

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,

Appellee

v.

Chase Duane Swanson,

Appellant.

Supreme Court Case No. 20180373
District Court Case No. 06-2016-CR-00085

APPELLANT'S BRIEF

**APPEAL FROM THE CRIMINAL
JUDGMENT OF THE BOWMAN
COUNTY DISTRICT COURT,
SOUTHWEST JUDICIAL DISTRICT BY
THE HONORABLE JAMES GION**

Thomas F. Murtha IV
North Dakota Attorney ID#6984
PO Box 1111
Dickinson ND 58602-1111
701-227-0146
Attorney for Appellant

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[¶3] STATEMENT OF THE ISSUES ON APPEAL

Did the jury instructions misinform the jury on culpability and is the Third Amended Information defective because under the definition of “knowingly” it is not possible to agree for the purpose of committing a conspiracy to “knowingly” cause the death of another?

[¶4] STATEMENT OF THE CASE

[¶5] This is a direct appeal from the Criminal Judgment dated November 21, 2018 in Bowman County District Court in the case of State of North Dakota v. Chase Duane Swanson, 06-2016-CR-00085. Index #440. The co-defendant, Madison West, was charged in the case of State of North Dakota v. Madison Beth West, 06-2016-CR-00086, 20180358, currently on appeal to the North Dakota Supreme Court.

[¶6] An initial complaint was filed on September 1, 2016 charging Mr. Swanson with Conspiracy to Commit Murder, a class AA felony, Theft of Property, a class C felony, and Felon in Possession of a Firearm, a class C felony for acts alleged to have occurred on or about August 20, 2016.

[¶7] Mr. Swanson was found eligible for appointed counsel on September 11, 2016 and attorney Steven Mottinger was assigned to represent Mr. Swanson on September 16, 2016. Index #11; Index #14.

[¶8] Mr. Swanson filed a written waiver of the preliminary hearing and entered a not guilty plea on November 8, 2016, the Court granted the same by Order filed November 10, 2016. Index #35; Index #37.

[¶9] A Notice of Pretrial and Jury Trial was filed on November 14, 2016 assigning District Court Judge Dann Greenwood and scheduling the case for pretrial conference on February 14, 2017 and jury trial on February 22, 2017. Index #39.

[¶10] On December 20, 2016, the Bowman County State’s Attorney filed a letter to

Judges Greenwood and Gion asking “what the Court’s intentions were with regard to who is presiding and how we go forward in having the hearings track together?” Index #41. On December 20, 2016 Judge Greenwood recused himself. Index #43. On December 21, 2016 Judge James Gion was assigned to the case. Index #44, Index #45.

[¶11] The State filed an amended criminal complaint on February 28, 2017, an Information on February 9, 2017, and an amended Information on February 16, 2017. Index #49; Index #51, Index #52.

[¶12] Mr. Swanson substituted counsel for attorney Thomas F. Murtha IV on June 14, 2017. Index #72.

[¶13] Mr. Swanson filed a motion for relief from prejudicial joinder on August 18, 2017. Index # 96. The District Court denied the motion by Order filed September 29, 2017. Index #106.

[¶14] On December 11, 2017 the District Court filed an Order to change the location of trial. Index #128.

[¶15] On December 21, 2017 the State filed a Second Amended Information. Index #136.

[¶16] On January 25, 2018 the State filed a Third Amended Information. Index #183.

[¶17] Mr. Swanson filed written proposed jury instructions on February 11, 2018. Index #202.

[¶18] Mr. Swanson objected to the District Court’s jury instructions during trial and submitted a brief. Index #205.

[¶19] A jury trial was conducted in Stark County from February 12-22, 2018 finding Mr. Swanson guilty on all counts. Index #440 (Amended Criminal Judgment). On the

Conspiracy to Commit Murder charge Mr. Swanson was sentenced to the custody of the North Dakota Department of Corrections and Rehabilitation for life without parole, on the Theft of Property charge to 5 years (concurrent), and on the Felon in Possession of a Weapon charge to five years (concurrent).

[¶20] Mr. Swanson timely filed his Notice of Appeal on October 9, 2018. Index #414.

[¶21] **STATEMENT OF THE FACTS**

[¶22] On August 19, 2016 Mr. Swanson was living and working at the El Vue Motel in Bowman, North Dakota Transcript page 1042; 1084, line 25 to page 1085, line 6 (T-1042; 1084:25-1085:1-6).

[¶23] On the evening of August 19, 2016 Ms. West and Mr. Swanson were drinking at Windy's bar in Bowman, North Dakota. T-83-85; 1059; 1087. Nicolas Johnson offered and gave Ms. West and Mr. Swanson a ride back to the El Vue Motel. T-1064; 1090-1091.

