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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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State of North Dakota,	*	
	*	
Plaintiff/Appellee,	*	
	*	
v.	*	**Supreme Court No. 20120240**
	*	
Esteban F. Dominguez,	*	
	*	
Defendant/Appellant.	*	

****

APPEAL FROM AN ORDER DENYING
DEFENDANT'S MOTION TO SET ASIDE JURY VERDICT
ENTERED IN THE NORTHEAST JUDICIAL DISTRICT
WALSH COUNTY FILE NO. 50-2011-CR-00328

THE HONORABLE M. RICHARD GEIGER, PRESIDING

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BRIEF OF APPELLEE

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STATEMENT OF THE CASE

[¶1] This case began with a Complaint/Arrest Affidavit filed in the Walsh County District Court on August 8, 2011, charging Mr. Dominguez with the crime of terrorizing. (Doc ID #1, A-6) The following day, the State of North Dakota filed an Amended Felony Complaint & Information, formally charging Mr. Dominguez with terrorizing, attempted murder, and two controlled substance crimes. (Doc ID #4, A-7-8) Mr. Dominguez was charged with terrorizing for pointing a gun at the victim, threatening the victim and trying to get the victim to get into the truck of Dominguez's vehicle. Mr. Dominguez was charged with attempted murder for firing his gun approximately four times at the victim, who was running away from Dominguez. The victim fell to the ground as if he had been hit, and Mr. Dominguez then left the scene. (Doc ID #4, A-7)

[¶2] On January 29, 2012, a Second Amended Felony Complaint & Information was filed, adding statutory language to the attempted murder charge. (Doc ID #23, A-9-11) Specifically, the charge was amended to state the following definition of murder: "intentionally or knowingly causing the death of another human being or causing the death of another human being under circumstances manifesting extreme indifference to the value of human life." (Doc ID #23, A-9)

The Second Amended Felony Complaint & Information was filed and received by the trial court without objection from Mr. Dominguez.[1]

[¶3] The case proceeded to jury trial commencing January 31, 2012. At the close of the State's case, Mr. Dominguez moved for a judgment of acquittal pursuant to Rule 29 of the North Dakota Rules of Criminal Procedure. On the record, the trial court ruled on that motion and denied the relief requested.[2]

[¶4] The trial proceeded, and Mr. Dominguez took the witness stand in his own defense.[3] Mr. Dominguez testified at length about being angry with the victim because he believed that the victim had stolen tire rims from him. Mr. Dominguez also testified that he acquired a gun only a few days prior to the incident at the heart of this case. He admitted that he had removed the gun from his house and placed it into the trunk of his car just moments before lying to the victim in order to induce the victim to ride around with him in that same car.

[¶5] Mr. Dominguez told that jury that he drove the victim out to a rural Walsh County area for the purpose of accusing the victim of stealing tire rims from him, and admitted that he confronted the victim about this issue and that the

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[1] Although the trial transcript was not ordered for this appeal, the State asserts that counsel for Mr. Dominguez would stipulate that there was no objection to the Second Amended Felony Complaint & Information.

[2] Although the trial transcript was not ordered for this appeal, the State has reviewed the court recorder's trial notes which specifically reflect defense counsel's oral Rule 29 motion, followed by the trial court's oral findings resulting in a denial of the motion.

[3] Without a trial transcript, the State is unable to give specific transcript references regarding the defendant's trial testimony. Nevertheless, the State is confident that defense counsel would agree that the synopsis provided hereafter is a general recitation of Mr. Dominguez's testimony.

victim initially denied stealing from him. Mr. Dominguez also testified that after he had taken the gun from his trunk, as the victim was trying to run away from him, the victim finally admitted that he had stolen the tire rims in question. Mr. Dominguez testified that the victim was trying to flee from the scene, and took off across a farmer's field.

