

20040348 -

20040350

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,)	District Ct. No. 02-K460, 461. 03-K52
)	
Appellee,)	
)	
vs.)	Supreme Ct. No. 20040348-20040350
)	
Travis Parisien,)	
)	
Appellant.)	

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 25 2005

STATE OF NORTH DAKOTA

BRIEF OF APPELLEE

Mary O'Donnell
Rolette County State's Attorney
Attorney # 04352
Box 1079
Rolla, ND 58367

Robin L. Olson
Attorney at Law
405 Bruce Ave., Suite 100A
Grand Forks, ND 58201

Attorney for Appellee

Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues.....	vi
Statement of the Case.....	1
Statement of the Facts.....	2
Argument.....	9
I. THE COURT DID NOT VIOLATE THE DEFENDANT'S STATUTORY OR CONSTITUTIONAL RIGHTS.....	9
A. THE JURY DID NOT INVOKE THE OPEN-COURT PROCEDURE OF §29-22-05 BECAUSE IT DID NOT REQUEST TESTIMONY OR INFORMATION ON A POINT OF LAW.....	10
B. DEFENDANT'S PRESENCE WAS NOT REQUIRED UNDER §29-22-05 BECAUSE COUNSEL WAS PRESENT AND MADE NO OBJECTION.....	13
C. DEFENDANT'S CONSTITUTIONAL RIGHT TO BE PRESENT AT TRIAL WAS NOT VIOLATED.....	15
II. EVEN IF THERE WAS ERROR IN COMMUNICATIONS WITH THE JURY, IT WAS HARMLESS ERROR.....	16
III. THE JURY VERDICT WAS NOT COERCED.....	19

IV.	THE TRIAL COURT'S INSTRUCTIONS DID NOT MISLEAD THE JURY	26
V.	EVIDENCE OF ONE PRIOR INSTANCE OF JEALOUS ASSAULT WAS PROPERLY ADMITTED	27
	Conclusion.....	37

TABLE OF AUTHORITIES

	<u>Page:</u>
<u>Cases:</u>	
<i>Davis v. State</i> , 832 So.2d 239 (Fla.App. 2002).....	23
<i>Hill v. State</i> , 2000 ND 143, 615 N.W.2d 135	14,18
<i>Loggins v. Frey</i> , 786 F.2d 364 (8th Cir. 1986).....	14
<i>Noble v. Aldred</i> , 2004 WL 1354260 (Cal.App. 4th Dist.)	21
<i>People v. Daily</i> , 41 Ill.2d 116, 242 N.E.2d 170 (1968)	20
<i>People v. Logston</i> , 196 Ill.App.3d 30, 552 N.E.2d 1266 (1990).....	22
<i>People v. Pecka</i> , 183 Ill.App.3d 60, 538 N.E.2d 1189 (1989).....	20
<i>Reed v. Ross</i> , 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984)	14
<i>State v. Ash</i> , 526 N.W.2d 473 (N.D. 1995)	11,13,15,17,18
<i>State v. Champagne</i> , 198 N.W.2d 218 (N.D. 1972)	25
<i>State v. Christensen</i> , 1997 ND 57, 561 N.W.2d 631	28
<i>State v. Gefroh</i> , 495 N.W.2d 651 (N.D. 1993)	28,34,35,36

<i>State v. Hatch</i> , 346 N.W.2d 268 (N.D. 1984)	11
<i>State v. Huber</i> , 555 N.W.2d 791 (N.D. 1996)	26
<i>State v. Jahner</i> , 2003 ND 36, 657 N.W.2d 266	10,13
<i>State v. Jensen</i> , 282 N.W.2d 55 (1979)	32,33
<i>State v. Klein</i> , 1999 N.D. 76, 593 N.W.2d 325	27
<i>State v. Klein</i> , 200 N.W.2d 288 (N.D. 1972)	11,16
<i>State v. Klose</i> , 2003 ND 39, 657 N.W.2d 276	13
<i>State v. Ramsey</i> , 2005 ND 42, 692 N.W.2d 498	35
<i>State v. Smuda</i> , 419 N.W.2d 166 (N.D. 1988);	11,18
<i>State v. Steinbach</i> , 1998 ND 18, 575 N.W.2d 193	27
<i>State v. Trimble</i> , 371 N.W.2d 921 (Minn.App. 1985)	19
<i>State v. Zimmerman</i> , 524 N.W.2d 111 (N.D. 1994)	15,17
<i>Thomas v. State</i> , 748 So.2d 970 (Fla. 1999)	21,22,23
<i>U.S. v. DeGraffenreid</i> , 339 F.3d 576 (7th Cir. 2003)	15

United States v. Neff,
10 F.3d 1321 (7th Cir. 1993)..... 14

Statutes and Rules:

NDCC §29-22-05 10,11,13
North Dakota Constitution, Art. 1, §12 15
North Dakota Rules of Evidence, Rule 403 35
North Dakota Rules of Evidence, Rule 404(a)(1)32,33
North Dakota Rules of Evidence, Rule 404(b) 27,32,33,35

STATEMENT OF ISSUES

- I. Whether the Defendant must be present when the court responds in writing to a written jury question that does not involve trial testimony or a legal issue?

Trial Court did not rule because defense counsel did not object.

- II. Whether it is coercive to inform the jury, after four hours of deliberation, that the jury should deliberate further and try to reach a verdict, if it can?

Trial Court held: in the negative.

- III. Whether it was threatening or coercive for the district court to ask the jury if a recess would be helpful?

Trial Court held: in the negative.

- IV. Whether the trial court's instruction on jury deliberations was misleading?

Trial court did not rule because the defendant did not object to the instruction.

- V. Whether evidence of a prior assault by the defendant was admissible to show state of mind and to rebut defendant's testimony as to the "usual routine"?

Trial Court held: in the affirmative.

