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### **STATEMENT OF THE ISSUE**

[¶1] Probable cause did exist to bind the Defendants over for trial on the charges of Conspiracy to Commit Burglary and Conspiracy to Commit Aggravated Assault, and the District Court's decision finding probable cause did not exist and the resultant order of dismissal was contrary to the evidence presented at the preliminary hearing and the law regarding probable cause at a preliminary hearing.

### **STATEMENT OF THE CASE**

[¶2] On August 6, 2020 the Defendant Howard was arrested and charged with Conspiracy to Commit Burglary and Conspiracy to Commit Aggravated Assault. App. at 35. Defendant Howard was seen for her Initial Appearances before North Central District Court for Ward County (Hon. D. Mattson, presiding) on August 7, 2020. App. at 3. Defendant Watkins was arrested pursuant to a warrant on August 7, 2020 and charged similarly. App. at 35. Defendant Watkins appeared for her Initial Appearance before North Central District Court for Ward County (Hon. D. Mattson, presiding) on August 10, 2020. App. at 5. A felony scheduling order was entered, including a preliminary hearing date of October 15, 2020. App. at 3, 5.

[¶3] On October 15, 2020, Defendant Howard appeared for preliminary hearing together with her attorney, Erich Grant, and Defendant Watkins appeared with her attorney, Ashley Flagstad. The State was represented by Assistant State's Attorney for Ward County, Tiffany M. Sorgen. App. at 17, 18.

[¶4] The Court heard the testimony of Deputy Taylor Schiller of the Ward County Sheriff's Office at the preliminary hearing. App. at 19.

[¶5] Following testimony and the arguments of counsel, the Court (Hon. S. Louser, presiding) found that there was not probable cause to hold the Defendants over for trial on

the charges of Conspiracy to Commit Burglary and Conspiracy to Commit Aggravated Assault. App. at 52-53. The Court issued a written decision setting forth its reasoning and dismissing the cases. App. at 11-15. The Court further issued orders directing each of the Defendants released from their bail conditions. App. at 9, 10.

[¶6] The State filed a timely Notice of Appeal and Order for Transcript on November 13, 2020. App. at 55-57.

### **STATEMENT OF THE FACTS**

[¶7] On August 6, 2020 Kristen Howard, a supervisor at Community Options in Minot, North Dakota, called a meeting between herself and two of her supervisees, Oshaya Watkins and Kayla Kelly. App. at 22, 31-32. Kelly and Defendant Watkins had both been called in on their day off for this meeting. App. at 32. Kelly arrived to find Defendant Watkins and Defendant Howard already engaged in conversation. *Id.* Kelly was suspicious of the basis for the meeting and recorded the meeting on her phone. App. at 22, 32.

[¶8] Defendant Howard brought Kelly up to speed: Defendant Howard's husband was having an affair with Jane Doe and Defendant Howard had a plan to "settle the score" by getting back at Doe. App. at 23. Defendant Howard's plan was for Defendant Watkins and Kelly to reach out to Doe, arrange for them to pick Doe up at her residence, and take Doe out for a night of drinking. App. at 23, 24, 36. They were to get Doe drunk. App. at 36. Then Doe's drink would be dosed with a drug, "Adderall or something" like it, in order to get Doe fired from her job with the United States Air Force. App. at 23, 26, 36. Defendant Howard had already procured this drug. App. at 23, 28.

[¶9] Defendant Howard further explained that Defendant Watkins and Kelly were to procure Doe's keys and purse while they had Doe in their custody and deliver those items to Defendant Howard. App. at 23. Defendant Howard would then go to Doe's residence on

the Minot Air Force Base, use Doe's keys to gain entry to Doe's residence, and plant illegal substances in Doe's residence in an effort to get Doe in even further trouble with the Air Force. App. at 23.

[¶10] Defendant Watkins stated that she had "befriended" Doe previously, and bragged that Doe does not know who Defendant Watkins really is, that Doe believes Defendant Watkins to be someone she met recently at a bonfire. App. at 29-30, 33, 34.

[¶11] Kelly and Defendant Watkins assented to Defendant Howard's plan. App. at 40. However, Kelly was concerned for Doe's safety and immediately went to law enforcement to report the plot. App. at 22.