[¶6] Mr. Dominguez told the jury that he wanted to bring the victim into the Grafton Law Enforcement Center to report the victim's admission that he had stole tire rims from Dominquez, and therefore he aimed his gun at the victim's back as the victim was running away. Mr. Dominguez insisted that he did not want to kill the victim. Nevertheless, Mr. Dominguez admitted to pulling the trigger of the gun, while it was still aimed in the direction of the victim, and moreover that he pulled the trigger approximately 4 times. Mr. Dominguez persisted in his testimony that he shot at the victim for the purpose of having the victim return to Dominguez's car so that Dominguez could then transport the victim into the City of Grafton and turn the victim over to law enforcement.

[¶7] Mr. Dominguez testified that after he shot at the victim, he saw the victim fall into the field, and that he did nothing to check on the status of the victim. Instead, Mr. Dominguez admitted that he put his gun back into his car and left the scene, with the victim still lying in the field. Mr. Dominguez then returned to Grafton and played basketball outside with friends.

[¶8] After the conclusion of Mr. Dominguez's case, the State waived rebuttal testimony, and the trial court held a conference to review the jury instructions and verdict forms. Mr. Dominguez's counsel suggested one change

to the jury instruction entitled "attempted murder," which the trial court granted. No other objection was raised regarding the "attempted murder" jury instruction, nor to the proposed general verdict forms. The trial court subsequently instructed the jury in accord with the jury instructions agreed upon at the conference.[4]

[¶9] The case was submitted to the jury at the end of the second day of trial, February 1, 2012, and concluded with verdicts of "guilty" to the two charges that were submitted: terrorizing and attempted murder. (A-3) The "guilty" verdicts were docketed the following day, February 2, 2012. (Doc ID #32 & #33, A-4)

[¶10] Aside from the initial Rule 29 motion made at the conclusion of the State's case, Mr. Dominguez did not make any further motions prior to submission of the case to the jury. Similarly, Mr. Dominguez did not make any oral motions on the record after the verdict was returned.[5]

[¶11] Nevertheless, on March 20, 2012, Mr. Dominguez filed a written Motion to Set Aside Jury Verdict and Order a New Trial. (Doc ID #48, A-4) The State responded to Mr. Dominguez's motion on April 13, 2012, and raised the issue of timeliness in its response. (Doc ID #53, A-4) The motion was set for oral argument, held on April 23, 2012. (A-4)

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[4] Again, without a trial transcript the State is unable to provide this Court with specific references to the record. The trial court's written memorandum opinion reflects these facts at A-19.

[5] The State has reviewed the court recorder's trial notes which specifically reflect that no motions were made at the conclusion of Mr. Dominguez's case, nor after the verdict was returned. The State further asserts that based on communications with defense counsel, there is no dispute as to these assertions.

[¶12] Following the motion hearing, the trial court issued a detailed Memoranda Decision and Order Denying Defendant's Motion to Set Aside Jury Verdict. (Doc ID #55, A-15-19) The trial court did not address the timeliness of Mr. Dominguez's motion, but provided a substantive response to the issues raised by Mr. Dominguez relating to the jury instruction and verdict form. (Doc ID #55, A-15-19) The trial court's decision was filed April 25, 2012. (Doc ID #55, A-15-19)

[¶13] Mr. Dominguez appeared before the trial court for sentencing on May 16, 2012. (A-4) Criminal judgments were docketed on May 17, 2012. (Doc ID #58 & #59) The following day, May 18, 2012, Mr. Dominguez timely filed and served a Notice of Appeal of the trial court's memorandum decision. (Doc ID #62, A-20)

STANDARD OF REVIEW

[¶14] The defendant suggests three different standards of review in his brief. At paragraph 10, Mr. Dominguez asserts that this case should be reviewed as an "abuse of discretion" committed by the trial court based upon the memorandum decision to deny his request for a new trial. (Appellant's Brief at ¶10) Next, Mr. Dominguez suggests that this appeal is actually an application for post-conviction relief, and that the standard of review is "clearly erroneous under N.D.Civ.R.P. 52(a)." (Appellant's Brief at ¶11) Finally, Mr. Dominguez suggests that the alternative standard of review is "obvious error" pursuant to N.D.R.Crim.P. 52(b). (Appellant's Brief at ¶12)

[¶15] For reasons set forth hereafter, the State asserts that this is an "obvious error" appeal pursuant to N.D.R.Crim.P. 52(b). This standard of review requires Mr. Dominguez to show error that is plain and affects his substantial rights.