STATEMENT OF THE CASE

On August 27, 2002, Travis Parisien, Defendant, was arrested by Rolette County Sheriff's Deputy C.J. Graham as a result of a sexual assault that occurred in St. John, North Dakota. This assault took place at the residence of T█████ K█████, the victim in this case. (T. at 52) On August 29, 2002, Defendant, was charged with Gross Sexual Imposition (A. 1, D. 1), and Felonious Restraint, (A. 5, D. 1). On February 7, 2003, Defendant was charged with Aggravated Assault (A. 9, D. 1), a crime allegedly occurring on August 27, 2002. On June 7, 2004, amended criminal informations were filed for the Gross Sexual Imposition charge, (A. 2, 13, D. 47), and the Felonious Restraint charges. (A. 6, 14, D. 47). On June 7, 2004 the criminal information was filed for the Aggravated Assault charge. (A. 9, 15, D. 35). Defendant entered the pleas of not guilty. (A. 1, D. 10, A. 5, D. 10, A. 9, D. 12). A jury trial was held on June 22, 2004 at the Rolette County Courthouse in Rolla, North Dakota, the Honorable Lester Ketterling, presiding. (T. at 1) Defendant was convicted of the charges on June 26, 2004 at 2:19 a.m. (A. 3, D. 103, A. 7, D. 103, A. 10, D. 91) On November 29, 2004 Defendant was sentenced on the Gross Sexual Imposition charge (A. 4, D. 119, A. 16) to nineteen years with seven years suspended; on the Felonious Restraint charge (A. 8, D. 119, A. 17) to five years, concurrent and; on the Aggravated Assault charge (A. 11, D. 107, A. 18) to five years concurrent with the other charges. Notice of Appeal

was filed on December 2, 2004. (A. 4, D. 125, A. 8, D. 124, A. 11, D. 112, A. 19).

On February 14, 2005 Motion to Correct or Modify record was filed. (A. 4, D. 135, A. 8, D. 134, A. 11, D. 122, A. 20). The State filed an objection to that motion. (A. 4, D. 144, A. 8, D. 143, A. 12, D. 131, A. 25) On March 8, 2005 Judge Ketterling issued a Memorandum and Order for Modification or Correction of Record. (A. 4, D. 146, A. 8, D. 145, A. 12, D. 133, A. 28).

FACTS

On August 27, 2002, Travis Parisien, the defendant in this case, intentionally and willfully sexually assaulted the victim, T■■■■ K■■■, in her residence in St. John, North Dakota. He forced her to submit to vaginal and anal sexual acts. He also physically assaulted her, beating her face and her body and breaking a rib, specifically an undisplaced fracture of the tenth rib. During the sexual assaults and the physical assaults he made threats of violence against her, and he physically forced and dragged her from the living room of her trailer residence into the south bedroom. At one point, she did attempt to escape him by trying to crawl out a bathroom window. The defendant restrained the victim in her residence for more than two hours.

On the date of the assault, T■■■■ K■■■ was living with her two small girls in her mobile home in St. John. She was divorced. Ms. K■■■ was employed at Uniband in Belcourt, ND as an accountant. (T. p. 146) She had received an accounting degree from the University of Mary in Bismarck, ND and she had been employed at Uniband for six and one-half years. (T. pgs. 145, 146)

The criminal acts of which the defendant was convicted began on the

afternoon of August 27, 2002. That day T [REDACTED] K [REDACTED] had gotten up and gone to work at about 8:30 a.m. (T. p. 153) In the afternoon she left work and arrived back at her residence at about 4:00 p.m. (T. p. 154) The defendant was there when she got home. (T. p. 154) At the trial, Ms. K [REDACTED] testified that during the summer of 2002, she and the defendant had been separated. For about two weeks just prior to the assault the defendant had been staying with her at her mobile home. (T. p. 151) She said she had known the defendant for approximately two years, and they had had an on and off again relationship. (T. pgs. 147, 149)

T [REDACTED] testified that when she got home the day of the assault the defendant had been consuming alcohol. (T. p. 155) She went into her bedroom and changed from her work clothes into a pair of red sweatpants and a white sweater. (T. pgs. 151, 152) She was wearing pink underpants. (T. pages 151, 152) She went into the living room, she lay down on the couch and closed her eyes. (T. p. 157) The defendant was seated on the couch. (T. p. 157) Ms. K [REDACTED] testified that she commented to the defendant that she was very unhappy with the living arrangement and that she did not want him at her house anymore. (T. pgs. 157, 158) The defendant said he would leave at the end of the week. (T. p. 157) The defendant then asked Ms. K [REDACTED] if she had "been with" anyone else during their separation. (T. p. 158) She replied "yeah", and then asked "what about you, Travis? Were you with anybody else?" He answered that he had been with two other people. Ms. K [REDACTED] testified that she was still lying on the couch with her eyes closed when the defendant suddenly jumped up and began striking her face and her head yelling and screaming at her that "...if I wanted to be a fucking whore and fuck everybody that he was going to fuck me like the whore I was." (T. p. 159) He grabbed her by the hair and forced her head down by her knees dragging and pulling her. (T. p. 160) The defendant pulled off the red sweatpants and the pink