[¶12] Deputy Schiller of the Ward County Sheriff's Office took Kelly's report and listened to the recording Kelly had made of the meeting. App. at 22, 24. Schiller called Defendant Howard's husband, who confirmed the affair. App. at 24. Schiller then made contact with Jane Doe. App. at 25. Doe confirmed to Schiller that she had been messaging with a female she believed she had met recently at a bonfire and had made plans to meet up with this person to go out that same evening. App. at 24, 25, 30, 34. Schiller reviewed this messaging conversation on Doe's phone. App. at 25, 33.

[¶13] At this point, Schiller believed he had sufficient probable cause for arrest of Defendant Howard and Defendant Watkins. App. at 25. The decision was made to circumvent the plot so that no harm befell Jane Doe. Id. Schiller made contact with both Defendant Howard and Defendant Watkins. Id. Schiller arrested Defendant Howard on that day without a warrant on the basis of probable cause. App. at 35. Defendant Watkins was arrested pursuant to an arrest warrant issued upon probable cause on August 7, 2020. Id.

[¶14] Defendant Howard made her initial appearance on August 7, 2020. App. at 3. Defendant Watkins made her initial appearance on August 10, 2020. App. at 5. Their cases

were joined, and a preliminary hearing was held in the matters jointly on October 15, 2020. App. at 20.

### **STANDARD OF REVIEW**

[¶15] “A district court decision to dismiss a criminal charge is reviewed for abuse of discretion.” State v. Brown, 2018 ND 229 ¶3, 918 N.W.2d 382 (ND 2018). “A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner or if it misinterprets or misapplies the law.” Id.

[¶16] When reviewing an appeal from a dismissal of a criminal charge at a preliminary hearing, the Court “will not reverse a trial court’s findings of fact if after the conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the findings and if the trial court’s decision is not contrary to the manifest weight of the evidence.” State v. Turbeville, 2017 ND 139, ¶7, 895 N.W.2d 758 (ND 2017) citing State v. Goldmann, 2013 ND 105, ¶9, 831 N.W.2d 748 (ND 2013).

[¶17] “Whether the facts found by the trial court reach the level of probable cause is a question of law, fully reviewable on appeal.” Id., citing State v. Foley, 2000 ND 91, ¶8 610 N.W.2d 49 (ND 2000).

### **LAW AND ARGUMENT**

[¶18] **I. The District Court misinterpreted or misapplied the law regarding probable cause at a preliminary hearing, and therefore erred when it failed to find probable cause and consequently dismissed the cases against the Defendants.**

[¶19] Whether the trial court’s findings of fact reach the level of probable cause is a question of law, and is fully reviewable on appeal. State v. Smith, 2010 ND 89, 781 N.W.2d 650 (ND 2010).

[¶20] 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. N.D.C.C. § 12.1-06-04(1).

[¶21] A conspiracy shall be deemed to continue until its objectives are accomplished, frustrated, or abandoned. “Objective” includes escape from the scene of the crime, distribution of booty, and measures, other than silence, for concealing the crime or obstruction of 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. N.D.C.C. § 12.1-06-04(3).

[¶22] At a preliminary hearing the standard of probable cause is the same standard for an arrest. “Under that standard, probable cause exists when the facts and circumstances are “sufficient to warrant a person of reasonable caution in believing an offense has been or is being committed” and “knowledge of facts sufficient to establish guilt is not necessary to establish probable cause.”” State v. Smith, 2010 ND 89, ¶8, citing State v. Blunt, 2008 ND 135, ¶16, 751 N.W.2d 692 (ND 2008).

[¶23] A defendant need not commit the overt act charged, but one of the conspirators must commit an overt act, and once an illicit agreement is shown, the overt act of any conspirator may be attributed to other conspirators to establish the offense of conspiracy. State v. Keller, 2005 ND 86, ¶51, 695 N.W.2d 703 (2005).

[¶24] If the magistrate finds probable cause to believe an offense has been committed and the defendant committed the offense, an arraignment must be scheduled. The finding of probable cause may be based on hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. The magistrate may receive evidence that would be inadmissible at trial. N.D.R.Crim.P. 5.1(a).

[¶25] In the case at bar, the District Court misapplied the law with regard to an “overt act.” Also, the District Court misconstrued the evidence presented. Specifically, the Court found “Deputy Schiller testified other than the recorded conversation between Defendant Howard, Defendant Watkins and the third individual and a text message sent from an unidentified phone, no steps were taken to effectuate the ‘plan’ discussed in the audio recording.” App. at 13. Lack of the most helpful evidence or the strongest evidence possible should not result in a dismissal of charges because the State is not required to negate every possible scenario of innocence to establish probable cause at a preliminary hearing. State v. Brown, 2018 ND 229, ¶14.