A. ***The Defendant's Motion to Set Aside the Jury Verdict and Order a New Trial was not timely made***

[¶16] North Dakota Rule of Criminal Procedure 29 allows a criminal defendant to move for a judgment of acquittal after the prosecution closes its evidence or after the close of all of the evidence, prior to the case being submitted to the jury for verdict. After a jury has rendered a verdict, there is also a mechanism for a defendant to request a judgment of acquittal. Specifically, subsection (c) provides:

> *(c) After jury verdict or discharge.*
>
> *(1) Time for a motion. A defendant may move for a judgment of acquittal, or renew such a motion,* ***within 14 days*** *after a guilty verdict or after the court discharges the jury, whichever is later. [emphasis supplied]*

[¶17] Mr. Dominguez did not move for judgment of acquittal prior to submission of the case to the jury, nor on the record after the jury had returned its verdicts. Mr. Dominguez filed his motion on March 20, 2012, more than six weeks after the guilty verdict was rendered and the jury discharged. Mr. Dominguez's motion was not timely made, and therefore the issue was not properly preserved for appeal and should not be reviewed on an "abuse of discretion" standard.

[¶18] In the same vein, Rule 33 of the North Dakota Rules of Criminal Procedure also provide for a motion to vacate a verdict and grant a new trial.

Specifically, Rule 33 gives a trial court the authority to set aside a jury verdict upon a Defendant's motion "if the interest of justice so requires." Still, this Rule also sets out the specific limits which apply to such a circumstances, including strict time guidelines for requesting this type of relief.

[¶19] The Rule 33, at subsection (b) subpart (1), allows for a new trial on the basis of newly discovered evidence, if it is filed within three years after the verdict. Mr. Dominguez has never asserted that he is entitled to a new trial based on "newly discovered evidence," nor has he provided affidavits or other supporting documents to assert that he has come upon "newly discovered evidence."

[¶20] Instead, Mr. Dominguez seems to be requesting relief under Rule 33, subsection (b) which also authorizes granting a new trial for "other grounds." Specifically, the Rule 33 states at subsection (b), subpart (2):

> *Any motion for a new trial based on any other reason other than newly discovered evidence* **must be filed within 14 days after the verdict** *or finding of guilty.* [emphasis supplied]

[¶21] This is not a discretionary timeline. See State v. Coppage, 2008 ND 134, 751 N.W.2d 254, ¶11-14; State v. Simek, 502 N.W.2d 545 (N.D.1993). Mr. Dominguez's request for a new trial was not made until more than six weeks after the verdict was returned. Consequently, this issue was not properly preserved at the trial court level and should not be reviewed on an "abuse of discretion" standard as suggested by Mr. Dominguez.

B. ***The Defendant's appeal is not a post-conviction relief proceeding pursuant to Chapter 29-32.1 of the North Dakota Century Code***

[¶22] By referring to the standard of review for post-conviction relief proceedings, Mr. Dominguez seems to suggest that this pending matter should be viewed by this Court as a civil, post-conviction relief proceeding. Paragraph 11 of Mr. Dominguez's brief asserts that post-conviction relief appeals are reviewed under the "clearly erroneous" standard annunciated in Rule 52 of the North Dakota Rules of Civil Procedure.

[¶23] Post-conviction proceedings are available to "[a] person who has been convicted of **and sentenced** for a crime." N.D.C.C. § 29-32.1-01(1) [emphasis supplied]. In the instant case, Mr. Dominguez filed a written motion to set aside the jury verdict and for a new trial on March 20, 2012, prior to being sentenced. Moreover, the trial court held oral argument on the motion and issued a written opinion in April, 2012. Mr. Dominguez wasn't sentenced until May, 2012. He then immediately appealed to this court. The State is perplexed by any suggestion that this pending appeal is, in any fashion, a post-conviction relief proceeding.

