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JANUARY 8, 2023
STATE OF NORTH DAKOTA

# In the Supreme Court of the State of North Dakota

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| State of North Dakota<br>Plaintiff, Appellee | )<br>)<br>) | |
| v | )<br>)<br>) | |
| Brandon Todd Tompkins<br>Defendant, Appellant | )<br>) | 20220270 |

# Appellee's Brief

Tompkins appealed the judgment entered on 23 August 2022 in 47-2022-CR-00145.

Troy LeFevre, Judge, District Court, Stutsman County, presided.

ORAL ARGUMENT REQUESTED

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1. Whether Tompkins' failure to submit specific proposed instructions and proposed verdict forms beyond his routine requests for pattern instructions failed to thoroughly preserve his objections for appeal and left his objections to be reviewed for plain error.

2. Whether N.D.C.C. subsection 39-08-01(1)(e) refusal to submit to a chemical test is a separate offense or an alternate means of committing DUI or APC.

3. Whether the jury instructions as a whole correctly and adequately informed the jury of the applicable law, when the trial court did not give separate elements instructions or separate verdict forms for either refusal DUI or refusal APC.

**Statement of the case, nature of the case, course of proceedings below, and disposition**

4. On 17 April 2022, citizen Tom Solwey found Tompkins' pickup stopped in a snowy ditch, transmission in drive, engine running, and Tompkins unresponsive behind the wheel. Thompkins was arrested, read Miranda, read the implied consent warning, and asked to take a chemical breath test. Tompkins never submitted to the chemical breath test.

5. Tompkins was initially charged by uniform complaint and summons with "39-08-01(1)(E)(2) -APC-REFUSAL-1ST OFF". 47-2022-CR-00145 R1.

6. On 18 April 2022, the state's attorney filed an amended complaint containing only one count combining DUI and APC by either under the influence of an intoxicating liquor; and/or refused to submit to a chemical test. 47-2022-CR-

00145 R4.

7. On 21 April 2022, the trial court issued a scheduling order notifying the parties of the following deadlines.

"Deadline for the filing, service and noticing of all other Motions: June 13, 2022;"

"Pre-Trial Memorandums are due 7 days prior to trial;" and

"Jury Selection and Trial: Tuesday, the 23rd day of August 2022. . ."

R11.

8. On 21 June 2022, Tompkins filed a motion to suppress claiming he was denied a reasonable opportunity to consult with an attorney prior to taking a chemical breath test. That motion to suppress was denied. Tompkins failed to complain about duplicity until the day before trial. R44.

9. On 16 August 2022, Tompkins filed "Defendant's Pre-Trial Memorandum." R38. In his Pre-trial Memorandum, Tompkins made no request for any special instruction regarding separating DUI, APC, or refusal nor did Tompkins request separate verdict forms. R38; 39. Tompkins only made the following routine requests in regard to the elements of the offense and the verdict forms.

| | | |
|---|---|---|
| NDJI | K21.10 | Driving Under the Influence |
| NDJI | K21.20 | Essential Elements of Offense (DUI) |
| NDJI | K5.70 | forms of Verdict (for Two Verdicts). |

R38:¶6.

10. In his 16 August 2022 Pre-Trial Memorandum, Tompkins proposed the following special instruction about refusal, *Modified Refusal to Submit to Chemical Testing*, but made no mention of separate instructions for DUI, APC, or refusal. R39.

11. On 22 August 2022, the day before trial, Tompkins proposed the another special instruction on refusal, *Failure to Advise of Consequences of Refusal*, but made no request for separate verdict forms for DUI, APC, and refusal; and made no mention of separate instructions for DUI, APC, or refusal. R42.

12. Late on the afternoon before trial, R87:9:23; R87:10:8, Tompkins filed "Defendant's Notice of Motion and Motion in Limine to Dismiss" claiming the combined DUI, APC, and refusal count was duplicitous. R44.

13. On the morning of trial, 23 August 2022, less than two business hours after receiving "Defendant's Notice of Motion and Motion in Limine to Dismiss" the State filed the *State's Response to Motion in Limine to Dismiss*. R46. The trial court had five minutes to read the *State's Response*. R87:10:10. In it, the State pointed out the following.

    A. *Motions that must be made before trial* include claims of duplicity and claims of failure to state an offense. N.D.R.Crim.P. 12(b)(3)(B)(I) and 12(b)(3)(B)(v). R46:¶3.

    B. The trial court may set a deadline for pretrial motions. N.D.R.Crim.P. 12(b)(3)(c). R46:¶4. The trial court set 13 June 2022 as the deadline for pre-trial motions. Tompkins missed the deadline and less than 24 hours prior to trial demanded dismissal. R46:¶4.

    C. If a party does not meet a deadline for a Rule 12(b)(3) motion, the court may consider a defense, objection, or request if good cause is shown. N.D.R.Crim.P. 12(c)(3). R46:¶5. Tompkins made no attempt to show

cause for his untimely objection but demanded dismissal rather than any other of the recognized remedies for a duplicitous count. R46:¶5.

D. "[D]eferring matters until it was too late for the prosecutor either to amend the indictment or appeal from an adverse decision," is precisely the harm Rule 12 was "designed to block." *United States v. Jackson*, 5 F.4th 676, 682 (7th Cir. 2021) quoting *United States v. Boliaux*, 915 F.3d 493, 496 (7th Cir. 2019). R46:¶5.

14. The State proposed separating APC from DUI. R46:¶11.

15. On the morning of trial, 23 August 2022, the State filed a motion to amend the complaint and a "Second Amended Complaint." R87:10:12; R48; R49. The "Second Amended Complaint" separated DUI and APC into two separate counts each of which allowed its respective DUI or APC to be proven either by N.D.C.C. §39-08-01(1)(b) being under the influence and/or by N.D.C.C. §39-08-01(1)(3) refusal. R49.