[¶26] What the Court neglected to consider was the fact Defendant Howard had already procured the drug which was intended to be introduced into Jane Doe’s drink. App. at 23. The procurement of the drug was an overt act by one of the co-conspirators toward the goals of the conspiracy. The overt act need not be illegal in and of itself, but must only further the ultimately illegal ends of the conspiracy. An overt act may be an act of only one of the conspirators and need not be a crime itself. State v. Lind, 322 N.W.2d 826, 844 (N.D. 1982), citing Braverman v. United States, 317 U.S. 49 (1942).

[¶27] Defense’s argument the substance procured by Defendant Howard to spike Jane Doe’s drink may have been legitimately prescribed to Defendant Howard has no bearing on a finding of probable cause. “The district court may not base its conclusion that probable cause was lacking upon a finding that “it is not inconceivable” there is an innocent explanation for the defendant’s conduct.” State v. Brown, 2018 ND 229, ¶13, citing State v. Blunt, 2008 ND 135, ¶17. Whether Defendant Howard possessed the substance legally is of no consequence; it was her ultimate intent of introducing the substance to Jane Doe through surreptitious means that is of import, and intent is the province of the jury. The

trial court at a preliminary hearing is to test the sufficiency of the information, not weigh the evidence. State v Smith, 2010 ND 89, ¶10. The preliminary hearing is not a mini-trial, and the trial court’s “role is not a trier of fact,” but its “function is solely to determine the existence or absence of probable cause.” State v. Blunt, 2008 ND 135, ¶17.

[¶28] The burden upon the prosecution to prove an overt act is minimal, for almost any act in furtherance of the unlawful agreement will satisfy the overt act requirement. State v. Lind, 322 N.W.2d 826, 845 (N.D.1982); People v. Persinger, 49 Ill.App.3d 116 (1977). Probable cause is a minimal burden of proof. Healy v. Healy, 397 N.W.2d 71 (N.D. 1986). “The State is not required to prove with absolute certainty or beyond a reasonable doubt that a crime occurred, but rather need only produce sufficient evidence to satisfy the court that a crime has been committed and that the accused is probably guilty.” State v. Gratton, 2020 ND 41, ¶9, 938 N.W.2d 902 (ND 2020) citing State v. Blunt, 2008 ND 135, ¶15.

[¶29] With regard to the Court’s interpretation of the text messages testified to, the Court failed to adhere to the law regarding proof at a preliminary hearing. The Court incorrectly found there was no nexus between the conspiracy and the text messages received by Jane Doe. App. at 14. Deputy Schiller testified the content of the text messages received by Jane Doe and the statements of Defendant Watkins on the recording regarding her messages to Jane Doe matched up. App. at 25, 33. This establishes the nexus and leads to the inference that the messages Jane Doe received originated from the co-conspirators, specifically Defendant Watkins. Inference may be made from circumstantial evidence. State v. Beciraj, 2003 ND 173, 671 N.W.2d 250 (ND 2003). At a preliminary hearing, the court “must draw the inference favorable to the prosecution.” Roe v. State, 2017 ND 65, ¶7 891 N.W.2d 745 (ND 2017), quoting Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265, 1268 (Colo. 1975).

[¶30] The reviewing court determines only whether there is competent evidence which could have allowed the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. State v. Kirkpatrick, 2012 ND 229, ¶15, 822 N.W.2d 851 (ND 2012).

[¶31] An inference of a conspiracy agreement is acceptable. United States v. Clay, 37 F.3d 338, 342 (7<sup>th</sup> Cir. 1994); State v. Serr, 1998 ND 66, ¶¶14, 15, 575 N.W.2d 896 (ND 1998).

[¶32] The State established probable cause for the charges set forth when considering the totality of the circumstances and the evidence presented as a whole. When determining probable cause, evidence should not be considered individually, but as a collective whole. Although each bit of information, by itself, may not be enough to establish probable cause and some of the information may have an innocent explanation, probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers, which is not weighed in individual layers but in the laminated total. State v. Doohen, 2006 ND 239, ¶13, 724 N.W.2d 158 (ND 2006) citing State v. Nelson, 2005 ND 11, ¶21, 691 N.W.2d 218 (ND 2005). The totality of the circumstances is reviewed when determining probable cause. Doohen at ¶10; State v. Roth, 2006 ND 106, ¶13, 713 N.W.2d 513 (ND 2006).