C. ***When an issue is not properly preserved at the trial court, the standard of review is "obvious error" pursuant to Rule 52(b) of the North Dakota Rules of Criminal Procedure***

[¶24] It is established that when a defendant fails to object to perceived irregularities at the trial court level, he has waived his right to complain on appeal about those same issues. *"[T]he doctrine of waiver is applicable to all rights and privileges to which a person is legally entitled, whether secured by contract,*

conferred by statute, or guaranteed by the constitution, provided such rights and privileges rest in the individual who has waived them and are intended for his benefit." State v. Jahner, 2003 ND 36, ¶9, 657 N.W.2d 266.

[¶25] The waiver doctrine applies to jury instructions. "*Consequently, an attorney's failure to object at trial to instructions, when given the opportunity, operates as a waiver of the right to complain on appeal of instructions that either were or were not given . . . Thus, our inquiry is limited to determining if the alleged error constitutes obvious error affecting the substantial rights of the defendant.*" Jahner at ¶12 [citations omitted]. "*When a defendant fails to properly object to a proposed instruction . . .the issue is not adequately preserved for appellate review and our inquiry is limited under N.D.R.Crim.P. 52(b) to whether the jury instructions constitute obvious error affecting substantial rights.*" State v. Erickstad, 2000 ND 202, ¶18, 620 N.W.2d 136. In the same vein, this Court also noted: "*In applying obvious error analysis under the corresponding federal rule, the United States Supreme Court has noted: "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."* Erickstad at ¶21 [citations omitted].

[¶26] The State asserts that in this case, where Mr. Dominguez failed to object to the jury instruction and the general verdict form for which he now appeals, the proper standard of review is founded in Rule 52 of the North Dakota Rules of Criminal Procedure:

Rule 52. Harmless and obvious error.
(a) Harmless error. Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded.
(b) Obvious error. An obvious error or defect that affects substantial rights may be considered even though it was not brought to the court's attention.

Error founded in Rule 52 can be reviewed by both the trial court and this appellate court. State v. Kraft, 413 N.W.2d 303 (N.D. 1987).

[¶27] Justice Maring reaffirmed this well-accepted standard in State v. Bingaman, 2002 ND 202, ¶ 9, 655 N.W.2d 51, providing a detailed explanation of how this standard of review is to be applied:

> *Generally, issues not properly preserved at the trial court level will not be heard on appeal. See State v. Yineman, 2002 ND 145, ¶ 21, 51 N.W.2d 648. However, under N.D.R.Crim.P. 52(b), this Court is allowed to notice obvious errors which are revealed in the record. See Yineman, at ¶ 21. "Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." N.D.R.Crim.P. 52(b). Our Court has stated that it will only exercise its power to notice obvious error in "exceptional circumstances where the accused has suffered serious injustice." State v. Johnson, 2001 ND 184, ¶ 12, 636 N.W.2d 391. We exercise our power to find obvious error cautiously and have very rarely found obvious error under Rule 52(b). See Johnson, at ¶ 12. "An alleged error does not constitute obvious error unless there is a clear deviation from an applicable legal rule under current law." State v. Miller, 2001 ND 132, ¶ 25, 631 N.W.2d 587. In order to prove that obvious error occurred, [the defendant] would have the burden of showing: "(1) error, (2) that is plain, and (3) that affects substantial rights." Id.*

[¶28] The attempted murder jury instructions and the general verdict form submitted to the jury in this case were not erroneous. Moreover, the trial court gave a detailed memorandum explaining his decision to deny Mr. Dominguez's request for a new trial based on these ill-perceived errors, and consequently

there is no basis for this Court to conclude that there was "obvious error" or a "clear deviation" from the applicable law.

