FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 10, 2023
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Appellee, vs. Brandon Todd Tompkins, Appellant.	**SUPREME COURT NO. 20220270** Crim. No. 47-2022-CR-00145 ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE AUGUST 23, 2022,
JUDGMENT OF THE DISTRICT COURT
COUNTY OF STUTSMAN
STATE OF NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
HONORABL TROY J. LEFEVRE PRESIDING

APPELLANT'S AMENDED REPLY BRIEF

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LAW AND ARGUMENT

I. Mr. Tompkins preserved his objection to the jury instructions.

[¶1] Despite the State's arguments, this Court's precedent confirms Mr. Tompkins preserved for appeal his objection to the jury instructions. In *State v. Huber*, 555 N.W.2d 791 (N.D. 1996), the State requested instructions allowing the defendant to be convicted of DUI by finding he either operated a vehicle, or was in actual physical control. *Id.* at 793. The district court provided the instruction over the defendant's objection. *Id.* When convicted, the defendant appealed. *Id.* at 792. On appeal, the State argued the defendant failed to preserve his objection. *Id.* at 794. This Court reasoned a "defendant must request or object to the instructions to preserve the matter[,]" and that the "[f]ailure to object to a jury instruction . . . waives the right to challenge the instruction on appeal." *Id.* at 793 (citations omitted) (emphasis added). But because the defendant "objected prior to jury selection to the inclusion of APC in the jury instructions[,]" this Court held the defendant "adequately objected to the instruction" to preserve the issue. *Id.* at 794.

[¶2] This case is indistinguishable from *Huber*. Mr. Tompkins repeatedly objected to the district court's instructions. (R:87:133:15-24; R:87:133:25-134:6; R:87:142:3-22) Indeed, the district court specifically recognized Mr. Tompkins had a standing objection to the issue. (R:87:22-24) A party preserves an objection to an instruction "if that party made a proper objection under Rule 30(c)[.]" N.D.R. Crim. P. 30(d)(1)(A); *see also* N.D.R. Crim. P. 30(c)(1) ("[A] party who objects to an instruction . . . must do so on the record, stating distinctly the matter objected to

and the grounds of the objection."). Accordingly, Mr. Tompkins "adequately objected to the instruction" to preserve the issue for appeal. *Huber*, 555 N.W.2d at 794.

[¶3] And even if, arguendo, Mr. Tompkins did not properly preserve his objection, reversal is still warranted. If a party fails to preserve an objection to jury instructions, then "this Court's review is limited . . . to whether the jury instructions constitute plain or obvious error." *State v. Pulkrabek*, 2017 ND 203, ¶ 5, 900 N.W.2d 798 (citations and internal quotations omitted). "The determinative factor in the obvious-error analysis is whether the remaining instructions, as a whole, informed the jury about the [law]." *State v. Olander*, 1998 ND 50, ¶ 24, 575 N.W.2d 658. Because the instructions—as a whole—did not inform the jury about the law by allowing a non- unanimous verdict, the district court's error warrants reversal even under the obvious-error standard.

II. The jury instructions erred in treating refusal as an alternative means of committing DUI/APC.

A. History confirms refusal is a separate offense from DUI/APC.

[¶4] The State concedes history is relevant in determining whether a statute creates separate elements or alternative means. *See* Appellee's Br., at ¶ 56; *see also id.* at ¶¶ 54-61 (arguing historical context). History confirms refusal is not an alternative means of committing DUI/APC, but is instead a separate offense.

[¶5] Historically, North Dakota law treated refusing a chemical test request as a civil issue distinct from the crime of DUI/APC. *See, e.g.*, N.D.C.C. § 39-08-01

(2011); N.D.C.C. § 39-20-04 (2011). This history is consistent with other States' treatment of refusal. *See Birchfield v. North Dakota*, 579 U.S. 438, 444-49 (2016) (outlining history of DUI law in the United States, including the relatively new practice of "enacting laws making it a crime to refuse to undergo testing[]"). The State does not—and cannot—deny that, historically, refusal was separate from the crime of DUI/APC. *See* Appellee's Br., at ¶¶ 54-61.