16. On the morning of trial, 23 August 2022, the trial court took up the State's motion to amend the complaint. R87:10:12. The Defense observed that breaking the allegations into two left "two competing theories." R87:11:21.

17. The trial judge asked whether the State was conceding APC and DUI cannot be alleged in a single count and the state's attorney clearly declined the opportunity to concede that. R87:21.

18. On the morning of trial, 23 August 2022, Tompkins argued the State's proposed amendment created a need for more verdict forms, but Tompkins never submitted

any proposed verdict forms. R87:15:15. Tompkins's counsel made the following less than definite observation about separate verdict forms.

> Your Honor, I don't think it would necessarily be two different verdict forms. I think it would be - - have to be multiplied again because it would require a verdict form for APC under the influence, APC refusal, APC - - or driving under the influence refusal. If their alternative method - - I mean, because I think it's even in the State's responsive brief they note, you know, unanimous verdict forms on the alternatives, I believe.

R87:15:15.

19. After the parties had rested, but before instructions and verdict forms were given to the jurors, the trial judge solicited input on them. The Defense objected to the proposed essential elements and made the following comment.

> I'm just going to object for the record for the purposes of that it's got driving under the influence and the elements for – essential elements for a refusal to submit to a chemical test in the same statute. I understand it's been addressed by the Court already earlier today on the separate offense argument, but I just need to preserve it.

R87:133:15. In "Defendant's Pre-Trial Memorandum," Defense asked the court to give the pattern instruction for DUI, K21.10. R38:¶6. The Defense never submitted any other proposed instruction for the essential elements of DUI, APC, or refusal.

20. When the court took input on the verdict forms, the Defense gave the following comment.

> Well, it's my position that there needs to be a unanimous finding of guilt on whether or not it would be a refusal to submit to the chemical test or the under the influence in that it has to be – it would be actual physical control under the influence, and then a verdict form for actual physical control refusal, and then the same

> would be under the influence for driving under the influence for refusal. That's Mr. Tompkins' position on it.

R87:142:14-22. In his Pre-Trial Memorandum, Tompkins asked the court to give pattern verdict forms, "NDJI K5.70 Forms of Verdict (for Two Verdicts)." R38:¶6. Tompkins never submitted any other proposed verdict forms, particularly ones for separate verdicts on refusal, DUI, and/or APC.

21. The jury instructions the trial court used contained modified editions of patterns K-21.10 and K-21.20 describing DUI and providing the elements of DUI, and modified editions of patterns K-21.25 and K-21.26 describing APC and the essential elements of APC. R55:9-12.

22. Other than a statement in the jury instruction that, "Two verdict forms are provided for the offense charged, one form for finding the Defendant 'Guilty' and one form for finding the Defendant 'Not Guilty'" neither the record on appeal nor the Register of Actions shows what alternative verdict forms were provided to the jury. R55:20. Based on the proposed instruction packet the trial court provided the parties and the four forms of verdict in it, the state's attorney is confident the jurors were given four verdict forms: a pair for APC, and a pair for DUI.

**Statement of facts**

23. On 17 April 2022, R87:45:11, citizen Tom Solwey was nearing the end of a trip from North Carolina to Carrington, North Dakota. R87:45:16. Solwey's son was driving the same route, but had an hour lead on Solwey. R87:46:5. Solwey's son had called Solwey and reported a vehicle in the ditch in the Pingree area.

R87:46:11. Solwey testified there was a spring storm with cold, wet, and slushy conditions. R87:46:17. Solwey testified north of Buchanan he came upon a vehicle with its tail lights on. R87:46:25.

24. Solwey testified about what he found.

> The vehicle had looked like it just drove into the ditch. There was no spinning marks. There was no impact or anything like that. It looked like it just kind of coasted up into the snow drift and stopped. It was still in gear, idling, running. I got out and there was a person behind the wheel with his head rested on his chest. I knocked on the window and there was no response from the driver. I didn't know if it was a diabetic thing or alcohol involved. I couldn't get him to respond. I beat on the driver's door quite a bit.

R87:47:16. Solwey testified he couldn't get the doors open because it was in gear. R87:49:20. Solwey testified it looked like the vehicle had been there a while because it was overheating and some of the engine lights were flashing. R87:49:24; R87:61:9. Solwey said if he'd been the driver and the truck was four wheel drive Solwey could have easily driven it out of the ditch. R87:50:8. Solwey testified he called law enforcement, R87:48:3. Solwey saw the driver was breathing so he knew it wasn't an extreme medical emergency. R87:51:8. However, he stayed on scene to make sure "if he did come to, he didn't drive away." R87:51:14. Solwey waited a half hour and the ambulance showed up. R87:53:3.

25. Solwey testified paramedics arrived, knocked on the window and got no response. R87:53:19. Solwey testified the officer arrived and broke the passenger side window, immediately asking the driver, "Sir, are you all right" to which the driver

responded, “why did you break my window?” R87:54:18.

26. Solwey said the driver walked from his GMC to the officer’s patrol car with the help of the officer and a paramedic. R87:55:25. Solwey described the driver’s speech as kind of slurred. R87:56:20. Considering the circumstances, Solwey assumed that if it wasn’t a medical emergency, alcohol was probably involved. R87:56:5.

27. Rooklyn Feist, an ambulance crew member who was on the scene testified. R87:62. Feist testified she and her partner knocked on the window but received no response. R87:66-67. Feist testified since the driver was still breathing, they didn’t have a cardiac arrest, didn’t need to break the window to start CPR, and could wait for the officer to arrive. R87:65:6. Feist testified while they waited about ten minutes for the officer to show up, the vehicle kept running and the driver did not wake. R87:68-69. Feist testified the officer broke the window and Feist never saw any paraphernalia associated with diabetes inside the truck. R87:69:20. Feist testified she approached the driver and asked to try to get a blood glucose level, but that the driver shook his hands in a way that she interpreted as a refusal so she was not authorized to attempt to obtain a glucose level. R87:70:11. Feist testified she followed up, “he was shaking his hands, and I asked him are you saying no?” and the driver still refused. R87:71:12. Feist never noticed a diabetic bracelet when Tompkins shook his hands. R87:70. Feist testified she saw no evidence of cardiac arrest or stroke. R87:72-73. Feist said due to her covid mask she couldn’t smell any alcohol, but that when the officer

stepped aside to let the driver walk on his own, the driver stumbled. R87:74. Feist testified the driver was confused or disoriented. R87:76. Feist testified, "he didn't want anything to do with us. I tried to get him to come to our truck so we could do a basic assessment, and refusal." R87:74:4. Feist testified in her experience hypoglycemic people who are confused still realize they need assistance. R87:78.