[¶24] Upon arriving at the motel Nicolas Johnson invited himself in over the objection of Mr. Swanson to have a few drinks. T-1091. Once inside the room Mr. Swanson explained that they were tired and needed to work in the morning and Mr. Johnson responded that he wanted to get his dick sucked. T-1093. Mr. Swanson was incredulous and Mr. Johnson forced the issue by drawing a knife and declaring that "she's going to suck my dick." T-1093.

[¶25] Mr. Swanson responded by assuming a boxing stance and Mr. Johnson slashed at him with the knife. T-1094. Mr. Swanson then punched Mr. Johnson in the nose and a fight ensued. T-1094. Mr. Swanson thought Mr. Johnson was trying to kill him and got the knife from Mr. Johnson and threw it. T-1094-1095. Mr. Johnson went to pick up the

knife and Mr. Swanson struck Mr. Johnson with a ratchet repeatedly incapacitating him. T-1096-1097. Ms. West hugged Mr. Swanson and thanked him for saving her. T-1097.

[¶26] While Mr. Swanson was holding Ms. West Todd Pashano entered the room. T-1097. Mr. West informed Mr. Pashano that Mr. Johnson had just tried to rape Ms. West. T-1097-1098. Mr. Pashano then started assaulting Mr. Johnson as Mr. Swanson watched in shock. T-1098-1099. Mr. Swanson wanted to stop Mr. Pashano but was afraid Mr. Pashano would turn on him so he left the room. T-1099.

[¶27] Mr. Swanson left the room and sat down in front of another room and listened. T-1099. Eventually Mr. Swanson went back to the room and observed Mr. Pashano leaving and Mr. Johnson laying on the ground with a flashlight in his rectum and a belt around his neck with Ms. West sanding naked covered in blood laughing. T-1100. Mr. Swanson was in shock. T-1101. Mr. Swanson left the room again and upon his return observed that Mr. Pashano had returned to the room and again assaulted Mr. Johnson. T-1102.

[¶28] Eventually Mr. Swanson, Mr. Pashano, and Ms. West left the hotel room, got into Mr. Johnson's truck and left the motel for Denver, Colorado. T-1194-1121.

[¶29] **LAW AND ARGUMENT**

[¶30] **Did the jury instructions misinform the jury on culpability and is the Third Amended Information defective because under the definition of “knowingly” it is not possible to agree for the purpose of committing a conspiracy to “knowingly” cause the death of another?**

[¶31] **Standard of Review**

[¶32] Jury instructions are fully reviewable on appeal. State v. Wilson, 2004 ND 51, ¶ 11, 676 N.W.2d 98. We review the instructions as a whole to decide whether they adequately and correctly inform the jury of the applicable law. State v. Anderson, 2016 ND 28, ¶ 31, 875 N.W.2d 496.

State v. Gunn, 2018 ND 95, ¶ 21, 909 N.W.2d 701, 707, cert. denied, 139 S. Ct. 231, 202

L. Ed. 2d 128 (2018).

Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. State v. Pavlicek, 2012 ND 154, ¶ 14, 819 N.W.2d 521. Jury instructions are reviewed as a whole to determine whether they adequately and correctly inform the jury of the applicable law. Id. “The district court is not required to give instructions using the specific language the defendant requests, and may refuse to give a requested instruction if it is irrelevant or does not apply.” State v. Montplaisir, 2015 ND 237, ¶ 29, 869 N.W.2d 435. The court errs if it refuses to instruct the jury on an issue that was adequately raised. Pavlicek, at ¶ 14. “A defendant is entitled to a jury instruction on a defense if there is evidence to support it and it creates a reasonable doubt about an element of the charged offense.” State v. Samshal, 2013 ND 188, ¶ 14, 838 N.W.2d 463. The evidence is viewed in the light most favorable to the defendant to determine whether there is sufficient evidence to support a requested instruction. Id.

City of Bismarck v. King, 2019 ND 74, ¶ 6, 924 N.W.2d 137, 140.

[¶33] **Argument**

[¶34] The main point of Mr. Swanson’s argument is that conspiracy to knowingly cause the death of another human being is not an offense in North Dakota and therefore, in so far as the third amended information charges Mr. Swanson with conspiracy to knowingly cause the death of another human being, the third amended information is defective. See State v. Borner, 2013 ND 141, ¶ 24, 836 N.W.2d 383, 391–92 (“A charging document is defective if it fails to contain a “ ‘written statement of the essential elements of the offense.’ ” See State v. Bertram, 2006 ND 10, ¶ 23, 708 N.W.2d 913 (quoting State v. Frankfurth, 2005 ND 167, ¶ 7, 704 N.W.2d 564). The trial court obviously erred when it failed to apply this essential element of the offense of conspiracy to commit murder. Had it done so, it would have recognized the information was defective. See Olander, 1998 ND 50, ¶ 16, 575 N.W.2d 658.”).

