

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20180373
Bowman County No. 06-2016-CR-00085

State of North Dakota,)
)
 Plaintiff and Appellee,)
)
 vs.)
)
Chase Duane Swanson,)
)
 Defendant and Appellant.)

**PETITION FOR REHEARING
STATE OF NORTH DAKOTA**

APPEAL FROM THE CRIMINAL JUDGMENT ENTERED SEPTEMBER 10, 2018
SOUTHWEST JUDICIAL DISTRICT
THE HONORABLE JAMES GION, PRESIDING

State of North Dakota

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[¶1] TABLE OF AUTHORITIES

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STATUTES AND RULES

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[¶2] STATEMENT OF THE ISSUE

[¶3] Whether the North Dakota Supreme Court erred when it reversed and remanded State v. Swanson and State v. West. State v. Swanson, 2019 ND 181; State v. West, 2019 ND 182.

[¶4] STATEMENT OF THE FACTS

[¶5] The statement facts from the original appellee brief remains the same.

[¶6] ARGUMENT

[¶7] I. THE SUPREME COURT'S OPINION ERRONEOUSLY RELIED UPON BORNER RATHER THAN DOMINGUEZ.

[¶8] The Appellee submits this Petition for Rehearing because this Court related the present matter to Borner rather than the more closely related Dominguez and Olson. State v. Borner, 2013 ND 141, 836 N.W.2d 383; Dominguez v. State, 2013 ND 249, 840 N.W.2d 596; Olson v. State, 2019 ND 135, 909 NW 2d 676. The State requests this Court review its decision and cure the inconsistency between Borner, Dominguez, and Olson. Id.

[¶9] Dominguez held that an attempted extreme indifference murder is not cognizable but if evidence of intent to kill, attempted murder under N.D.C.C. 12.1-16-01(1)(a) is cognizable. "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." Id. at ¶ 19. Like Borner, Dominguez is a specific intent crime coupled with a general intent crime. Unlike Borner, the facts in Swanson contain evidence of intent to kill; which makes the jury instructions correct under Dominguez.

[¶10] The defendant in Dominguez was charged with attempted murder under N.D.C.C. §§ 12.1-06-01 and both 12.1-16-01(1)(a) - intentional or knowing murder, and 12.1-16-01(1)(b) - under circumstances manifesting an extreme indifference to the value of human life. Id. at ¶ 2. The verdict form did not specify which type of attempted murder the jury

found him guilty under. On appeal, Dominguez argued his conviction was illegal and must be vacated because attempted murder under circumstances manifesting an extreme indifference to the value of human life (1)(b) was not a cognizable crime. Id. at ¶ 9.

[¶11] Like in Borner, this Court could not reconcile the logical and legal inconsistency in the elements under attempt and extreme indifference murder because criminal attempt requires an intent to complete the commission of the underlying crime and extreme indifference murder results in an unintentional death. Dominguez, at ¶ 13.

[¶12] The key distinction in Dominguez is this Court recognizing “[w]hen 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.” Id. at ¶ 19. This Court concluded “attempt is a specific intent crime, requiring an intent to commit the underlying offense.” Id. at ¶ 22. The rule set forth in Dominguez controls Swanson; as long as there’s evidence of intent to kill, the offense is cognizable.

[¶13] Swanson hit Johnson in the head multiple times with his fist, a socket wrench, and a Maglite flashlight – “as hard as I could.” Tr. V6, p. 1094, lines 10-11, 13-16; p. 1096, lines 7-11. Johnson sustained head trauma that served as a “lights out” injury. Tr. V3, p. 394, lines 23-25; p. 395, line 1. If a belt had not been involved to asphyxiate Johnson, he would have died from either the head trauma inflicted by Swanson or the abdominal trauma inflicted by West. Certainly, Swanson’s actions were intentional, or at the very least, he had a firm belief unaccompanied by substantial doubt that his actions would cause Johnson’s death. These facts show intent which places Swanson under the precedent Dominguez, making the jury instructions correct.