28. Deputy Brian Davis testified he arrived on scene and found the vehicle was running, the lights were on, and there was a man slumped behind the wheel, non-responsive. R87:97-98. Davis testified he went to the passenger's side, beat on that window, and decided to break it. *Id*. In court, Davis identified Defendant Tompkins as the man who had been behind the wheel. R87:98.

29. Davis testified he asked the driver, Tompkins, how Tompkins got into the ditch and got no response from Tompkins. R87:99.

30. Davis testified he noticed blood shot watery eyes and asked Tompkins to come back to Davis' vehicle. R87:102. Davis testified Tompkins had difficulty walking, especially in the grass. R87:108:23. Davis testified once they were together in his patrol car Davis noticed the odor of alcohol. R87:108:10. Davis testified Tompkins refused field sobriety tests like HGN, walk and turn, and one leg stand. R87:102. Davis testified he asked Tompkins whether he had been drinking but got no response from Tompkins. R87:106:23. Davis testified that in his opinion, Tompkins was under the influence of intoxicating liquor. R87:109:1.

31. Davis testified his dash cam had cameras that pointed out the windshield and to

the back seat of his patrol car. The dash cam recording was received in evidence as State's Exhibit 1 and played for the jury. R54; R87:107-108. On the video, Tompkins appears to be intoxicated and is highly abusive.

32. Upon being arrested, Tompkins became loud and abusive to the deputy. R54 at 2:53:50

Tompkins: You fucking cunt.

Deputy: Climb on in.

Tompkins: Fucking freezing my ass off.

Deputy: Yeah I know, it's cold out there.

Tompkins: Yeah, yeah, yeah I bet you do. What?

Deputy: Come on.

Tompkins: You need to settle the fuck out. Let me get in here.

Deputy: Alright. Well you're not helping any.

Tompkins: Oh you know what I'm fucking trying to figure it out. Fucking settle the fuck down.

Deputy: Okay you're under arrest for DUI.

Tompkins: Yeah, thank you, Yeah.

Deputy: Okay.

Tompkins: Yeah. Close the goddamn door.

Deputy: Okay.

Tompkins: Fucking cock sucker. R55 at 2:54:26.

33. The Deputy read the Miranda warning to Tompkins. R54 at 2:55:00. Tompkins

interrupted 11 times saying among other things: “put my shit in my wallet” and “give me my phone.” *Id*.

34. Tompkins’ speech was slurred. After Tompkins settled down, his eyes were droopy and his head bobbed as if he was sleepy. R54 at 3:03. Tompkins yawned. R54 at 3:11:41. Tompkins made juvenile whooshing sounds with his mouth. R54 at 3:12:04. Tompkins politely asked the Deputy to pull over so that Tompkins could urinate. R54 at 3:13:49.

35. Davis testified he read Tompkins Miranda and the implied consent warning for a chemical test. R87:103; R87:115-117.

36. Davis testified Tompkins wanted a lawyer and Davis charged up Tompkins’ phone to facilitate Tompkins making a call. R87:104. Officer Bushaw testified he watched Tompkins for about 20 minutes while Deputy Davis was away. Bushaw testified that during that 20 or so minutes Tompkins attempted several times to call a lawyer but was unable to contact one. R87:88-91. Tompkins was asked to submit to a chemical test. R87:109. Tompkins responded he wasn’t doing anything until he had his lawyer. R87:110:3. Tompkins never provided a chemical breath test sample.

**Argument**

37. On the eve of trial, Tompkins filed “Defendant’s Notice of Motion and Motion in Limine to Dismiss.” R44.

38. The standard of review for a motion in limine follows.

> “We review a district court's decision on a motion in limine for an

> abuse of discretion." *State v. Buchholz*, 2006 ND 227, ¶ 7, 723 N.W.2d 534. A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner or if it misinterprets or misapplies the law. *State v. Kleppe*, 2011 ND 141, ¶ 8, 800 N.W.2d 311. "Our standard of review for a claimed violation of a constitutional right, including the right to confront an accuser, is de novo." *State v. Blue*, 2006 ND 134, ¶ 6, 717 N.W.2d 558.

*State v. Lutz*, 2012 ND 156, ¶¶ 2-3, 820 N.W.2d 111, 112.

**A. Due to Tompkins' failure to submit specific proposed instructions and proposed verdict forms beyond his routine requests for pattern instructions Tompkins failed to thoroughly preserve his objections for appeal and left his objections to be reviewed for plain error**.

39. "Failure to make a motion required to be made prior to trial pursuant to N.D.R.Crim.P. 12(b), operates as a waiver of that motion under N.D.R.Crim.P. 12(f)." *State v. Valgren*, 411 N.W.2d 390, 393 (N.D. 1987) (citing *State v. Demery*, 331 N.W.2d 7 (N.D.1983); *State v. Taylor*, 2018 ND 132, ¶ 13, 911 N.W.2d 905, 911–12. Claims of duplicity and claims of failure to state an offense must be made before trial. N.D.R.Crim.P. 12(b)(3)(B)(I) and 12(b)(3)(B)(v).