[¶6] And when the Legislature eventually decided to criminalize refusals, it did so by creating "a separate offense[.]" Hr'g on H.B. 1302 Before the Conf. Comm. (Apr. 17, 2013), 63rd N.D. Legis. Sess. (oral testimony from Ken Sorenson). The State downplays this evidence, arguing "[a]nyone sifting the 501 page legislative history for 2013's House Bill 1302, can find helpful quotes." Appellee's Br., at ¶ 58. But the State's attempt to find "helpful quotes" fails, instead providing additional evidence confirming the Legislature intended refusal to be a separate offense from DUI/APC.

[¶7] The State first relies on "a chart . . . that shows the changes between the proposed law and this law." Hr'g on H.B. 1302 Before the House Judicial Comm. (Feb. 5, 2013), 63rd N.D. Legis. Sess. (oral testimony from Wayne Stenehjem). Specifically, a comment to that chart notes House Bill 1302 "[m]akes a refusal a criminal violation – same as a DUI offense, with offense penalty & license suspension, but no eligibility for restricted license." Hr'g on H.B. 1302 Before the House Judicial Comm. (Feb. 5, 2013), 63rd N.D. Legis. Sess. (handout #4 from Wayne Stenehjem). This confirms refusal is separate offense from DUI/APC

because, if refusal was merely an alternative means of committing DUI/APC, then it would not be the "same as a DUI offense," it would simply be a DUI offense. Moreover, the Attorney General's Office later confirmed "refusal is a separate offense[.]" Hr'g on H.B. 1302 Before the Conf. Comm. (Apr. 17, 2013), 63rd N.D. Legis. Sess. (oral testimony from Ken Sorenson).

[¶8] Alternatively, the States relies on a note reading: "'[u]nder 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.'" Appellee's Br., at ¶ 61 (citation omitted). This again confirms refusal is separate from DUI/APC—if a "refusal offense" was the same as "other DUI offenses," then there would be no need to classify a "refusal offense" as a "DUI offense," it would simply be a DUI offense. And again, Mr. Sorenson latter clarified refusal "is a separate offense[.]" Hr'g on H.B. 1302 Before the Conf. Comm. (Apr. 17, 2013), 63rd N.D. Legis. Sess. (oral testimony from Ken Sorenson). The State's legislative history supports Mr. Tompkins's position that refusal is a separate offense from DUI/APC.

B. Refusing a chemical test request is conceptually different from being under the influence of a substance.

[¶9] The State concedes some jurisdictions use the "conceptual grouping" test to determine whether a statute creates separate elements, or alternative means. *See* Appellee's Br., at ¶¶ 62-74 (arguing conceptual grouping). As identified by Mr.

Tompkins, Section 39-08-01 contains two groups: an "influence" group, and a "refusal" group. *See* Appellant's Br., at ¶ 23. While the State objects to these groups, *see* Appellee's Br., at ¶ 74, its attacks fail.

[¶10] The State argues "influence" and "refusal" are not the appropriate groups because, like DUI per se, "the [L]egislature's motive [in criminalizing refusal was] to stop loopholes that allow drinkers to continue driving." Appellee's Br., at ¶ 74. The State fails to explain how criminalizing refusal closed a "loophole" when the law already revoked the driving privileges of motorists that refused chemical testing. *See, e.g.*, N.D.C.C. § 39-20-04 (2011).