ARGUMENT

I. Did the trial court properly instruct the jury on the law of attempted murder?

[¶29] The North Dakota Century code defines the crime of murder as follows at N.D.C.C. § 12.1-16-01:

> *1. A person is guilty of murder, a class AA felony, if the person:*
> *a. Intentionally or knowingly causes the death of another human being; [or]*
> *b. Causes the death of another human being under circumstances manifesting extreme indifference to the value of human life*
>
> * * * * *

[¶30] North Dakota also sets forth the circumstances under which a person can be found guilty of an attempted crime, pursuant to N.D.C.C. 12.1-06-01(1), which provides:

> *1. A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime. A "substantial step" is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime. Factual or legal impossibility of committing the crime is not a defense, if the crime could have been committed had the attendant circumstances been as the actor believed them to be.*
>
> * * * * *

[¶31] Finally, our criminal code also provides clear direction on the various levels of criminal "culpability." This is found at N.D.C.C. § 12.1-02-02, which states:

1. *For the purposes of this title, a person engages in conduct:*
   a. *"Intentionally" if, when he engages in the conduct, it is his purpose to do so.*
   b. *"Knowingly" if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.*
   c. *"Recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 12.1-04-02, awareness of the risk is not required where its absence is due to self-induced intoxication.*
   d. *"Negligently" if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct.*
   e. *"Willfully" if he engages in the conduct intentionally, knowingly, or recklessly.*
2. *If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully.*
3. a. *Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense, except that where the required culpability is "intentionally", the culpability required as to an attendant circumstance is "knowingly".*
   b. *Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required degree of culpability is required with respect to the result.*
   c. *Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for grading.*
   d. *Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in chapters 12.1-01 through 12.1-06; otherwise the least kind of culpability*

required for the offense is required with respect to such facts.

e. A factor as to which it is expressly stated that it must 'in fact' exist is a factor for which culpability is not required.

4. Any lesser degree of required culpability is satisfied if the proven degree of culpability is higher.

5. Culpability is not required as to the fact that conduct is an offense, except as otherwise expressly provided in a provision outside this title.

[¶32] It is the intermingling of these three statutes that is at the core of Mr. Dominguez's appeal in this case. He argues that the varying levels of culpability attached to subdivision (1)(a) and subdivision (1)(b) of the murder statute, layered with the culpability requirement of "attempt," are so incongruous that a jury would be unable to navigate the requisite levels of culpability so as to find a criminal defendant guilty of attempted murder.

[¶33] In essence, Mr. Dominguez asks this Court to hold that in situations where a victim does not die, as a matter of law, a defendant cannot be convicted of "attempting" to "cause the death of another under circumstances manifesting extreme indifference to the value of human life." Unfortunately for Mr. Dominguez, that is neither an accurate recitation of the law of attempted murder in North Dakota, nor is it a compelling argument to overturn the established precedent.

A. **The culpability attributed to subsection (1)(b) murder is "willfully."**

[¶34] The statutory directive of N.D.C.C. § 12.1-02-02 at subsection (2) is clear. Subsection (1)(b) murder does not specify culpability, and therefore the culpability required is "willfully." "Willfully" necessary includes conduct that is intentional, knowing or reckless. N.D.C.C. § 12.1-02-02(1)(e). This was properly

determined by the district court in his written opinion. A-16-18; see also State v. Halvorson, 346 N.W.2d 704 (N.D. 1984).

B. **The culpability assigned to criminal attempt of subsection (1)(b) murder is two-fold.**

[¶35] The criminal attempt statute requires the level of culpability "otherwise required for commission of a crime," but also requires the defendant to have "intentionally" engaged in conduct which is a substantial step toward commission of the crime. Applying this to the subsection (1)(b) murder, it necessarily means that there must be both "willful" (i.e., intentional, knowing or reckless) conduct under circumstances manifesting extreme indifference to the value of human life, and there must also be "intentional" conduct which constitutes the substantial step toward causing the death of another. This is precisely how the trial court instructed the jury on this issue.