40. Tompkins' motion to dismiss was abusively tardy. The trial court may set a deadline for pretrial motions. N.D.R.Crim.P. 12(c)(1). In Tompkins' case, the trial court set 13 June 2022 as the deadline for pre-trial motions. Tompkins missed the deadline and filed his motion alleging duplicity late on the afternoon of 22 August 2022, less than 5 business hours prior to trial. R46:¶4; R87:9:23; R87:10:8. If a party does not meet a deadline for a Rule 12(b)(3) motion, the

court may consider a defense, objection, or request if good cause is shown. N.D.R.Crim.P. 12(c)(3). Tompkins made no attempt to show cause, good or other, for his untimely objection. R46:¶5. "[D]eferring matters until it was too late for the prosecutor either to amend the indictment or appeal from an adverse decision," is precisely the harm Rule 12 was "designed to block." *United States v. Jackson*, 5 F.4th 676, 682 (7th Cir. 2021) quoting *United States v. Boliaux*, 915 F.3d 493, 496 (7th Cir. 2019). R46:¶5.

41. Tompkins surprised the court and the State. Although Tompkins apologized for the tardy filing, R87:10:8, he left slim time to research a question of first impression regarding refusal. The trial court had five minutes to read the *State's Response*. R87:10:10.

42. Tompkins' sole submitted proposed instruction on DUI and it's essential elements was his routine request in his pre-trial memo that the court give the DUI pattern instruction K-21.10. R38:¶6. Tompkins orally made some uncertain suggestions about instructions, R87:15:15; R87:142:14-22. Other than his routine request for the pattern DUI instruction, K-21.10, Tompkins never submitted any written proposed instruction on the elements of DUI, APC, or refusal that showed how he thought the essential elements ought to be expressed. Because Tompkins did not submit a proposed instruction in writing, he failed to properly preserve for appeal his claim the jury should have been instructed differently than it was. Therefore, appellate review of Tompkins' claim of improper jury instruction is limited to determining whether the jury instructions given resulted in obvious error. *State v.*

*Martinez*, 2015 ND 173, ¶ 12, 865 N.W.2d 391, 395; *State v. Pulkrabek*, 2017 ND 203, ¶5, 900 N.W.2d 798, 799 (On same theory as Tompkins, Pulkrabek wanted unanimous verdict instructions in a theft case, but never provided court with proposed instructions).

> If a defendant desires more comprehensive instructions on any phase of the case, he must submit written instructions with the request that they be given. State v. Bowe, 57 N.D. 89, 220 N.W. 843 (1928). . . . Counsel will not be excused for failing to comply with a rule to present requested instructions in writing merely because the trial judge indicates in advance that he will not give the instruction requested. 75 Am.Jur.2d, Trial, § 580, p. 565; Gaspar v. Georgia Pacific Corp., 248 Cal.App.2d 248, 56 Cal.Rptr. 243 (1967). The reason for the requirement for written instructions is that a trial judge must be allowed an opportunity to examine the substance of the requested instruction in order to facilitate a proper ruling on that request. The desired result is a ruling by the trial judge that will allow the instructions to fully and accurately inform the jury of the applicable law. Additionally, by requiring requested jury instructions to be in proper form, we, as a court of review, will be able to determine from the record the correctness of the trial court's ruling.
>
> We hold that it was counsel's duty to draft a specific instruction on conscious action and to submit it to the trial judge. Because Olson did not submit a written jury instruction she may not predicate error upon the trial court's refusal to give the conscious-action instruction unless the trial court committed reversible error by so ruling.

*State v. Olson*, 356 N.W.2d 110, 114 (N.D. 1984); *State v. Marks*, 452 N.W.2d 298, 304-306 (N.D. 1990) ("counsel's failure to properly submit proposed written instructions is controlling"); *State v. Vetsch*, 368 N.W.2d 547, n5 (N.D. 1985) (Vetsch argued N.D.C.C. § 39-08-01(1)(a) and (b) were separate offenses but failed to submit separate verdict forms at trial and the appellate court declined to

address his claim.); *State v. Miller*, 466 N.W.2d 128, 133 (N.D. 1991) ("N.D.R.Crim.P. 30(b) directs that requested instructions must be in writing"); *State v. Pulkrabek*, 2017 ND 203, ¶ 5, 900 N.W.2d 798, 799 ("If a party fails to request the instruction in writing, the issue is not adequately preserved for appeal and this Court's review 'is limited under N.D.R.Crim.P. 52(b) to whether the jury instructions constitute plain or obvious error.'"); *State v. Anderson*, 2016 ND 28, ¶39, 875 N.W.2d 496, 508 ("an error that infringes upon substantial rights of a defendant is noticeable notwithstanding lack of an objection or in the absence of a request for an instruction.").

> Under N.D.R.Crim.P. 30(c), to preserve a jury instruction issue for appellate review, a party must object on the record stating the issue "distinctly" and specifying the grounds of his or her objection. If a party does not timely object, the issue is not preserved for review. State v. Mathre, 1999 ND 224, ¶ 5, 603 N.W.2d 173. This Court's inquiry into an unpreserved jury instruction issue is limited to obvious error review under N.D.R.Crim.P. 52(b). Mathre, at ¶ 5; N.D.R.Crim.P. 30(d)(2). Obvious error review consists of determining whether (1) there was an error, (2) that was plain, and (3) that affected a party's substantial rights. State v. Olander, 1998 ND 50, ¶ 14, 575 N.W.2d 658. An error is not obvious unless the defendant demonstrates it is a "clear or obvious deviation from an applicable legal rule." Id. at ¶ 15. If a defendant proves obvious error occurred, we have discretion whether to rectify it and will only do so when the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." Id. at ¶ 16 (quoting United States v. Olano, 507 U.S. 725, 726, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). *816 Rule 52(b) obvious error review does not apply to waived errors. Id. at ¶ 14. A party may not take advantage of an error he or she invited. State v. White Bird, 2015 ND 41, ¶ 24, 858 N.W.2d 642.

*State v. Gaddie*, 2022 ND 44, ¶4, 971 N.W.2d 811, 815–16, as amended (May 11, 2022). The oral suggestions Tompkins made were unclear.