underpants that T [REDACTED] was wearing and dropped them on the living room floor. (T. p. 160) He dragged her into the south master bedroom and threw her on the bed, hollering that "...he was going to fuck me in the ass and that I deserved it..." (T. p. 161) T [REDACTED] said that she struggled and tried to get away, but when she did, he grabbed her by the throat and threw her back down. (T. p. 161) She was crying and saying "No Travis. No." (T. p. 161) The defendant continued to strike her, he grabbed her, and she testified that he "...stuck his penis in my rectum..." (T. p. 161) T [REDACTED] flew off the bed, and the defendant grabbed her by the hair and screamed that "... I was a fucking crybaby, and that he bet I wasn't crying when Shane fucked me." (T. p. 161) The defendant then went to the bathroom in the master bedroom and came out with a jar of Vaseline. (T. p. 162) He told T [REDACTED] that he would "...lube her up enough so it won't hurt." (T. p. 162) He put Vaseline on her "private parts" and on his penis. (T. p. 162) (The defendant testified that he used the vaseline because the victim was menstruating; He said "...the bloody thing is just not really my type, you know." (T. p. 454) T [REDACTED] testified that "...he grabbed a hold of me and when he grabbed a hold of me he jumped on me, and when he jumped on top of me I couldn't breathe. I was telling him to stop because I couldn't breathe, and he told me that he wished I'd pass out so he'd be able to do whatever he wanted to do with me." (T. p. 162) She said that the defendant penetrated her both anally and vaginally, and it was very painful. (T. pages 162, 163) She struggled to get away and begged him to stop: "I begged him to quit. I told him that I had had enough ---I had been punished enough." (T. p. 163) The defendant continued to strike her, and when her glasses flew off, he grabbed them and broke them in half, throwing the pieces on the floor. (T. p. 164)

T [REDACTED] testified that when the defendant "finished" he went out of the bedroom. (T. p. 166) She leaped up from the bed, ran into the bathroom and

locked the door. (T. p. 166) She opened the bathroom window, and, standing on the toilet, she tried to jump out the window, knocking several ceramic items off the window sill to the ground outside. (T. p. 167) She was part way out the bathroom window when the defendant kicked in the bathroom door, grabbed her legs and twisted them saying that "...he was going to break my legs..." (T. p. 168) He grabbed her by the hair and pulled her back in. (T. p. 168) The defendant began striking her again and said he "...was just going to quit, but now I deserved it more..." (T. p. 168) The bathroom was badly damaged during this further assault. A full length mirror attached to the bathroom door shattered all over the floor. (T. p. 169) Rolette County Deputy Clifford Graham testified that when he arrived at the residence to investigate, he found damage to the bathroom door jam, the mirror, the toilet stool was damaged, the toilet seat was torn off, and there were stains on the toilet that appeared to be blood. (T. p. 46) He said the bathroom door had been kicked in. (T. p. 139) He found the ceramic items that had been on the window sill outside on the ground. (T. p. 46) The toilet was located immediately below the bathroom window through which T ██████ had tried to escape. (T. p. 45)

T ██████ K ██████ testified that after the defendant attacked her in the bathroom, he then ordered her to go and get her nicest clothes because he was going to cut them up. (T. p. 169) She brought him several pairs of jeans, and he cut them across the leg with an orange handled scissors. (T. pgs. 169, 170) T ██████ told the defendant that she had to go pick up her two little girls because they had to go to the school to meet their new teachers. (T. p. 170) She told him she loved him and everything was going to be okay. (T. p. 170) He was still angry, and T ██████ testified that the reason she told him she knew he still loved her was because she was terrified and did not think she "...was going to get out of there alive." (T. p. 171) The defendant said he hated her, and he was "...so mad at me he could just kill me." (T. p. 171) T ██████ put on a pair of

jeans. The defendant pushed her on her back onto the bed. He took a scissors and began cutting up both legs of her jeans toward her groin. (T. pgs. 172, 173) She could feel the scissor blades going up her leg against her skin. (T. p. 173)

During defendant's attack on T█████, she was cut on the leg and was bleeding. (T. p. 174) She told the defendant she needed a bandaid. (T. p. 174) He grabbed her by the hair and shoved her head down by her knees and dragged her to the other (north) bathroom. (T. p. 174) In the north bathroom she continued to tell him she loved him. (T. p. 174) They went back to the living room and sat on the couch. (T. p. 176) She put her arms around him and said that she knew he still loved her. (T. p. 176) At about 6:30 p.m., the defendant finally allowed T█████ to leave her residence. (T. p. 182) Before she left, he said to her, "Just remember if you go to the police I won't be in jail forever." (T. p. 177) T█████ testified that she was afraid for her life and that she believed the defendant when he said he was so mad he could kill her. (T. p. 176, 177) She went out to her vehicle, got in, locked the doors and drove away. (T. p. 177) She picked up her children and took them to meet their new teachers. (T. p. 180) Thereafter, she dropped the children at a friend's house and then immediately drove to the Rolette County Sheriff's Office, where she reported the assault to Deputy Clifford Graham. (T. p. 182) She arrived at the Sheriff's Office at 7:30 p.m. (T. p. 182) At 8:00 p.m. Sheriff Tony Sims took T█████ to the emergency room at Presentation Medical Center. (T. p. 184) She was examined by Physician's Assistant Phyllis Abrahamson. (T. p. 185) T█████ told the P.A. that she had been "...sexually assaulted and beaten." She reported that she had been dragged "...by my hair and forced to have anal and vaginal sex." (T. p. 185) Phyllis Abrahamson testified that T█████ was crying, upset and complaining of pain. (T. p. 280) Ms. Abrahamson noted numerous bruised areas and abrasions on T█████ (T. p. 286) The patient complained of

pain during pelvic and rectal exams. (T. p. 287) Ms. Abrahamson ordered an x-ray of T■■■■'s ribs, and the finding was an undisplaced fracture of the tenth rib. (T. pgs. 294, 295) Ms. Abrahamson testified that the bruises she observed and the results of her examination were consistent with the description that the victim gave of the assault. (T. p. 307) She also said that the victim was not menstruating on the day of the assault. (T. pgs. 296, 585) During the examination, T■■■■ told Ms. Abrahamson that the sexual acts were "not consenting". (T. p. 289) In the hospital admission summary Ms. Abrahamson had written: "Assault-rape. 4:00 to 6:30 p.m. dragged to the ...bedroom. Hair pulled, struck with hand and pushed into the headboard of bed... Had vaginal alternating with rectal penetration. Fought back herself." (T. p. 286) Ms. Abrahamson's notes went on to describe T■■■■ as, "shaken and upset, red eyes, black and blue behind the ear on the left side, bruised left cheek, chin and tender below the right eye, abrasion on arm, back, legs and thighs...tender in the right upper quadrant, tender right lower anterior ribs, tender generalized back, bruises (black and blue) scattered over body." (T. p. 286)

