal complaint.

State v. Bohl, 317 N.W.2d 790 (N.D. 1982).

[¶74] Kirkpatrick argues that "[c]ertainly the Defense was prejudiced by this sudden change of events." Kirkpatrick Brief, ¶38. He also described it as "extreme prejudice". Kirkpatrick Brief, ¶41. However, he does not actually argue what that prejudice was. Kirkpatrick does not indicate he would have asked different questions of the State's witnesses. The State offered to produce all of its witnesses again if Kirkpatrick wished. Trial Tr. 576, ln.21-24. (By that reference the State is not suggesting the defense is required to put on a case, but that it could clarify anything it wanted with the State's witnesses.) Kirkpatrick did not indicate he would have produced different defense witnesses. Kirkpatrick did not indicate he was surprised in some manner. During his opening statement at trial, Kirkpatrick's counsel referred to the Count 1 charge as "conspiracy to commit murder", not conspiracy to commit felony murder. Trial Tr. 53, ln.15 – 18. The crux of his opening statement, and of his defense against the murder conspiracy, was that there was no "agreement" between Kirkpatrick and Nakvinda. He based that defense upon Kirkpatrick repeatedly telling investigators that he told Nakvinda things like "we can't do this" and "[d]on't do this". Trial Tr. 53, ln.3 – 10; 60, ln.13 – 15. His argument was that Nakvinda did this on his own, that he went "Maverick" and "Rogue". Trial Tr. 59, ln.25 – 60, ln.2. That defense approach is not impacted by whether the conspiracy to commit murder relates to intentional/knowing murder or felony murder. It is all about the conspiracy element.

[¶75] For all these reasons the State asserts the District Court did not err in issuing its jury instructions on conspiracy to commit murder.

[¶76] IV. The District Court did not err is not issuing a jury instruction for extreme emotional disturbance.

[¶77] Kirkpatrick claims the District Court erred in failing to issue a jury instruction for extreme emotional disturbance. Kirkpatrick Brief, ¶¶42-51. The State disagrees.

[¶78] A. Standard of Review and Law

[¶79] "Jury instructions must fairly and adequately advise the jury of the law, and the court may refuse to give a requested instruction if it is irrelevant or does not apply." State v. Clark, 2012 ND 135, ¶8, --- N.W.2d ---. On appeal, jury instructions are reviewed as a whole to determine whether they fairly and adequately advised the jury of the applicable law. Id. "We view the evidence in the light most favorable to the defendant to determine whether there is sufficient evidence to support a jury instruction." Id. (quoting from State v. Lehman, 2010 ND 134, ¶12, 785 N.W.2d 204). "An error in a jury instruction is grounds for reversal when the 'instruction, read as a whole, is erroneous, relates to a subject central to the case, and affects the substantial rights of the defendant.'" State v. Sorenson, 2009 ND 147, ¶22, 770 N.W.2d 701.

[¶80] B. Analysis

[¶81] Kirkpatrick argues he was entitled to an instruction on extreme emotional disturbance, pursuant to N.D.C.C. §12.1-16-01(2), based upon the

testimony, or the proposed testimony, of Dr. David Tiller. Kirkpatrick called Tiller who testified, among other things, that Kirkpatrick suffered from "complicated grief". Trial Tr. 584 – 616. Part way through his testimony the State objected. Kirkpatrick's counsel made an offer of proof, indicating that he intended to have Tiller testify that Kirkpatrick suffered an extreme emotional distress (or disturbance). Trial Tr. 590. The State responded with several objections, one of which was that not only did Tiller's report fail to use that term, but that it was not relevant in the context of the case. Trial Tr. 591 – 592.

[¶82] In Dilger, the Court held that an extreme emotional disturbance is not an element of crime because the statute does not explicitly designate it as such. Instead, it is a mitigating circumstance. State v. Dilger, 338 N.W.2d 87, 95 (N.D. 1983). Since Dilger, the provision has not been amended to explicitly designate it as either a defense or an affirmative defense under the statute, nor is it included in the statutory sections containing defenses and affirmative defenses. Sorenson, at ¶28.

[¶83] Kirkpatrick was not charged with murder under N.D.C.C. §12.1-16-01, but rather with conspiracy to commit murder under N.D.C.C. §12.1-16-01 and N.D.C.C. §12.1-06-04. Although pursuant to N.D.C.C. §12.1-06-04(6) a conspiracy is considered the same class of crime as the crime which was the objective of the conspiracy, they are different crimes with different elements. The extreme emotional disturbance provision states, in part: "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 a class AA felony murder, except that the person causes the death under the influence of extreme emotional disturbance for which there is a reasonable excuse." N.D.C.C. §12.1-16-01(2). It does not state that it covers conspiracy. Had the Legislature so intended it could have said so. Although Kirkpatrick's argument is that the provision would be available to him had he personally killed Gattuso, and therefore should be available to him in a conspiracy, the statute does not support that. Nonetheless, the judge allowed Tiller to testify to Kirkpatrick's "complicated grief" diagnosis and the jury was able to consider its impact on Kirkpatrick's involvement in the crime and their determination of his guilt.

[¶84] Given that, the State asserts the judge correctly denied giving such an instruction, and the instructions given fairly and adequately advised the jury of the law.

[¶85] **CONCLUSION**

[¶86] For all the reasons provided above, the State respectfully requests this Honorable Court affirm the District Court's judgment and conviction of October 17, 2011.

Respectfully submitted this 13th day of July, 2012.

Birch P. Burdick, NDID #5026
Cass County State's Attorney
Cass County Courthouse
P.O. Box 2806
Fargo, ND 58103
(701) 241-5850
Attorney for Plaintiff-Appellee

[¶87] **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on the 13th day of July, 2012, to: Mr. Daniel E. Gast, Dan@redriverlaw.com.

Birch P. Burdick