43. To amount to plain or obvious error, the trial court's act or omission must conflict with clearly established law. There is no clearly established law saying N.D.C.C. subsection 39-08-01(1)(e) is a separate offense from any other means of committing the crime of DUI or APC. *State v. Beltran*, 2018 ND 166, ¶9, 914 N.W.2d 488, 492 (Court questioned the litigants but declined to resolve because Beltran had neither raised it in the district court nor on appeal). The trial court gave separate jury instructions on the elements of the offense of DUI and APC and two pairs of verdict forms, one each for DUI and APC. The trial court's instructions and verdict forms were not plain error.

44. In Tompkins' case, any error in instructing was harmless beyond a reasonable doubt. The evidence in this case would support a rational fact finder concluding that Tompkins had committed all the means of committing DUI and APC alleged: refusal and/or under the influence. *City of Mandan v. Sperle*, 2004 ND 114, ¶ 15, 680 N.W.2d 275, 279.

**B. North Dakota Century Code subsection 39-08-01(1)(e) refusal to submit to a chemical test is an alternate means of committing DUI or APC, not a separate offense.**

45. Whether N.D.C.C. § 39-08-01(1)(b) and (e) create separate crimes or are simply alternative methods of proving the same crime is an issue that has surfaced in this Court but not been decided. In *State v. Beltran*, the Court questioned the litigants on this issue but declined to resolve it because Beltran had neither raised it in the district court or on appeal. *State v. Beltran*, 2018 ND 166, ¶9, 914 N.W.2d 488,

492.

46. Tompkins argues he was not given a separate verdict form for refusal and should have been. While special verdict forms in criminal trials are eschewed, general verdict forms have long been accepted. *City of Mandan v. Sperle*, 2004 ND 114, ¶ 12, 680 N.W.2d 275, 278 (citing N.D.R.Crim.P. 31(e)). "The general rule is that the jury need not agree on the "underlying brute facts" of a verdict, such as the means the defendant used to commit an element of the crime." *United States v. Rice*, 699 F.3d 1043, 1048 (8th Cir. 2012) (quoting *Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999)).

> Juries are typically called upon to render unanimous verdicts on the ultimate issues of a given case. But it is understood that 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.

*McKoy v. North Carolina*, 494 U.S. 433, 449–50, 110 S. Ct. 1227, 1236–37, 108 L. Ed. 2d 369 (1990).

47. This Court and the United State's Supreme Court have recognized, ". . . legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes. The question whether statutory alternatives constitute independent elements of the offense therefore does not, as the dissent would have it, call for a mere tautology; rather, it is a substantial question of statutory construction." *Schad v. Arizona*, 501 U.S. 624, 636, 111 S. Ct. 2491, 2499, 115 L. Ed. 2d 555 (1991) (footnote 6 omitted); *City of*

*Mandan v. Sperle*, 2004 ND 114, ¶14, 680 N.W.2d 275, 279.

**C. Four prong analysis for distinguishing a separate offense from an alternate means of committing the same offense.**

48. Although this Court has not mandated a strict multi-pronged analysis for determining whether an allegation constitutes a separate offense or an alternative means of committing the same offense, it has considered a statute's structure and legislative history. *State v. Bourbeau*, 250 N.W.2d 259, 262 (N.D. 1977) (legislative history, theft); *City of Mandan v. Sperle*, 2004 ND 114, ¶ 14, 680 N.W.2d 275, 279 (structure, disorderly conduct); *State v. Vetsch*, 368 N.W.2d 547, 552 (N.D. 1985) (structure, DUI 0.08 or under the influence); *State v. Huber*, 555 N.W.2d 791, 794 (N.D. 1996) (structure, driving is an element required in DUI, but not APC); *State v. Moos*, 2008 ND 228, ¶ 13, 758 N.W.2d 674, 678 (legislative history, theft and deceptive writings); *State v. Pulkrabek*, 2017 ND 203, ¶ 14, 900 N.W.2d 798, 801 (legislative history, theft by taking v. knowingly in possession); *State v. Beltran*, 2018 ND 166, ¶9, 914 N.W.2d 488, 492 (structure, uniform punitive scheme, refusal or other 39-08-01 means); *compare* cases determining one offense was a lesser included of another *State v. Vance*, 537 N.W.2d 545, 548 (N.D. 1995) (sexual contact is lesser included of sexual act); *State v. Gaddie*, 2022 ND 44, ¶ 14, 971 N.W.2d 811, 818, as amended (May 11, 2022).

49. The Ninth Circuit set out a four factor analysis for determining whether an allegation is a separate offense or an alternate means of committing the same

offense. *United States v. UCO Oil Co.*, 546 F.2d 833, 836-838 (9th Cir. 1976).

> In determining whether the statute at issue creates separate offenses, or simply describes alternative means to commit the same crime, we employ the analytical framework established in UCO Oil. Under UCO Oil, we consider "several relevant factors," including:
> (1) "language of the statute itself,"
> (2) "the legislative history and statutory context,"
> (3) the type of conduct proscribed, and
> (4) the "appropriateness of multiple punishment for the conduct charged in the indictment."

*United States v. Arreola*, 467 F.3d 1153, 1157 (9th Cir. 2006) (quoting *United States v. UCO Oil Co.*, 546 F.2d 833, 836-838.

**(1) Language of the statute**

50. In ascertaining legislative intent, one first looks to the statutory language and gives the language its plain, ordinary and commonly understood meaning. *State v. Gaddie*, 2022 ND 44, ¶ 18, 971 N.W.2d 811, 819, as amended (May 11, 2022).

51. In subsection 39-08-01(2), the legislature expressly stated that refusal is an offense under 39-08-01.

> 2. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section 39-06.2-10.2 or 39-20-01, is guilty of an offense under this section.