When the defendant was arrested and brought to the Rolette County Sheriff's Office, he asked Sheriff Tony Sims to take some photographs of him. (T. p. 262) The Sheriff said the defendant made this request to show the damage done to him during the incident. (T. p. 263) The two photographs taken by the Sheriff depicted some marks on the defendant's upper right back and shoulder. (T. p. 264) When the defendant testified at trial, he described the marks shown in the two photographs as being "hickeys" that were the result of romantic activity between himself and the victim during the August 27 assault. (T. p. 490)

The defendant was charged with Gross Sexual Imposition, Aggravated Assault, and Felonious Restraint. He was found guilty on all three charges by

a jury of twelve on June 26, 2004. On November 29, 2004, the defendant was sentenced on the Gross Sexual Imposition charged to nineteen years with seven years suspended; on the Felonious Restraint charged to five years concurrent; and on the Aggravated Assault charge to five year concurrent.

ARGUMENT

I. THE COURT DID NOT VIOLATE THE DEFENDANT'S STATUTORY OR CONSTITUTIONAL RIGHTS.

Defendant contends that he had a statutory and constitutional right to be present when the district court responded in writing to the jury's communication to the court. The jury commenced deliberations at 7:40 p.m. The jury wrote, at about 11:25 p.m., that it was "hung" on the sexual charge, and noted, 10-2. The court responded by asking the jury to "Please try your best to see if you can arrive at a verdict if you can." [A.30]. In another note at 12:15 a.m., the jury indicated that it was still "hung." The court responded by asking if the jury had reached a verdict on the other two charges and asking, "Would a recess until later today be of any assistance in reaching a verdict?" The jury responded at 12:27 a.m.: "We are taking a break and then vote again." The jury continued to deliberate until it returned the guilty verdicts at 2:19 a.m. Both the prosecution and defense counsel were notified of these communications and given opportunity to present argument before the judge responded. The defendant was not present. Defense counsel did not object to the defendant's absence. All communications between judge and jury were in writing. The jury was not called back into the courtroom.

A. THE JURY DID NOT INVOKE THE OPEN-COURT
PROCEDURE OF §29-22-05 BECAUSE IT DID NOT REQUEST
TESTIMONY OR INFORMATION ON A POINT OF LAW.

NDCC §29-22-05 provides, as defendant contends, for a procedure when the jury desires “to be informed on a point of law . . . or to have any testimony . . . read to them . . .” The jury in this case sent notes indicating it was having difficulty reaching a verdict. It did not request to be informed on a point of law. It did not ask to have testimony read back. The court responded in writing to these inquiries after discussion with the prosecution and defense counsel.

The statute requires that “the information must be given in the presence of, or after notice to, the state’s attorney and *the defendant or his counsel* . . .” The defendant’s counsel was notified and was present when the judge replied to these inquiries. Defense counsel made no claim that the defendant should be present.

In *State v. Jahner*, 2003 ND 36 ¶6, 657 N.W.2d 266, the jury requested a transcript of the defendant’s testimony. After inquiry by the court, the jury elaborated by stating that it was in disagreement regarding the testimony. The court sent a note advising the jurors to rely on their recollection of the testimony. The court observed [¶ 8]:

N.D.C.C. §§ 29-22-05 confers a statutory right upon a defendant to have the jury brought into the courtroom and to have the

information requested by the jury given to it. *See State v. Ash*, 526 N.W.2d 473, 484 (N.D. 1995) (Neumann, J., concurring specially) (noting a defendant's right under N.D.C.C. §§ 29-22-05 to have all responses to jury questions be given to the jurors in the courtroom is a statutory right). Statutory rights may be waived by the party entitled to the benefit unless a waiver would be against public policy or the statute declares or implies there cannot be a waiver. *Brunsomman v. Scarlett*, 465 N.W.2d 162, 167 (N.D. 1991).

Although *Jahner* could be read to require bringing the jury and the defendant back into the courtroom for every exchange of information with the jury, that is not what the statute states. Practical reality indicates that jury inquiries not requesting testimony or legal points should not require the courtroom procedure. It should be sufficient that defense counsel is noticed and present, especially where the communications are written.

Several North Dakota cases have held that after the case has been submitted to the jury, *all communications* between judge and jury must be in open court and in the presence of the defendant. *State v. Ash*, 526 N.W.2d 473, 481 (N.D. 1995); *State v. Smuda*, 419 N.W.2d 166, 167 (N.D. 1988); *State v. Hatch*, 346 N.W.2d 268 (N.D. 1984); *State v. Klein*, 200 N.W.2d 288, 292 (N.D. 1972). On their facts, these cases involved jury inquiries that included requests for testimony or legal advice. In *Ash*, the jury asked for a list of exhibits, reading back the defendant's testimony, and playing a testimonial tape. In *Smuda*, the jury asked for legal advice on the definition of "force." In *Hatch*, the jury asked to see certain evidence. In *Klein*, the jury asked the court

about the meaning of certain testimony. In every one of these cases, the court found the error harmless.