[¶14] II. THE SUPREME COURT'S OPINION CREATES INCONSISTENCY IN PRECEDENT RELATED TO CHARGING A SPECIFIC INTENT CRIME WITH A GENERAL INTENT CRIME.

[¶15] Borner held that conspiracy to commit extreme indifference murder is not a cognizable offense. Id. at ¶ 20. This Court stated that:

Conspiracy . . . requires the intent to cause a particular result that is criminal. To be guilty of conspiracy to commit murder, an individual must intend to achieve the results – causing the death of another human being. Therefore, charging a defendant with conspiracy to commit unintentional murder creates an inconsistency in the elements of conspiracy and extreme indifference murder that is logically and legally impossible to rectify. An individual cannot intend to achieve a particular offense that by its definition is unintended.

Borner, at ¶ 18.

Conspiracy to commit extreme indifference murder is a specific intent crime with a general intent crime. Id. at ¶ 20, N.D.C.C. §§ 12.1-06-04 and 12.1-16-01(1)(b). The difference between Borner and Dominquez is that Dominquez recognizes that where there is evidence of intent, a person can be convicted of attempted murder under 12.1-16-01(1)(a). Dominquez, at ¶ 19.

[¶16] Olson held that accomplice to extreme indifference murder is a cognizable offense under North Dakota Law. Olson, at ¶ 18. In making his argument, Olson asserted that accomplice to murder requires aid with intent that murder be committed. Id. at ¶ 16. This Court found that “[w]ith respect to extreme indifference murder, the language of N.D.C.C. § 12.1-03-01(1)(b) does not require an accomplice intend that murder be committed, only the intent that an offense be committed. Id. at ¶ 17. This Court went on to say that “... Olson could be charged with accomplice to extreme indifference murder by agreeing to willfully aid in the aggravated assault upon Gaarland ...” Id. at ¶ 18. “A person engages in conduct: ‘Willfully’ if

he engages in the conduct intentionally, knowingly, or recklessly.” Id. citing N.D.C.C. § 12.1-02-02(1)(e).

[¶17] In sum, this Court held in Olson that accomplice to extreme indifference murder is cognizable; finding that a specific intent crime coupled with a general intent crime is cognizable. Id. at ¶ 18. In Borner, this Court found the opposite, that a specific intent crime coupled with a general intent crime is not cognizable. Borner, at ¶ 20. In Dominguez, the Court found that a specific intent crime coupled with a general intent crime was not cognizable unless there was evidence of intent to kill, then murder under N.D.C.C. §§ 12.1-06-01 and 12.1-16-01(1)(a) was cognizable. Dominguez, at ¶ 19. Finally, in Swanson, this Court ruled that conspiracy to commit intentional or knowing murder was not cognizable because of Borner. Swanson, at ¶ 14. The inconsistency of precedent leaves prosecutors no clear direction when charging these types of crimes in the future.

[¶12] CONCLUSION

[¶18] The State respectfully requests this Court reverse its opinion to be consistent with Dominguez and affirm the judgment of the lower court.

Dated this 25th day of July, 2019.

RESPECTFULLY SUBMITTED:

State of North Dakota

By: /s/ Andrew J. Q. Weiss

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State of North Dakota,

Supreme Court Case No. 20180373
District Court Case No. 06-2016-CR-000085

Appellee,

vs.

CERTIFICATE OF SERVICE

Chase Duane Swanson,

Appellant.

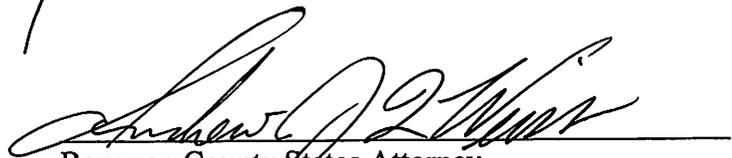
- [1] Andrew J. Q. Weiss is an attorney licensed in good standing in the State of North Dakota, Bar ID # 07205, and states that on July 25, 2019 he electronically served the following on Thomas F. Murth, IV:

Petition for Rehearing

By sending an electronic copy to the following email address::

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Dated this 25th day of July, 2019.



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