N.D.C.C. § 39-08-01(2) (underlining added). The legislature's N.D.C.C. § 39-08-01(2) intent to include refusal as an offense under N.D.C.C. § 39-08-01 is an act with relevance to today's issue.

52. Including the refusal proscription in the same criminal code section as the driving

or operating under the influence offense is another indicator North Dakota intends refusal to be treated as DUI and APC. A canvas of other states indicates not one imbeds its refusal crime with its driving / operating under the influence crime. National Highway and Traffic Safety Administration *Digest of Impaired Driving and Selected Beverage Control Laws*, 30th ed (2016), https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/812394-digest-of-impaired-driving-and-selected-beverage-control-laws.pdf; National Conference of State Legislators, *Criminal or Enhanced Civil Penalties for Implied Consent Breath Test Refusal*, (2018), https://www.ncsl.org/Portals/1/Documents/transportation/Criminal_or_Ehanced_Civil_penalties_implied_consent_refusal_27135.pdf.

53. This court has looked at the structure of the statute to determine whether the conduct is another offense or simply an alternate means. In *Sperle*, the court noted the separate ways of committing disorderly conduct under Mandan's city ordinance § 19-05-01 were listed in a series, none of which were exclusive. *City of Mandan v. Sperle*, 2004 ND 114, ¶ 15, 680 N.W.2d 275, 279. Section 39-08-01 is similarly structured, containing a list of means, 39-08-01(1)(a) through 39-08-01(1)(e), by which the offense may be committed, none of which are exclusive. In N.D.C.C. section 39-08-01, all the various means follow the distinguishing language "drive or be in actual physical control." Refusal is a means of committing a 39-08-01 driving or actual physical control offense.

**(2) Legislative History**

54. At paragraph 15 of Appellant's Brief, Tompkins cites *State v. Bourbeau* and argues legislative history is a method commonly used to evaluate whether two things are separate offenses. ATB at ¶15 (citing *State v. Bourbeau*, 250 N.W.2d 259, 262-65 (N.D. 1977)).

55. In *Bourbeau,* the State's third and final request to amend its theft Information was granted. *Bourbeau*, at 262. The amendment granted at the close of the state's evidence changed the theft charge from having received or retained the property of another which had been stolen to having 'exercised unauthorized control over the property of another.' *Id*. In determining whether the amendment had allowed charging a new or different offense, the *Bourbeau* court noted our state Judiciary 'B' Committee read guidance from LaFave & Scott, *Handbook on Criminal Law* into the record to acknowledge the experts' view the new consolidated theft approach could result in a theft conviction regardless of which of three ways the theft was accomplished. *Bourbeau* at 263. The *Bourbeau* court also noted the federal drafter's observation: "Consolidation of receiving and other forms of theft affords the same advantages as other aspects of the unification of the theft concept. It reduces the opportunity for technical defenses based upon legal distinctions between the closely related activities of stealing and receiving what is stolen." *Bourbeau*, at 264 (quoting National Commission on Reform of Federal Criminal Laws, II Working Papers 933—934, quoting Model Penal Code s 206.8, comment at 93—94 (Tent. Draft No. 2, 1954)). At least twice in the legislative history for House Bill 1302, closing a loophole was noted as a motive for

criminalizing refusal. H.B. 1302, 63 legislative session (2013), at 156, 436. https://www.ndlegis.gov/sites/default/files/resource/63-2013/library/hb1302.pdf. In 2013, the legislature's aim to close DUI loopholes was similar to the federal and state revisors' aim to preclude technical defenses in the new combined theft section.

56. *Bourbeau* not only stands for the idea that legislative history has been used to evaluate whether subsections create separate offenses, but also that elements as diverse as 1) *having exercised unauthorized control over the property of another*, and 2) *knowingly received or retained the property of another which had been stolen*, constitute a single offense. *Bourbeau* at 266 ("As the amendment to the Information did not vary the nature of the charge against Bourbeau and Perry, we find no denial of Due Process.")

57. Similarly, in *City of Mandan v. Sperle*, the appellate court found elements in Mandan's disorderly conduct ordinance's as diverse as 1) *fighting, threatening behavior*, and 2) *abusive language that results in harassing another* did not amount to separate offenses. *Sperle*, 2004 ND 114, ¶¶13-15.

58. Justice Scalia has been critical of legislative history and often repeated Judge Harold Leventhal's metaphor that using legislative history is the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends. *Conroy v. Aniskoff*, 507 U.S. 511, 519, 113 S. Ct. 1562, 1567, 123 L. Ed. 2d 229 (1993). Anyone sifting the 501 page legislative history for 2013's House Bill 1302, can find helpful quotes.

59. At page 436 of the legislative history one finds the encouragement that HB 1302 makes refusal the same as a DUI, not an additional crime.

> **Refusal to submit to chemical testing**
> ■ Crime of DUI under subsection of 39-08-01
> ■ Treated just like a DUI
> ■ Makes refusals easier to prosecute as a DUI.
> ■ Makes it the same as a DUI not an additional crime (MN. Makes it a separate crime)
> ■ Closes a DL loophole that exists now

*Id*. at 436 (underlining added).

60. Additionally, at page 312 of the legislative history one finds a table entitled, *Proposed DUI Legislation Summary*, submitted by Attorney General Stenehjem, which succinctly pointed out, "1. Makes refusal a criminal violation - same as a DUI offense, with offense penalty & license suspension, but no eligibility for restricted license." *Id*. at 312.

61. At page 306, in Ken Sorenson's explanatory notes submitted to House Judiciary on 05 February 2013, one finds, "Under this new subsection, an individual who refuses to submit to chemical testing, including on-site breath testing, is guilty of an offense under Section 39-08-01. The refusal offense is subject to the same offense classifications as other DUI offenses under Section 39-08-01." *Id*. at 306.

**(3) Type of conduct proscribed aka *conceptual grouping***

62. Tompkins contends 39-08-01 is split in two groups: A) a group in which the driver is or is deemed to be under the influence, and B) refusal. ATB ¶23. Tompkins argues it's a salient factor that an operator may be convicted of refusal

without any evidence the operator is under the influence. Tompkins' view is fatally flawed.