[¶35] In this case Mr. Swanson was charged by information with the crime of

conspiracy to commit murder. The third amended information specifically states:

The defendants agreed with one or more persons to engage in or cause conduct which in fact constituted the offense of Murder, and any one or more of such persons committed an overt act to effect the objective of the conspiracy, specifically the defendants agreed with each other to intentionally or knowingly cause the death of Nicholas Johnson, and the defendants committed the overt act or acts of obtaining a weapon(s), inviting Nicholas Johnson into their motel room, striking Nicholas Johnson in the head with an object, stomping Nicholas Johnson, cinching a belt around Nicholas Johnson's neck, or concealment of the evidence of the crime.

The third amended information further referenced N.D.C.C. § 12.1-06-04 and § 12.1-16-01(1)(a).

[¶36] The crime of conspiracy in North Dakota is a statutory crime as described in N.D.C.C. § 12.1-06-04 as follows:

1. 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.
2. If a person knows or could expect that one with whom he agrees has agreed or will agree with another to effect the same objective, he shall be deemed to have agreed with the other, whether or not he knows the other's identity.
3. A conspiracy shall be deemed to continue until its objectives are accomplished, frustrated, or abandoned. "Objectives" includes escape from the scene of the crime, distribution of booty, and measures, other than silence, for concealing the crime or obstructing justice in relation to it. A conspiracy shall be deemed abandoned if no overt act to effect its objectives has been committed by any conspirator during the applicable period of limitations.
4. It is no defense to a prosecution under this section that the person with whom such person is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

5. Accomplice liability for offenses committed in furtherance of the conspiracy is to be determined as provided in section 12.1-03-01.

6. Conspiracy is an offense of the same class as the crime which was the objective of the conspiracy.

[¶37] The crime of murder, as referenced in the third amended information, is described in N.D.C.C. § 12.1-16-01(1)(a) as follows:

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;

[¶38] There is no pattern criminal jury instruction written by the committee for conspiracy to commit murder. The preliminary and final jury instructions submitted to the jury by the District Court included language charging conspiracy to commit murder as both an intentional crime or a knowing crime. Mr. Swanson argues that doing so was an error and that conspiracy to “knowingly” cause the death of another human being is not a cognizable offense in North Dakota. See State v. Borner, 2013 ND 141, ¶ 7, 836 N.W.2d 383, 386 (“We conclude conspiracy to commit murder requires a finding of intent to cause death . . .”).

[¶39] The crime of conspiracy is a specific intent crime. State v. Borner, 2013 ND 141, ¶ 20, 836 N.W.2d 383, 391 (“We conclude conspiracy is a specific intent crime . . .”). Specific intent crimes require that the State prove an illegal purpose whereas general intent crimes require no such proof of purpose. Id. Intentionally and knowingly are each defined separately in N.D.C.C. § 12.1-02-02 as follows:

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.

Further, the North Dakota Supreme Court has explained that “[t]he highest level of culpability is intentionally. State v. Rufus, 2015 ND 212, ¶ 22, 868 N.W.2d 534.” State v. Gunn, 2018 ND 95, ¶ 24, 909 N.W.2d 701, 708, cert. denied, 139 S. Ct. 231, 202 L. Ed. 2d 128 (2018)(explaining the difference in culpability between knowingly and intentionally). Therefore a charge of homicide pursuant to N.D.C.C. § 12.1-16-01(1)(a) is both a specific intent and a general intent crime because the statute includes the culpability requirements of knowingly (general intent, no proof of purpose requirement) and intentionally (specific intent, proof of purpose requirement).

[¶40] By way of comparison the North Dakota Supreme Court has previously determined that in North Dakota conspiracy to commit unintentional murder is not a cognizable crime. State v. Borner, 2013 ND 141, ¶ 20, 836 N.W.2d 383, 391 (“We conclude conspiracy is a specific intent crime requiring intent to agree and intent to achieve a particular result that is criminal. Specifically, to find a person guilty of conspiracy to commit murder, the State must prove (1) an intent to agree, (2) an intent to cause death, and (3) an overt act. See State v. Keller, 2005 ND 86, ¶ 51, 695 N.W.2d 703.”). The difference between “intentionally” and “knowingly” causing death is that for “knowingly” there is no requirement for the State to prove it was the defendant’s purpose to cause death whereas for “intentionally” the State must prove it was the defendant’s purpose to cause death. Therefore the crime of conspiracy to “knowingly” cause the death of another human being is not a cognizable crime in North Dakota because the definition of “knowingly” relieves the State from proving it was the defendant’s purpose to cause death.

