20180373
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 29, 2019
STATE OF NORTH DAKOTA

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 REPLY 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] **The State's Brief misconstrues Mr. Swanson's argument that the jury instructions misinformed the jury on culpability.**

[¶4] Mr. Swanson, in arguing that the jury instructions misinformed the jury on the culpability requirements to determine guilt on the charge of conspiracy to commit murder, did not allege that the District Court provided language any different from the North Dakota Century Code, and in fact Mr. Swanson argued that using the exact language in this instance is the problem. The State's claim that the language is the same and "therefore the lower court did not misinform the jury of the culpability requirement for the crime charged" (Appellee's Brief at ¶33) fails to address and appears to intentionally avoid Mr. Swanson's actual argument.

[¶5] **The State's argument that Mr. Swanson's argument is weak because Mr. Swanson did not file a pretrial motion pursuant to N.D.R.Crim.Pro. 12(b)(3(B)(v) is not supported by any legal theory.**

[¶6] Mr. Swanson's argument that the charge of conspiracy to knowingly cause the death of another is not a cognizable offense is actually a jurisdictional challenge because the District Court lacks jurisdiction when no crime has been committed and N.D.R.Crim.Pro. 12(b)(2) allows a defendant to make a motion that the court lacks jurisdiction at any time while the case in pending. See generally, N.D. Const. art. VI, § 8; N.D.C.C. § 27-05-06(1). The State's argument, that Mr. Swanson was untimely in raising the issue and that weakens his argument, has no legal support which is apparently why the State cited none in its brief.

[¶7] **Mr. Swanson's brief accurately interprets State v. Borner, 2013 ND 141, 836 N.W.2d 383, Dominguez v. State, 2013 ND 249, 840 N.W.2d 596, and Mr. Swanson's reliance on Stromberg v. California, 283 U.S. 359 (1931) is not misplaced.**

[¶8] Mr. Swanson argued in his brief that conspiracy to knowingly cause death is a general intent crime whereas conspiracy to intentionally cause death is a specific intent crime. Mr. Swanson's brief generally and at ¶43. Mr. Swanson invited this Court in his brief to compare the law and facts in Borner to the current case. Id. at ¶40. Because Borner addressed the application of conspiracy to a general intent crime and Mr. Swanson is arguing the same issue, application of conspiracy to a general intent crime, Borner appears to be an obvious case for this Court to consider. Mr. Swanson's interpretation of Borner is not erroneous, Borner concluded that conspiracy is a specific intent crime and conspiracy to commit a general intent crime is not cognizable. Id. at ¶18-¶20.

[¶9] Mr. Swanson cited Dominguez for the much same reasons Mr. Swanson cited Borner. In fact the Court in Domingez cites to Borner and Mr. Swanson pointed that out in his brief at ¶43. Dominguez, 2013 ND 249, ¶13, 840 N.W.2d 596, 600 ("An individual cannot intend to achieve a particular offense that by its definition is unintended. Borner, at ¶ 18."). The State's brief focused on dicta from Dominguez at paragraph 19 where the Court stated that

> [u]nder our statutory scheme, reckless endangerment is the appropriate offense when a person's conduct manifests an extreme indifference to human life and there is no evidence of an intent to kill. When there is evidence of an intent to kill, a person can be convicted of attempted murder under N.D.C.C. §§ 12.1–06–01 and 12.1–16–01(1)(a) for attempting to knowingly or intentionally cause the death of another human being.

The Court in Dominguez did not address Mr. Swanson's argument that the charge pursuant to N.D.C.C. § 12.1–16–01(1)(a) involves both a specific and general intent culpability because of the statutory difference between knowingly and intentionally. The State's argument ignores this distinction and asks this Court to rely on dicta. See City of Bismarck v. McCormick, 2012 ND 53, ¶ 14, 813 N.W.2d 599, 604 ("Because the statements are dicta, they are not controlling. See Bakke, 359 N.W.2d at 120.").

[¶10] The State's brief then goes on to argue that because there is evidence of an intent to kill the crime charged is cognizable. State's Brief ¶40. The State's argument and the cases cited by the State fail to address Mr. Swanson's argument that knowingly is a general intent culpability and intentionally is a specific intent culpability. Simply because there is evidence of intent does not change the requirement that the offense charged must cognizable. The State's Brief finds no distinction between the two culpability standards of knowingly and intentionally and ignores that intentionally requires a higher burden of proof than knowingly. See State v. Rufus, 2015 ND 212, ¶ 22, 868 N.W.2d 534; Mr. Swanson's Brief at ¶39.

[¶11] Mr. Swanson's reliance on Stromberg was not a mistake as argued by the State. State's Brief at ¶44. As Mr. Swanson pointed out in his brief at paragraph 41 that the United States Supreme Court in Yates v. U.S., 354 U.S. 298 (1957) applied the rule from Stromberg to conspiracy cases. Yates is a controversial case that should have elicited some response from the State. The State's Brief however ignores Mr. Swanson's reference to Yates and accuses Mr. Swanson of committing a "misleading word scramble" but then fails to substantiate that accusation with any legal authority or substance. The State's brief uses artful word descriptions to impugn Mr. Swanson's brief

but has failed to address the substance of his argument. Plainly stated the Stromberg rule established that a general verdict should be set aside if one of the possible bases of conviction was either unconstitutional or illegal. See generally Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist., No. 4:10-CV-04872, 2017 WL 3236110, at *11 (S.D. Tex. July 31, 2017), aff'd sub nom. Gil Ramirez Grp., L.L.C. v. Marshall, No. 17-20542, 2019 WL 1281192 (5th Cir. Mar. 15, 2019)("If the court errs in a legal instruction, it is reversible error. See Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734, 742 (5th Cir. 1980) (when plaintiff asserts several theories of recovery and one is in error, court is "required to assume that the jury followed only the erroneous instruction"). However, when a court has submitted a charge that lacks factual support, this is not reversible. The Fifth Circuit, interpreting Supreme Court precedent, found that "the Stromberg rule [requiring reversal when one of possible bases for jury's verdict was unconstitutional] should be applied only when jurors have been left the option of relying on a legally inadequate theory, not a factually inadequate theory. Thus we will not reverse a verdict simply because the jury might have decided on a ground that was supported by insufficient evidence." Walther v. Lone Star Gas Co., 952 F.2d 119, 126 (5th Cir. 1992) (emphasis in original). The Supreme Court stated: "We are aware of [no context] in which we have set aside a general verdict because one of the possible bases of conviction was neither unconstitutional as in Stromberg, nor even illegal as in Yates, but merely unsupported by sufficient evidence." Griffin v. United States, 502 U.S. 46, 56 (1991)."). The Stromberg rule applies to Mr. Swanson's situation because one of the basis for the jury's verdict was for a not cognizable offense, that verdict now requires reversal.

[¶12] **CONCLUSION**

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

Dated: May 29, 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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Supreme Court Case No. 20180373
District Court Case No. 06-2016-CR-00085

CERTIFICATE OF SERVICE

[¶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 13, 2019 he electronically served the following on the Bowman County States Attorney and the North Dakota Attorney General:

Appellant's Reply Brief

by sending an electronic copy to the following email address:

Andrew J.Q. Weiss
aweiss@bowmancountynd.gov

Britta K. Demello Rice
bkdemelloricew@nd.gov

Dated: May 29, 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