63. The *Bourbeau* and *Pulkrabek* courts relied on the legislative history of N.D.C.C. 12.1-23-02 to find theft by unauthorized taking, 12.1-23-02(1), was not a different offense than theft by knowingly receiving or retaining stolen property, 12.1-23-02(3). Two fundamental currents drove the unification of the various old styles of theft, e.g. larceny, embezzlement, false pretenses. One was that the courts had suffered from vacillating arguments after trial, e.g. after trial A the defendant argued he didn't commit larceny, he committed embezzlement. Overturned and retried for embezzlement, the same defendant claimed after trial B he was wrongfully convicted of embezzlement when the evidence showed larceny. *Bourbeau*, 250 N.W.2d 259, 263. The second fundamental principle the federal and state revisors relied on was that both sorts of theft had a commonality of being in unauthorized control of stolen property. *Bourbeau*, 250 N.W.2d 259, 264; *Pulkrabek*, 2017 ND 203, ¶¶12-15. The revisors and the Court have recognized that two very different means of exercising unauthorized control over another's property, 12.1-23-02(1) taking and 12.1-23-02(3) knowingly possessing stolen property, both constitute theft. Melding the means in one offense stopped the vacillating complaints: *I didn't do this, I did that*. Compare this with Tompkins' distinction between class A) under the influence, and class B) refusal. Tompkins claims the two are so different it persuasively shows refusal and under the influence are separate offenses. The State's position is under the influence and

refusal are no more divergent than theft by asportation and theft by possessing.

64. Tompkins' "influence" group includes the 0.08 or higher means of committing the offense. "That person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle." N.D.C.C. § 39-08-01(1)(a).

65. The eight one-hundredths of one percent means of committing the offense is commonly referred to as "per se" means and used to be referred to as "presumptive" DUI.

> When first enacted, this subsection was worded differently and read, "shall be presumed to be under the influence of intoxicating liquor," rather than "is under the influence." (Emphasis added). State v. Hendrickson, 240 N.W.2d 846, 851 (N.D.1976). A 1983 amendment to this subsection replaced the phrase, "shall be presumed to be," with the single word, "is." S.L.1983, ch. 415, § 29. Legislative history indicates that the intention of this enactment was to establish a "per se," strict-liability crime in two ways, one of which was this definition of "under the influence." House Judiciary Minutes, March 2, 1983, SB 2373. Using this legislative history, the prosecution counters that "we are no longer dealing with a presumption statute, but rather a per se statute." We agree.

*State v. Vogel*, 467 N.W.2d 86, 89 (N.D. 1991); *State v. Steinmetz*, 552 N.W.2d 358, 361 (N.D. 1996) ( per se driving under the influence); *State v. Engebretson*, 326 N.W.2d 212, 215 (N.D. 1982), overruled by *State v. Himmerick*, 499 N.W.2d 568 (N.D. 1993) (presumptive level of intoxication).

66. Through the *per se* means, the state need not provide evidence of impairment, but can prove its 39-08-01 claim by offering a properly obtained chemical test result with an alcohol concentration of 0.08 or higher.

67. Conviction based on per se strict liability 0.08 or higher is similar to conviction based on refusal. Neither means requires the state to in deed prove the operator was impaired. In per se cases it's deemed proven and in refusal cases it is not required.

68. Fact finders may make adverse inferences from withheld evidence. Justice Meschke pointed this out in *Steffes*.

> [I]n a proper case, either the prosecution or defense in a criminal trial would be entitled to a correct jury instruction, similar to NDJI-Civil 1625, on an adverse inference against the party that fails to produce or destroys evidence under his control, if no satisfactory explanation for that failure is given. See 29 AmJur2d Evidence §§ 178, 179 (1967); Charles E. Torcia, Wharton's Criminal Evidence, § 146 (13th ed. 1972); 2 Wigmore, Evidence §§ 290, 291 (Chadbourn rev. 1979). A party is entitled to a jury instruction if there is evidence to support it. State v. Thiel, 411 N.W.2d 66 (N.D.1987).

*State v. Steffes*, 500 N.W.2d 608, 615 (N.D. 1993) (Meschke, J. concurring), see SBAND pattern jury instruction C-80.30. Failure to Produce [Evidence] [Witness] 2001.

69. This Court recognized a trial court is permitted to draw a negative inference from a sexually dangerous individual's failure to call his independent expert psychologist as a witness at the discharge hearing. *In the Matter of E.W.F.*, 2008 ND 130, ¶16, 751 N.W.2d 686, 691.

70. By promulgating N.D.C.C. § 39-20-08, the legislature recognized evidence of refusal is admissible in a criminal trial.

> If the person under arrest refuses to submit to the test or tests, proof of refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed

> while the person was driving or in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof.

N.D.C.C. § 39-20-08.

71. This Court acknowledged refusal is relevant to some element of driving while intoxicated. "Section 39–20–08 of our implied consent laws is not ambiguous. An ordinary reading of the statute suggests evidence of refusal to take a test is relevant to some element of the crime of driving while intoxicated." *State v. Murphy*, 516 N.W.2d 285, 287 (N.D. 1994) (citing *City of West Fargo v. Maring*, 458 N.W.2d 318 (N.D.1990) (legislative intent to admit evidence of any refusal in DUI and APC proceedings).

72. The United State's Supreme Court has held admission of refusal in criminal cases does not violate the Fifth Amendment right to silence. *S. Dakota v. Neville*, 459 U.S. 553, 564, 103 S. Ct. 916, 922–23, 74 L. Ed. 2d 748 (1983) ("We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination."); see Jay M. Zitter, Annotation, *Admissibility in Criminal Case of Evidence That Accused Refused to Take Test of Intoxication*, 26 A.L.R.4th 1112 (1983).

