

SUPREME COURT OF NORTH DAKOTA

State v. Kalmio

2014 ND 101 (2014) · No. 20130074 · Decided May 28, 2014

SUMMARY

The North Dakota Supreme Court affirmed Omar Mohamed Kalmio’s convictions for four counts of class AA felony murder and his four consecutive life sentences without parole. The court held that the district court did not abuse its discretion in admitting hearsay testimony concerning the victims’ state of mind and in making related evidentiary rulings. The court also addressed preservation of hearsay objections and declined to consider an unbriefed prior-bad-acts challenge.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Crothers, Justice; Daniel J. Crothers; Dale V. Sandstrom; Gerald W. VandeWalle, C.J.; Mary Muehlen Maring, S.J., sitting
JURISDICTION	North Dakota
DECIDED	May 28, 2014
DOCKET	20130074
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed judgments entered after a jury convicted him of four counts of class AA felony murder and the district court imposed four consecutive life sentences without the possibility of parole.
STANDARD OF REVIEW	Evidentiary rulings and the denial of an alibi instruction were reviewed for abuse of discretion. Whether prosecutorial conduct rose to the level of a constitutional due-process violation was reviewed de novo. Sufficiency of the evidence was reviewed under the limited standard of whether competent evidence permitted a reasonable inference of guilt when viewed in the light most favorable to the verdict.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Omar Mohamed Kalmio v. State of North Dakota

TOPICS

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by admitting hearsay testimony concerning the victims' fear, physical condition, and relationship with Kalmio under the state-of-mind exception.
2. Whether the district court abused its discretion by refusing to give an alibi jury instruction when Kalmio failed to provide the notice required by North Dakota Rule of Criminal Procedure 12.1.
3. Whether the prosecutor's use of gun and red-circle images during closing argument denied Kalmio a fair trial and required a mistrial.
4. Whether sufficient evidence supported Kalmio's four murder convictions.

HOLDINGS

1. The district court did not abuse its discretion by admitting the challenged hearsay testimony. Under North Dakota Rule of Evidence 803(3), admissibility requires a case-specific determination that the statement was contemporaneous with the declarant's state of mind, that no circumstances suggested a motive to misrepresent, and that the declarant's state of mind was relevant to an issue such as the defendant's motive or intent.
2. A sufficiently definite standing objection to hearsay, granted by the district court and renewed at trial, preserves the hearsay issue for appellate review even when counsel does not make an explicit objection to each individual item of testimony.
3. The district court did not abuse its discretion by refusing to give Kalmio's requested alibi instruction because he failed to comply with Rule 12.1 and did not establish sufficient good cause for that failure.
4. The district court did not violate Kalmio's due-process rights by denying a mistrial after directing the prosecutor to remove gun and red-circle images from a closing-argument presentation and instructing the jury to disregard them.
5. Competent evidence supported the jury's verdicts, and the circumstantial nature of the evidence did not require reversal.

KEY QUOTATIONS

"We require a case-specific analysis of what ultimate fact the evidence of the victim's state of mind is offered to prove." (¶ 21)

"While the State presented Kalmio's bare assertions he was at the oil rigs near Williston at the time of the murders, without more those assertions are not sufficient evidence to raise a reasonable doubt on the issue." (¶ 43)

“Even assuming without deciding there was misconduct, the prosecutor’s attempt to use two images during closing argument was not sufficiently prejudicial to violate Kalmio’s due process rights because the district court directed the images to be removed and the jury to disregard the images.” (¶ 47)

FACTUAL BACKGROUND

Four people were shot and killed in Minot on January 28, 2011: Sabrina Zephier, Jolene Zephier, Dylan Zephier, and Jeremy Longie. The same firearm was used in all four killings, but the weapon was never recovered. The State presented evidence concerning Kalmio’s tumultuous relationship with Sabrina Zephier and her family, disputes involving their child and tax returns, testimony that Kalmio left an oil-rig site in a white truck near the time of the murders, and evidence that a similar white truck was seen near Sabrina Zephier’s apartment.

PROCEDURAL HISTORY

Kalmio was initially charged with murdering Sabrina Zephier. The State later amended the information and added charges involving the murders of Jolene Zephier, Dylan Zephier, and Jeremy Longie. After a nine-day jury trial, Kalmio was convicted on all four counts and sentenced to four consecutive life terms without parole. The Supreme Court of North Dakota affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Chisholm, 2012 ND 147, ¶ 10, 818 N.W.2d 707
- State v. Cain, 2011 ND 213, ¶ 29, 806 N.W.2d 597
- State v. Anderson, 2003 ND 30, ¶ 6, 657 N.W.2d 245
- State v. Aabrekke, 2011 ND 131, ¶¶ 3, 16, 800 N.W.2d 284
- O’Connell v. Hjelle, 143 N.W.2d 251, 254 (N.D. 1966)
- Muhammad v. Secretary, Florida Department of Corrections, 733 F.3d 1065, 1072 (11th Cir. 2013)
- Reed v. Thalacker, 198 F.3d 1058, 1063 (8th Cir. 1999)
- United States v. Ruiz, 987 F.2d 243, 246 (5th Cir. 1993)
- Hultberg v. Hjelle, 286 N.W.2d 448, 458 (N.D. 1979)
- Vann v. Vann, 2009 ND 118, ¶ 41, 767 N.W.2d 855
- Schumacker v. Schumacker, 2011 ND 75, ¶¶ 15-16, 796 N.W.2d 636
- Crawford v. Washington, 541 U.S. 36, 51, 68 (2004)
- Davis v. Washington, 547 U.S. 813, 821 (2006)
- State v. Sorenson, 2009 ND 147, ¶¶ 16-17, 770 N.W.2d 701
- United States v. Tokars, 95 F.3d 1520, 1535 (11th Cir. 1996)
- United States v. Joe, 8 F.3d 1488, 1492-93 (10th Cir. 1993), cert. denied, 510 U.S. 1184 (1994)
- State v. Fulminante, 193 Ariz. 485, 498, 975 P.2d 75 (1999)

- State v. Sevigny, 2006 ND 211, ¶ 12, 722 N.W.2d 515
- State v. Olmstead, 261 N.W.2d 880, 885 (N.D. 1978)
- State v. Thiel, 411 N.W.2d 66, 67-69 (N.D. 1987)
- State v. Hazlett, 16 N.D. 426, 432, 113 N.W. 374, 376 (1907)
- Womack v. United States, 336 F.2d 959 (D.C. Cir. 1964)
- State v. Flohr, 301 N.W.2d 367, 371-72 (N.D. 1980)
- State v. Pena Garcia, 2012 ND 11, ¶¶ 6, 10, 812 N.W.2d 328
- State v. Duncan, 2011 ND 85, ¶ 12, 796 N.W.2d 672
- State v. Zottnick, 2011 ND 84, ¶ 14, 796 N.W.2d 666
- State v. Olson, 290 N.W.2d 664, 670-71 (N.D. 1980)