C. **The trial court addressed all of the culpability requirements of attempted murder throughout the jury instructions.**

[¶36] In the instant case, the trial court used the term "willfully" as it related to subsection (1)(b) in different places throughout the jury instructions. The trial court also properly described the "intentionally engaging in conduct" language that is critical to the attempt statute.

[¶37] Initially, on the instruction entitled "Duty Of Jury – Description of the Charges" the Court described the attempted murder charge as follows:

> *Count Two: That on or about August 4, 2011, in Walsh County, North Dakota, the defendant by use of a firearm attempted to intentionally or knowingly cause the death of another human being, David Nelson; or by use of a firearm attempted to willfully cause the death of David Nelson under circumstances manifesting extreme indifference to human life.*

[¶38] The Court also described the crime of "Attempted Murder" as follows:

A person is guilty of Attempted Murder if when acting intentionally or knowingly to cause the death of another human being or if acting willfully under circumstances manifesting extreme indifference to the value of human life, that person intentionally engaged in conduct which constituted a substantial step towards causing the death of another human being.

[¶39] When providing the jury with the "Essential Elements of Offense – Attempted Murder," the jury was instructed:

The State's burden of proof is satisfied if the evidence shows, beyond a reasonable doubt, the following essential elements:

1. *On or about August 4, 2011, in Walsh County, North Dakota, the defendant, Esteban F. Dominguez;*
2. *Acted intentionally or knowingly to cause the death of another human being, David Nelson; or acted willfully under circumstances manifesting extreme indifference to the value of human life; and*
3. *The defendant, Esteban F. Dominguez, intentionally engaged in conduct which constituted a substantial step towards causing the death of another human being, David Nelson.*

[¶40] The Court also provided the pattern jury instruction which defined the culpability terms: intentionally, knowingly, recklessly, and willfully.

D. **These jury instructions, when taken as a whole, adequately advised the jury of the appropriate law.**

[¶41] Numerous North Dakota Supreme Court cases reference murder and attempted murder cases where the defendant has been charged with violation of both subdivision (1)(a) and subdivision (1)(b) murder. See State v. Keller, 2005 ND 86, 695 N.W.2d 703; State v. Erickstad, 2000 ND 202, 620 N.W.2d 136; State v. Frey, 441 N.W.2d 668 (N.D. 1989); State v. Halvorson, 346 N.W.2d 704 (N.D. 1984). This Court has recognized that subpart (1)(a) murder may require specific intent, but subpart (1)(b) is a general intent crime. Erickstad at ¶25; see

also State v. Coppage, 2008 ND 134, 751 N.W.2d 254. Nevertheless, it follows that juries have long received instructions where they have been required to discern the differing culpability requirements of murder under subdivision (1)(a): "**intentionally** or **knowingly** causing the death of another human being;" and the culpability requirement of murder under subdivision (1)(b): "**willfully (i.e. "intentionally" or "knowingly" or "recklessly")** causing the death of another human being under circumstances manifesting extreme indifferent to the value of human life.

[¶42] It is well settled that in determining whether a particular jury instruction is misleading, the instructions must be considered as a whole and, when taken as a whole, they should correctly advise the jury as to the law. Jury instructions are sufficient even if a portion standing alone may be insufficient or erroneous. Halvorson at 709; see also State v. Jaster, 2004 ND 223, ¶17, 690 N.W.2d 213 and cases cited therein.

[¶43] In the instant case, the State asserts that the jury instructions as a whole more than adequately advised the jury of the essential elements of the offense of attempted murder. Moreover those same jury instructions properly cited the various culpability requirements assigned to the crime of attempted murder. There was no "clear deviation from an applicable legal rule under current law." Miller at ¶ 25. Consequently, there was no "obvious error" as required by N.D.R.Crim.P.52(b).

E. **A general jury verdict form was appropriately submitted to the jury**

[¶44] Mr. Dominguez also infers that separate verdict forms should have been provided to the jury to distinguish between "guilty" verdicts under subpart (1)(a) and subpart (1)(b) of the murder statute. (Appellant's Brief at ¶30) He asserts that there was no way to assure that the verdict on either of the subparts was reached unanimously. This position is unsupportable because Mr. Dominguez neither objected to nor presented alternate jury verdict forms. Moreover, North Dakota law does not favor anything other than a general verdict form in criminal cases.