[¶41] The basic tenet of criminal justice is that a defendant will be punished only for

committing an unlawful act. Constitution of North Dakota, Article 1, §12. When a conviction is based on any one of several grounds, each ground must constitute an unlawful activity. For example in Stromberg v. California, 283 U.S. 359 (1931) the United States Supreme Court ruled that considerations of fairness required a reversal of a general verdict of guilty when any of the bases of the verdict are constitutionally invalid. Id. at 368 (“As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause.”). This rule from Stromberg has been applied to conspiracy cases. See Yates v. U.S., 354 U.S. 516, 529 (1957)(Court reversed a conspiracy conviction determining that statute of limitations had run on the second objective of the conspiracy and the jury was only asked to deliver a general verdict.).

[¶42] In this case the State alleged in the third amended information two different objectives of the conspiracy listed in the disjunctive; those being an agreement to either intentionally or knowingly cause the death of Nicholas Johnson. Because conspiracy to knowingly cause death is not a cognizable offense in North Dakota a general verdict form as provided by the District Court to the jury over the objection of Mr. Swanson violated the rule established in Stromberg and should lead to a reversal. Compare Jones v. State, 301 Ga. 94, 98, 799 S.E.2d 749, 753 (2017) (“[I]t is clear that we reversed the felony murder conviction not because there was insufficient evidence to support one of its possible predicates but because one of those predicates was premised on an erroneous

jury instruction.”).

[¶43] “An individual cannot intend to achieve a particular offense that by its definition is unintended. Borner, at ¶ 18.” Dominguez v. State, 2013 ND 249, ¶ 13, 840 N.W.2d 596, 600. When parties agree to achieve an objective that by definition is not a crime it is impossible for those parties to be guilty of a criminal conspiracy. If one of several objectives does not state a crime, then the defendants are being charged with a conspiracy to commit acts only some of which are illegal. In such cases, a general verdict of guilty on the conspiracy count would violate the rule established in Stromberg because the defendant may have been convicted solely on the basis of an agreement to achieve a crime that is not cognizable. Such is the situation with the charge of conspiracy against Mr. Swanson because the charge of conspiracy to knowingly cause the death of a human being is not cognizable whereas the charge of conspiracy to intentionally cause the death of a human being is cognizable.

[¶44] In State v. Rambousek, 479 N.W.2d 832 (N.D. 1992), the North Dakota Supreme Court wrote, “[O]ur legislative history clearly supports the view that the word ‘agreement’ within N.D.C.C. § 12.1-06-04(1) focuses upon the individualized intent and conduct of the defendant-conspirator . . .” Therefore in order to conspire to commit murder it must be the defendant’s purpose to commit murder or there can be no conspiracy to commit murder. Mr. Swanson objected to the District Court’s jury instructions and submitted proposed written instructions. Index #202. Mr. Swanson’s proposed jury instructions cured the issue of Mr. Swanson being charged with a non-cognizable offense but were not used by the District Court. The District Court committed error and the Judgment must be vacated.

[¶45] **CONCLUSION**

[¶46] Based on the foregoing arguments and law Mr. Swanson respectfully requests that Criminal Judgment be reversed or vacated.

Dated: May 1, 2019

/s/ Thomas F. Murtha IV
Thomas F. Murtha IV (06984)
PO Box 1111
Dickinson ND 58602
701-227-0146
murthalawoffice@gmail.com
Attorney for Appellant

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Chase Duane Swanson,

Appellant.

**CERTIFICATE OF SERVICE FOR
APPELLANT'S BRIEF AND
APPENDIX**

[¶1] Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 06984, and states that on May 1, 2019 he electronically served the following on the Bowman County States Attorney and the North Dakota Attorney General:

APPELLANT'S BRIEF

APPELLANT'S APPENDIX

by sending an electronic copy to the email address aweiss@bowmancountynd.gov
and bkdemellorice@nd.gov.

Dated: May 1, 2019

Thomas F. Murtha IV

Thomas F. Murtha IV
Attorney ID 06984
PO Box 1111
58602-1111
701-227-0146
murthalawoffice@gmail.com

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REGISTER OF ACTIONS in Appendix

by sending an electronic copy to the following email address:

aweiss@bowmancountynd.gov

bkdemelloricew@nd.gov

Dated: May 13, 2019

Thomas F. Murtha IV

Thomas F. Murtha IV (ID #06984)
Attorney for Appellant
PO Box 1111
135 Sims, Ste. 217
Dickinson, ND 58602-1111
Tel: (701) 227-0146
murthalawoffice@gmail.com