B. DEFENDANT'S PRESENCE WAS NOT REQUIRED UNDER §29-22-05 BECAUSE COUNSEL WAS PRESENT AND MADE NO OBJECTION.

Even when it is invoked, NDCC §29-22-05 requires the presence of defendant's counsel, not the defendant personally. In *State v. Klose*, 2003 ND 39, 657 N.W.2d 276, the court held that §29-22-05 is distinct from the defendant's constitutional right to be present at critical stages of the trial. Upon receiving a written question from the jury, the court met with counsel in chambers to discuss the question. The attorneys and the judge agreed on the framework for an answer, and the judge submitted a written answer to the jury. The court held [¶ 39]:

Because Klose's counsel was given a full opportunity to participate in the discussion and in deciding the manner in which the answer would be given to the jury, we conclude, under NDCC §§29-22-05, *the district court did not communicate improperly with the jury and did not err.* [emphasis added].

Even if defendant had a right to be present under the circumstances here present, that right was waived by his attorneys' failure to object. *State v. Klose, supra; State v. Ash, supra; State v. Jahner, supra*, 2003 ND 36, ¶8].

Defendant argues that he has a constitutional right to be present during any communication with the jury, and that this right could not be waived by

his counsel, citing to *United States v. Neff*, 10 F.3d 1321, 1323-24 (7th Cir. 1993); and *Hill v. State*, 2000 ND 143, 615 N.W.2d 135. *Hill* was a post-conviction relief proceeding in which the trial court granted a new trial because the defendant was not present when trial testimony was read to the jury. At his post-conviction relief hearing, Hill testified that he did not want his attorney to waive his right to be present, and his attorney testified that he waived the right knowing that Hill wanted to be there. *Id.*, ¶9. The court on appeal upheld the grant of a new trial under these unique circumstances. Those circumstances are not present here. The defendant's after-the-fact statement that he didn't give anyone permission to waive his right to be present and his trial counsel's assertion that he was too tired to think about the defendant's presence, does not vitiate the waiver. [App. A-22]. It is undisputed that trial counsel made no request that the defendant be present.

Even if communications with the jury regarding testimony or legal points are "critical stages" of the trial at which the defendant has a constitutional right to be present, such presence is not necessarily required for lesser communications with the jury. Moreover, like other constitutional rights, it can be waived by counsel. See, *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 2909, 82 L.Ed.2d 1 (1984); *Loggins v. Frey*, 786 F.2d 364, 368 (8th Cir. 1986).

C. DEFENDANT'S CONSTITUTIONAL RIGHT TO BE PRESENT
AT TRIAL WAS NOT VIOLATED.

Defendant relies on *State v. Ash*, 526 N.W.2d 473 (N.D. 1995), for his argument that failure to have the defendant present violated his constitutional rights. In *Ash*, the court held that the court's communications with the jury violated Ash's constitutional rights under Art. 1, §12 of the North Dakota Constitution, citing to *State v. Zimmerman*, 524 N.W.2d 111 (N.D. 1994). In *Zimmerman*, the jury invoked §29-22-05 by requesting to have testimony read, and the court found that responding by written note, without the defendant present, was constitutional error. 524 N.W.2d at 485.

The communications with the jury in this case involved the logistics of the deliberations, not testimony or legal points. This should not be considered a stage of the trial invoking the defendant's right to be present. Even if it were such an occasion, it would be, like *Ash* and *Zimmerman*, harmless error. Indeed, the Seventh Circuit, following *Neff*, has found harmless error when the court communicates in writing with the jury without the defendant present [*U.S. v. DeGraffenreid*, 339 F.3d 576, 580 (7th Cir. 2003)]:

An error is harmless if it does not affect "substantial rights." Fed. R. Crim. P. 52(a). A defendant's absence from a stage of the trial is harmless if the issue involved is not one "on which counsel would be likely to consult [the defendant]," or which the defendant, "if consulted, would be likely to have an answer that

would sway the judge.” *United States v. Silverstein*, 732 F.2d 1338, 1348 (7th Cir. 1984).

Degraffenried claims that if present, “he may have suggested a response that was contrary to the district court’s response which allowed the jury to continue to deliberate without requesting a mistrial.” We are not persuaded. The jury’s note was straightforward, issued less than four hours after deliberations began. While the judge’s methodology was improper, his response was not. We cannot agree that defense counsel would have consulted Degraffenried about the jury’s note. Moreover, given the temporal proximity to the start of deliberations and the legal nature of the issue, we fail to see how a response from Degraffenried would have swayed the judge. Thus, the failure of the court to secure Degraffenried’s presence was harmless error.

Here, also, the issue was not one on which counsel would be likely to consult the defendant, and clearly not one on which the defendant could have said anything to sway the judge. The failure to have the defendant present was harmless error.

II. EVEN IF THERE WAS ERROR IN COMMUNICATIONS WITH THE JURY, IT WAS HARMLESS ERROR.

Error in communicating with the jury is harmless if it “was not prejudicial to the substantial rights of the defendant.” *State v. Klein*, supra, 200 N.W.2d at 292. In *Klein*, the court responded to a jury inquiry about the meaning of testimony with a note refusing to supply such advice. The court held that the defendant was not entitled to a new trial because the error was not prejudicial to any substantial right of the defendant.

Nearly every case cited by the defendant finding error in communicating with the jury found the error to be harmless. This is particularly true where, as here, the communications were in writing. In *State v. Zimmerman*, *supra*, 524 N.W.2d at 117, the court observed:

In the circumstances presented, where the trial court responded to a written question from the jury concerning the testimony about an exhibit with a written response telling the jurors to rely on their own recollections, it would be unreasonable to conclude that Zimmerman's presence or absence would have had any effect on the result. We discern no possibility of prejudice and conclude that the trial court's error was harmless beyond a reasonable doubt.

In *State v. Ash*, 526 N.W.2d 473 (N.D. 1995), the jury requested an exhibit list. Without bringing the jury into the courtroom, without having the defendant present, and without objection, the court directed the clerk to prepare and deliver the exhibit list. The jury later sent a second note, asking to have the defendant's testimony reread. The court, again without bringing the jury or the defendant back into the courtroom, and without objection, directed the jury by note to rely on its own recollection of the testimony. Finally, the jury sent a third note, asking for a tape player and the final jury instructions. Again, without bringing the jury or the defendant into the courtroom, and without defense counsel's objection, the trial court had the final instructions delivered to the jury and sent a note telling them to rely on its recollection of the content of the tape.