73. Even Defendant Tompkins recognized, "there is a right to refuse the test, it's just it comes with consequences on it. But North Dakota Supreme Court held that individuals have an absolute right to refuse testing too." R87:16:12.

74. Although refusal does not by itself prove the operator was under the influence of

intoxicating liquor, combined with other circumstances it can reasonably lead to that inference. Like a 0.08 test result, the jury is allowed to find a violation of 39-08-01 through a legislatively supplied shorthand method. Defense's claim N.D.C.C. § 39-08-01 is divided convincingly into two classes: A) the influence class requiring proof of being under the influence and B) refusal, ignores a substantial similarity between refusal and per se DUI and the legislature's motive to stop loopholes that allow drinkers to continue driving.

**(4) Appropriateness of multiple punishment aka punitive scheme**

75. To determine whether something is a separate offense or an alternative means, this court has looked to the punitive scheme. See generally, *State v. Moos*, 2008 ND 228, ¶ 13, 758 N.W.2d 674, 678; *United States v. UCO Oil Co.*, 546 F.2d 833, 837 (9th Cir. 1976). Refusal receives the same criminal sanctions under N.D.C.C. § 39-08-01 as the other means of committing the offense. In the legislative history for H.B. 1302, Ken Sorenson's explanatory notes dated 17 April 2013, pointed out that the bill draft was restructured to ensure refusal received the same punishments as the other means of committing the offense.

> [A]ddition of a new subdivision (e) to subsection 1 of Section 39-08-01 and moving the language that refusal is an offense to a new subsection 2 is at the request of the state's attorneys. By its placement before the offense classifications and penalties provisions, it will clarify that a refusal offense will be subject to the same offense classifications and penalties as a DUI/APC offense involving a chemical breath test."

H.B. 1302, 63 legislative session (2013), at 444, https://www.ndlegis.gov/sites/default/files/resource/63-2013/library/hb1302.pdf.

**Distinguish from Huber**

76. Tompkins argues the *Huber* court's method of finding APC was a lesser included of DUI controls today. ATB ¶27 citing *State v. Huber*, 555 N.W.2d 791 (N.D. 1996). Tompkins explained the *Huber* court found APC was separated from DUI with the word "or" and the sentence for APC could be stayed but the sentence for DUI could not. *State v. Huber*, 555 N.W.2d 791, 794. The different ways DUI and APC could be criminally sanctioned are not present with refusal. Refusal is subject to the same criminal sanctions as DUI and APC. When it comes to administrative sanctions, the legislature acted to treat refusal as an offense under DUI and APC, not in addition to DUI or APC. The legislature wrote, "If the individual violated subdivisions a, b, c, or d of this subsection and subdivision e of this subsection and the violation arose from the same incident, for purposes of suspension or revocation of an operator's license, the violations are deemed a single violation and the court shall forward to the department of transportation only the conviction for driving under the influence or actual physical control." N.D.C.C. § 39-08-01(1). The legislature dictated merger denoting refusal is an offense of APC or DUI. Additionally, the *Huber* distinction was between driving or operating in 39-08-01(1) not with the means of committing the offense in 39-08-01(1)(a) thru (e). *Huber*, at 794. North Dakota has never found that one of the alternative means of committing DUI and/or APC in 39-08-01(1)(a) thru (e) constitutes a separate offense.

77. This Court has provided the following standard of review for jury instructions.

> Jury instructions are fully reviewable on appeal. State v. Wilson, 2004 ND 51, ¶ 11, 676 N.W.2d 98. This Court reviews jury instructions as a whole and determines whether they correctly and adequately inform the jury of the applicable law, even though part of the instructions standing alone may be insufficient or erroneous. *Id*. Reversal is appropriate only if the instructions, as a whole, are erroneous, relate to a central subject in the case, and affect a substantial right of the accused. State v. Huber, 555 N.W.2d 791, 793 (N.D. 1996).

*State v. Landrus*, 2019 ND 162, ¶ 7, 930 N.W.2d 176, 179.

78. The trial court's instructions and verdict forms correctly instructed on the law as it stands.

**Conclusion**

79. Although Tompkins objected to the court's jury instruction that combined refusal with DUI and refusal with APC, Tompkins failed to supply a proposed instruction. Similarly, Tompkins objected to the court's verdict forms that combined refusal with DUI and refusal with APC, but failed to supply proposed verdict forms.

80. Having failed to submit proposed instructions or verdict forms, this court is limited to reviewing for obvious error. The State has found no case and Tompkins has provided none holding refusal is a separate offense.

81. There is no clearly established law that refusal is a separate offense from DUI or APC. The court's explanations of the elements of the offense and its general verdict forms did not diverge from clearly established law.

82. North Dakota Century Code section 39-08-01(1)(3) is not a separate offense, but an alternate way of committing a § 39-08-01 offense. Providing a general verdict

form for alternate means of committing an offense is well accepted. The instructions fairly appraised the jury of the law. The trial court's use of general verdict forms in this case was not error.

83. The State asks this Court to affirm the judgment.

**Rule 28(h) of the North Dakota Rules of Appellate Procedure explanation of why oral argument would be helpful to the court.**

84. This is a case of first impression with potential to effect any offense that can be committed through alternate means. The state's attorney is familiar with the proceedings below.

**Rule 32(d) Certificate of Page Number Compliance.**

85. This *Appellee's Brief* complies with the 38 page limit in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated 08 January 2023.

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In the Supreme Court of the State of North Dakota

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| State of North Dakota<br>Plaintiff, Appellee<br><br>v<br><br>Brandon Todd Tompkins<br>Defendant, Appellant | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Certificate of Service<br><br><br><br><br>20220270 |

1. On 08 January 2023, the *Appellee's Brief* was delivered via email to the Clerk of the Supreme Court North Dakota at supclerkofcourt@ndcourts.gov and served to Luke T. Heck, attorney for the Appellant, at lheck@vogellaw.com.

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