[¶33] The State very clearly established there was an agreement between the co-conspirators to engage in an illegal act. The recording provided by Ms. Kelly as testified to by Deputy Schiller established that element of the conspiracy, and carried with it a high level of reliability. “[I]nformation from an informant whose identity is easily ascertainable has a higher indicia of reliability than information obtained from a purely anonymous informant.” State v. Hendrickson, 2019 ND 183, ¶8, 931 N.W.2d 236 (ND 2019) citing

State v. Knox, 2016 ND 15, ¶14. “To establish probable cause, the officer does not have to possess knowledge of facts sufficient to establish guilt; all that is necessary is knowledge that would furnish a prudent person with reasonable grounds for believing a violation has occurred.” State v. Brown, 2018 ND 229, ¶10, citing State v. Berger, 2004 ND 151, ¶11, 683 N.W.2d 897 (ND 2004).

[¶34] The fact Ms. Kelly informed on the conspiracy rather than fully assented to same is of no consequence. An agreement to commit a conspiracy need not be explicit but may be implicit in the fact of collaboration or existence of other circumstances. State v. Serr, 1998 ND 66. The legislative intent of the conspiracy statute was that agreement be unilateral, not bilateral. Unilateral requires only the defendant believe he is participating in an agreement with another to engage in criminal conduct, manifested by some overt act, for the defendant to be guilty of conspiracy. State v. Rambousek, 479 N.W.2d 832, 835 (N.D. 1992).

[¶35] When reviewed as a whole, the State met its burden and established probable cause the crimes charged were committed and the Defendants were the individuals who committed them.

## CONCLUSION

[¶36] Based upon the foregoing, the State respectfully requests this Court reverse the lower court's finding of no probable cause for both charges, regarding both Defendants, and direct the filing of the Information against both Defendants setting both charges, and restore the matter(s) to the docket below for further proceedings.

Dated this 31<sup>st</sup> day of December, 2020.

/s/Tiffany M. Sorgen  
Tiffany M. Sorgen (09322)  
Assistant State's Attorney  
Ward County State's Attorney's Office  
315 3<sup>rd</sup> St SE  
Minot, ND 58701  
(701) 857-6480  
[51wardsa@wardnd.com](mailto:51wardsa@wardnd.com)

**IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA**

|                                     |   |                                     |
|-------------------------------------|---|-------------------------------------|
| <b>State of North Dakota,</b>       | ) |                                     |
|                                     | ) | <b>Supreme Court No. 20200302</b>   |
| <b>Plaintiff/Appellant,</b>         | ) | <b>20200301</b>                     |
|                                     | ) | <b>Ward Co No. 51-2020-CR-01476</b> |
|                                     | ) | <b>51-2020-CR-01482</b>             |
| <b>vs.</b>                          | ) |                                     |
|                                     | ) |                                     |
|                                     | ) |                                     |
| <b>Kristen Danielle Howard, and</b> | ) |                                     |
| <b>Oshaya Inez Watkins,</b>         | ) |                                     |
| <b>Defendants/Appellees.</b>        | ) |                                     |

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**REQUEST FOR ORAL ARGUMENT**

[1] The State requests oral argument to clarify arguments and address questions regarding facts that may not be apparent from the record.

Dated this 31<sup>st</sup> day of December, 2020.

/s/Tiffany M. Sorgen  
Tiffany M. Sorgen, (09322)

**IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA**

|                                     |   |                                      |
|-------------------------------------|---|--------------------------------------|
| <b>State of North Dakota,</b>       | ) |                                      |
|                                     | ) | <b>Supreme Court Nos. 20200300</b>   |
| <b>Plaintiff/Appellant,</b>         | ) | <b>20200301</b>                      |
|                                     | ) |                                      |
| <b>vs.</b>                          | ) |                                      |
|                                     | ) | <b>Ward Co. No. 51-2020-CR-01476</b> |
|                                     | ) | <b>51-2020-CR-01482</b>              |
| <b>Kristen Danielle Howard, and</b> | ) |                                      |
| <b>Oshaya Inez Watkins,</b>         | ) |                                      |
| <b>Defendants/Appellees.</b>        | ) |                                      |

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**CERTIFICATE OF COMPLIANCE**

[1] The undersigned hereby certifies that the Brief of Plaintiff/Appellant, is in compliance with Rule 32 of North Dakota Rules of Appellate Procedure and the brief contains 14 pages.

Dated this 31<sup>st</sup> day of December, 2020.

/s/Tiffany M. Sorgen  
Tiffany M. Sorgen (09322)