The court concluded that the trial court erred in responding to the jury communications without the defendant being present and without bringing the jury into open court. The error, however, was harmless beyond a reasonable doubt [526 N.W.2d at 481]:

[C]onsidering the jury's requests, defense counsel's repeated waiver, and the trial court's responses, it is clear to us that it would be unreasonable to conclude that Ash's presence or absence would have had any effect on the result. We discern no possibility of prejudice to Ash from these communications by the court with the jury outside Ash's presence, particularly when his counsel repeatedly waived the defendant's absence. Therefore, we conclude that the trial court's error was harmless beyond a reasonable doubt.

In *Hill v. State*, 2000 ND 143, 615 N.W.2d 135, the court held that, where the communications with the jury are all in writing, the State can easily meet its burden of showing that the error was harmless beyond a reasonable doubt [2000 ND 143, ¶ 19]:

When the violation of the defendant's right to be present consists of a written jury request and a court's written response to rely upon its recollection and there is "no possibility of prejudice to [the defendant] from these communications," the State may easily meet its burden. State v. Ash, 526 N.W.2d 473, 481 (N.D. 1995) (concluding written communications between the jury and the trial court which resulted in the court directing the jury to rely upon its recollection and the jury receiving items such as an exhibit list and the final jury instructions were harmless beyond a reasonable doubt). However, when the violation involves an open court communication between the court and the jury, such as the reading of testimony, the State may have more difficulty meeting its burden. See State v. Smuda, 419 N.W.2d 166, 168 (N.D. 1988) (involving a violation consisting of a jury note requesting the definition of a word and the court's note indicating it could not define the word and explaining "[t]his would be a

different case if there had been an open court communication between the judge and the jury without [the defendant's] personal presence”).

The jury’s requests and the judge’s responses were all in writing. There is no possibility of prejudice from the responses, which must be held harmless beyond a reasonable doubt.

The trial judge made written communications with this jury after consultation with defense counsel. If this communication was in error, it was harmless.

III. THE JURY VERDICT WAS NOT COERCED.

Defendant argues that the jury was coerced by being kept “late into the night” and by being told to try to reach a verdict. [Appellant’s Brief, issues II and III, p. 19-31]. The jury in this case commenced deliberations about 7:40 p.m. When they first communicated their impasse, it was 11:25 p.m. The judge’s instruction to “try your best” to reach a verdict “if you can” was neither unreasonable nor coercive after only four hours’ deliberation. An hour later, in response to the judge’s question about whether a recess was in order, the jury responded that it intended to take a break and then vote again. [App. A.30-32]. The defendant was convicted on that vote.

In *State v. Trimble*, 371 N.W.2d 921 (Minn.App. 1985), the court was advised, at about 11 p.m., after seven hours’ of deliberation, that the jury was deadlocked 10-2. The judge told the jury that they would recess to a motel

and reconvene at 9 a.m. A problem arose with the motel, and the jury continued to deliberate while it was being resolved. At about 2 a.m., the jury returned a guilty verdict. Trimble argued, like the defendant herein, that such a later night deliberation was improperly coercive. The court found that it was not. 371 N.W.2d at 926.

Defendant relies on *People v. Pecka*, 183 Ill.App.3d 60, 538 N.E.2d 1189 (1989). In that case, the jury deliberated 14 hours — from 1 p.m. until 2:50 a.m. Even so, the court found that the verdict was *not* the result of any coercive influence [183 Ill.App.3d at 72-73]:

The length of jury deliberations is a matter resting within the sound discretion of the trial court, and its judgment in this regard will not be disturbed unless this discretion has clearly been abused. (*People v. Daily* (1968), 41 Ill. 2d 116, 242 N.E.2d 170.) Whether the trial court has abused its discretion depends upon the circumstances of a given case. (*People v. Daily*, 41 Ill. 2d 116, 242 N.E.2d 170.) In the instant case the trial lasted six days, during which approximately 25 witnesses testified. At no time during their deliberations did the jurors indicate that they needed further instruction, were deadlocked, or were experiencing any difficulties of any kind. Nothing in the record indicates that the verdict arrived at was the result of fatigue or exhaustion. (See *People v. Kinzell* (1969), 106 Ill. App. 2d 349, 245 N.E.2d 319.) Trial counsel made no motion concerning the length of the jury's deliberations. The record does not suggest either that the trial court abused his discretion in permitting the jury to deliberate as it did or that the verdict was, as the defendant urges, the product of an improper coercive influence.

In the Illinois Supreme Court case relied upon by *Pecka*, *People v. Daily*, 41 Ill.2d 116, 242 N.E.2d 170 (1968), the court held that it was not coercive to

instruct the jury to continue to deliberate after 6 ½ hours of deliberations [41 III.2d at 121-122]:

Finally, the appellant contends that the trial court coerced the jury into returning a verdict after its foreman had advised the court that the jurors had not reached an agreement. After the jury deliberated for about 6 1/2 hours the trial judge recalled the jury to ascertain if a verdict had been reached. The foreman announced that it had not and, without disclosing how the jurors stood, stated there had been no change in voting in the preceding two or three hours. The court then directed the jurors to return to the jury room for further deliberations and a short time later a verdict of guilty was returned. After ordering the jury to resume deliberations the trial court denied the appellant's motion to discharge the jury as a hung jury.

The length of jury deliberations is a matter which rests within the sound discretion of the trial court and its judgment in this regard will not be disturbed unless this discretion has been clearly abused. (See 93 A.L.R.2d 627.) Whether discretion has been abused depends on the circumstances of a given case. Four trial days were required to present this case to the jury and 31 witnesses appeared before it. Questions of differing testimony had to be met by the jurors. The trial court soundly exercised its discretion in directing the jury to continue its deliberations. It cannot be realistically argued that the trial court coerced the jury into returning a verdict.