[¶45] It is settled law in North Dakota that a jury need not agree on significance of different pieces of evidence that are presented. When alternate theories of the commission of a crime are spelled out in a statute, jurors can still find alternative means by which the statute has been violated.

[¶46] In City of Mandan v. Sperle, 2004 ND 114, 680 N.W.2d 275, the defendant argued that the jury should have been required to unanimously find one specific act constituting disorderly conduct, rather than allowing the possibility that individual jurors could find that she committed different acts resulting in her guilty verdict. This theory was flatly rejected by the North Dakota Supreme Court. Specifically, this Court, citing to a United States Supreme Court decision wrote:

> *We have never suggested that in returning general verdicts . . . the jurors should be required to agree upon a single means of commission, any more than indictments were required to specify one alone. In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.* ***Plainly***

> ***there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.*** *" [internal footnotes omitted] . . . [L]egislatures frequently enumerate alternative means of committed a crime without intending to define separate elements or separate crimes . . . If a state's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law.* Sperle at ¶14.

[¶47] In this case, there was no need for the jury to distinguish between attempted murder pursuant to subpart (1)(a) of the murder statute, or subpart (1)(b) of the murder statute. Evidence supporting both theories of attempted murder was presented to them. The appropriate law on both theories of attempted murder was presented to them. Jurors are presumed to follow the law presented to them. State v. Osier, 1999 ND 28, ¶24, 590 N.W.2d 205. The tasks of weighing the evidence and judging credibility of witnesses belongs to them, and courts should neither second guess not speculate why they have rendered the verdicts that they did, so long as there is evidence to support the verdict. See Jahner at ¶21. Unfortunately for Mr. Dominguez, the submission of a general verdict form was no "obvious error" as required by N.D.R.Crim.P.52(b).

II. Is the crime of murder a "strict liability" offense?

[¶48] Mr. Dominguez asserts that this Court should conclude that murder is a strict liability offense based on the nature of the construction of the statute. This is a just another way of stating that subpart (1)(b) murder requires that the victim must die in order for a defendant to be convicted of subpart (1)(b) murder;

and effectively rendering that a person could not be convicted of attempted murder pursuant to subpart (1)(b).

[¶49] Mr. Dominguez cites no authority to this Court to support such a drastic change in the murder law of the State of North Dakota, other than to suggest that it is "simple logic" that the provision of the code that assigns "willful" culpability to criminal statutes (i.e., N.D.C.C. § 12.1-02-02(2)) should not apply. (Appellant's Brief at ¶33)

[¶50] The cases which Mr. Dominguez cites to support his assertion that murder should be viewed as a "strict liability" crime are specific crimes that are not found in Chapter 12.1 of the North Dakota Century Code. Although violation of a domestic violence protection order is a "strict liability" crime, it is found in Chapter 14 of the North Dakota Century Code. Likewise, DUI is generally considered a "strict liability" crime, but it is found in Chapter 39 of the Century Code. His suggestion that murder should be a "strict liability" crime should be soundly rejected.

[¶51] As with his other claims, Mr. Dominguez has failed to show that there is any basis upon which to grant him the relief he requests. At the trial court, there was no "clear deviation from an applicable legal rule under current law," Miller at ¶ 25, nor was there "obvious error" as required by N.D.R.Crim.P.52(b). Mr. Dominguez's appeal must be denied.

CONCLUSION

[¶52] For the reasons set forth herein, the State of North Dakota respectfully requests that the North Dakota Supreme Court AFFIRM the Memoranda Decision and Order Denying the Defendant's Motion to Set Aside the Jury Verdict, thereby affirming the jury verdict in this case which found Esteban Dominguez guilty of the crime of attempted murder.

Dated this 25th day of September, 2012.

Respectfully submitted,

Barbara L. Whelan

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