[¶11] And even if this were the Legislature's motive in criminalizing refusal, that motive does not change the conceptual groups actually created by Section 39-08-01. An "[e]lement of an offense" as "forbidden conduct[]" or "[t]he attendant circumstances[.]" N.D.C.C. § 12.1-01-03(1)(a) & (b). The plain language of Section 39-08-01 creates one group of "forbidden conduct" or "attendant circumstances" for when a motorist is "under the influence." *See* N.D.C.C. § 39-08-01(1)(a)-(d); *cf. also State v. Vogel*, 467 N.W.2d 86, 89-91 (N.D. 1991) (DUI per se does not use the "under the influence" language, but the Legislature's theory behind the statute is a motorist is "under the influence" when proved that a motorist's BAC reaches a certain level). Conversely, the "forbidden conduct" or "attendant circumstances" for refusal is "refusal." *See* N.D.C.C. § 39-08-01(1) ("That individual refuses to submit to any of the following: . . .").

[¶12] Alternatively, the State argues the conceptual groupings identified by Mr. Tompkins fail because refusal can be used as evidence that a motorist is under the influence. *See, i.e.*, N.D.C.C. § 39-20-08. But this, again, shows refusal is different from being under the influence because, if refusing a chemical test request was an alternative means of being under the influence, then refusal would not infer a motorist was under the influence—the motorist would simply be under the influence.

[¶13] The plain language of Section 39-08-01 creates a category of offenses criminalizing being "under the influence," and another category criminalizing "refusal." So categorized, "individual jurors and the collective jury could be expected to perceive and understand that the conduct prohibited by the first grouping," being under the influence, "is distinct and different from the conduct forbidden by the second grouping," refusing a chemical test request. *United States v. Gipson*, 553 F.2d 453, 458 (5th Cir. 1977). Because the district court's jury instructions did not maintain this distinction, the instructions misstated the law.

C. The statutory structure of the North Dakota Century Code confirms refusal is a separate offense from DUI/APC.

[¶14] The State argues that because Section 39-08-01(2) provides that a person who refuses a chemical test "'is guilty of an offense under this section[,]'" Appellee's Br., at ¶ 51 (quoting N.D.C.C. § 39-08-01(2)) (emphasis omitted), then refusal is merely an alternative means of committing DUI. *See id.* The State's argument misses the purpose of Section 39-08-01(2). Section 39-08-01(2) was

created "at the request of the state's attorneys[,]" to "clarify that a refusal offense will be subject to the same offense classifications and penalties as a DUI/APC offense involving a chemical or breath test." Hr'g on H.B. 1302 Before the Conf. Comm. (Apr. 17, 2013), 63rd N.D. Legis. Sess. (written handout from Ken Sorenson) (emphasis added). In other words, Section 39-08-01(2) shows "a refusal offense," while punished the same as "a DUI/APC offense," is a separate offense.

[¶15] Moreover, this Court has already effectively rejected this argument—that all crimes contained in 39-08-01 are alternative means of committing the same offense. DUI and APC are both offenses under Section 39-08-01. *See* N.D.C.C. § 39-08-01(1). Despite their placement, this Court has held DUI and APC are distinct offenses. *See Huber*, 555 N.W.2d at 794. Placement of the criminalization of refusal in Section 39-08-01 does not mean it is an alternative means of committing DUI/APC.

CONCLUSION

[¶16] Again, the Constitution limits "a State's capacity to define different courses of conduct . . . as merely alternative means of committing a single offense[.]" *Schad v. Arizona*, 501 U.S. 624, 632 (1991). That is because "no person may be punished criminally save upon proof of some specific illegal conduct." *Id.* Because the instructions allowed Mr. Tompkins to be convicted without unanimous proof of some specific illegal conduct, this Court should reverse.

Respectfully submitted this 11th day of January, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(d) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 12 pages.

Dated this 11th day of January, 2023.

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STATE OF NORTH DAKOTA, APPELLEE, vs. BRANDON TODD TOMPKINDS, APPELLANT.	**SUPREME COURT NO. 20220270** Criminal No. 47-2022-CR-00145

CERTIFICATE OF ELECTRONIC SERVICE

[¶1] I hereby certify that on January 11, 2023, the following documents:

APPELLANT'S AMENDED REPLY BRIEF

were e-mailed to the address below and are the actual e-mail address of the parties intended to be so served and said parties have consented to service by e-mail:

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