The same is true here.

It is clear that these deliberations were not so late or long as to be coercive. The defendant cites to cases from California (*Noble v. Aldred*, 2004 WL 1354260 (Cal.App. 4th Dist.))¹ and Florida (*Thomas v. State*, 748 So.2d

¹ *Noble* is an unpublished California case in which the judge *repeatedly* commented on the undesirability of negotiations continuing. There are no similar comments here, and this case has neither precedential nor logical value.

970 (Fla. 1999)). In *Thomas*, the deliberations extended from 7 p.m. until some time after 4:30 a.m. After being sent home, the jury returned the next day, when it returned a guilty verdict after a short deliberation.

The *Thomas* court looked to the totality of the circumstances, including the trial judge's repeated urgings that the jury reach a unanimous result, the "exhausting and pressured" all-night deliberations, and the fact that it was a capital case. These extreme pressures were simply not present here. In this case, the judge simply asked the jury, at 11:30 p.m. (after only 5 hours of deliberation) to try to reach a verdict "*if you can.*" On the next inquiry, at 12:30, the judge asked, "would a recess help?" This simply does not amount to coercion and does not compare to the circumstances in *Thomas*.

Defendant argues that it is "improper for a judge to inquire into the numerical division of a jury that is deadlocked." [Appellant's Brief, p. 24]. This is plainly the law. However, *even when the court improperly inquires into the numerical division*, it is harmless error when the inquiry does not ask which verdict the division favored [*People v. Logston*, 196 Ill.App.3d 30, 37, 552 N.E.2d 1266 (1990)]:

While it is error for a court to inquire into the numerical division of the jury, the error is harmless if it does not interfere with the verdict. (*Green*, 91 Ill. App.3d at 1087, 415 N.E.2d at 597.) In *Craddock*, this court determined that the trial court's inquiry into the numerical division, but not which verdict the decision favored, was harmless. (*Craddock*, 163 Ill. App.3d at 1045, 516 N.E.2d at 1362.) The trial court's inquiry as to the numerical division of the jury in the present case was

similarly harmless. See also *People v. Enoch* (1988), 122 Ill.2d 176, 522 N.E.2d 1124, *cert. denied* (1988), 488 U.S. 917, 102 L.Ed.2d 263, 109 S.Ct. 274.

The trial judge herein did not inquire into the jury division. Moreover, when the jury disclosed its numerical division in the note, it did not disclose which verdict that division favored.

Defendant suggests that it is error to tell the jury to continue to deliberate after the court is informed of the numerical division among the jury. [Appellant's Brief, p. 26-29]. However, the jury was considering three counts, and its note does not say on which count or counts they might be divided, nor does it say which verdict was favored by the majority. At this point, the trial court's decision to ask the jury to deliberate further and try to reach a verdict "if you can" was proper. This was not coercive, and it plainly left open to the jury the option of not reaching a verdict. The court's second communication, asking whether a break would be helpful, was not an instruction at all, and it was not coercive in any way. Under the totality of the circumstances here present, it is very clear that this jury was not coerced.

Defendant relies heavily on *Thomas, supra*, a Florida decision. However, when faced with circumstances similar to this case, the Florida court in *Davis v. State*, 832 So.2d 239 (Fla.App. 2002), found no error. In *Davis*, as here, the trial court (like the trial court herein) did not give an *Allen*

charge, but instead simply asked the jury to try to reach a verdict if they are able to do so. The court stated:

In *Holmes v. State*, 710 So. 2d 188 (Fla. 1st DCA 1998), the trial court did not give an *Allen* instruction when a jury came back after two hours and 13 minutes of deliberation. The judge instead urged the jurors to listen to each person without interruption and let everyone express their opinion. He then added, "I believe if you do that, all six of you will come to a decision. So I'm going to ask that you go back in there and do the job that you are required to do." *Holmes*, 710 So. 2d at 189. The appellate court cautioned that the instructions would have been better if something had been added that the jury was not required to return a verdict. It, nonetheless, found the instructions not to be so egregious as to amount to fundamental error. The court distinguished other cases in which fundamental error had been found, noting that they involved "more explicit judicial comments or significant coercive circumstances not present in the instant case, which would have made it futile or ineffectual in those cases, to have added a curative instruction." *Id.* at 191.

In this case, the instruction was not so coercive as to constitute fundamental error. *The jury was not told they had to reach a verdict on one of the counts, only that they should reach a verdict at least as to one of the two counts if they are "able."* It is fair to assume that the jury understood that the judge wanted them to know, without improperly interfering with their jury deliberations, that they were not in a completely deadlocked position if they were able to agree on one of the two counts.

As in *Holmes*, the instruction might have been better if it had been more in the spirit of *Allen* by making some statement to the effect of: "If you cannot reach a verdict as to either count, the case will be dismissed." *The jury was not, however, coerced into making a decision based on the time and expense of the trial or otherwise told that they had to reach a decision within a certain period of time.* The jury was simply told it could, and if it could it should, make a decision as to one count even if it could not make a decision as to the other count. The non_coercive tenor of the trial court's instruction in the instant case was further evidenced by the fact that *no objection to the instruction was made.* See *Holmes v. State*, 710

So. 2d 188, 190, holding that "[t]he fact that no objection was raised to the instruction can indicate that the potential for coercion did not appear to be so to anyone on the scene."

Under the totality of the circumstances of this case, the trial court's actions were not coercive. The trial court did not impose a deadline on the jury or otherwise pressure the jury to reach a decision; it simply explained to the jury that the jury permissibly may reach a verdict as to one count and not as to the other. Because the jury's verdict was not coerced or otherwise tainted by the judge's instruction, Davis' conviction and sentence are affirmed.

[Emphasis added].

The trial court below also did not threaten or pressure the jury. The non-coercive nature of the communications is further evidenced by the absence of any objection.

In *State v. Champagne*, 198 N.W.2d 218 (N.D. 1972), the jury deliberated from 2:05 p.m. until 12:05 a.m. (10 hours), when it was given a lengthy *Allen*-type instruction by the judge. It returned to deliberations until after 1:15 a.m., when it found the defendant guilty of murder. Considering the totality of the circumstances presented, the court found that the charge "did not constitute prejudicial error to the defendant." [emphasis added]. 198 N.W.2d at 239. There was much less pressure placed upon the jury in this case than in *Champagne*. There was not prejudicial error to this defendant from the judge's responses to the jury's inquiries.

IV. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DID NOT MISLEAD THE JURY.

Defendant argues that the trial court should have given a more complete instruction to the jury regarding how to conduct its deliberations. On appeal, this court reviews the instructions to the jury for clear error. The trial court instructed the jury that, in the jury room, they should discuss the case “openly, freely, frankly and thoroughly with each other . . . “ Defendant, who did not object to this instruction, now claims that it “gave the jury the impression that there had to be a verdict.” [Appellant’s Brief, p. 32]. Any reasoned review of this record must reject that claim. When the instructions are considered as a whole, they correctly and adequately informed the jury of the law without being misleading or confusing. In *State v. Huber*, 555 N.W.2d 791, 793 (N.D. 1996), the court held:

“The purpose of jury instructions is to apprise the jury of the state of the law.” *State v. Murphy*, 527 N.W.2d 254, 256 (N.D. 1995) (quoting *State v. Murphy*, 516 N.W.2d 285, 286 (N.D. 1994)). “Taken as a whole, the jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury.” *State v. Schneider*, 550 N.W.2d 405, 407 (N.D. 1996) (quoting *City of Minot v. Rubbelke*, 456 N.W.2d 511, 513 (N.D. 1990)). N.D.R.Crim.P. 30 allows any party to request jury instructions. The defendant must request or object to instructions to preserve the matter for appeal. *Azure* at 656. Failure to object to a jury instruction, when given an opportunity to do so during trial, waives the right to challenge the instruction on appeal. *State v. Trosen*, 547 N.W.2d 735, 740 (N.D. 1996); *see also State v. Barnes*, 551 N.W.2d 279, 281-82 (N.D. 1996) (“[i]f the defendant does not request an instruction or object to the omission of an instruction, we will not reverse unless the failure

to give the instruction constitutes obvious error”).

These instructions, taken as a whole, accurately informed the jury on the law as to deliberation. The instructions did not mislead the jury. By failing to object, the Defendant waived his right to present this challenge on appeal. There is not obvious error necessitating this court’s intervention despite the waiver.

V. THE EVIDENCE OF ONE PRIOR INSTANCE OF JEALOUS ASSAULT WAS PROPERLY ADMITTED IN EVIDENCE.

The district court’s admission or exclusion of evidence is a matter within its discretion, and the court’s decision will be reversed only if the court acted “arbitrarily, unconscionably, or in an unreasonable manner.” *State v. Klein*, 1999 N.D. 76, ¶5, 593 N.W.2d 325; *State v. Steinbach*, 1998 ND 18, ¶9, 575 N.W.2d 193. Defendant objects to the district court’s admission of evidence, through cross examination of the Defendant, respecting one incident when the Defendant became jealous and assaulted T [REDACTED] at the Skyliner Casino. The court acted reasonably and cautiously in admitting this evidence.

The prosecution notified the defense that it intended to offer rebuttal evidence of prior bad acts under Rule 404(b) of the North Dakota Rules of Evidence, if defendant raised the issue. [Tr. 420]. The prosecution cited to

State v. Gefroh, 495 N.W.2d 651 (N.D. 1993), and *State v. Christensen*, 1997 ND 57, 561 N.W.2d 631, for the proposition that the prior conduct here involved was admissible to show the defendant's state of mind and the victim's state of mind, making the conduct admissible in the State's case in chief. [Tr. 422].

The Defendant testified on direct examination that the parties had consensual vaginal and anal sex. He implied, contrary to the victim's testimony, that they had anal sex on prior occasions. (T. pgs. 453, 585) He also testified that T█████ was the aggressor, hitting him first. [Tr. 453-457]. He also testified that T█████ had been the aggressor on prior occasions, hitting him first the day before. [Tr. 447]. He testified that T█████ hit him with her fist, but that he simply "backhanded" her. [Tr. 457-458]. He testified that T█████ further escalated the fight by "cussing" while he responded by "chuckling". [Tr. 458].

The Defendant further testified that this was the "usual routine" when they fought: she would get angry and he would "chuckle" [Tr. 458, l. 14-25]:

A She started cussing at me, calling me a "fucking bastard", a "no good bastard". Every word in the book. She was just cussing.

Q Okay and that's just words. What was your response to this?

A Chuckled.

Q *Was this the kind of routine that the two of you had had in the past where she gets angry and you chuckle?*

A Yeah, most of the time.

Q Does that seem to calm her down when you chuckle?

A No, it *usually gets her away from me*. She doesn't want to look at me, she doesn't want to. . . It *keeps us apart so that no fighting would happen*.

[Emphasis added].

The Defendant then claimed that he, the peacemaker, retreated to the bathroom when T█████'s anger escalated. T█████'s testimony was that she ran into the bathroom to escape from the Defendant's continuing assault.

Apparently to explain how T█████ (who is physically small, much smaller than Defendant) could break down two bathroom doors, he testified that the bathroom door had been damaged in previous fights, implying that

T [REDACTED] (whom he had just painted as the aggressor in their “usual routine”) had done the prior damage. [Tr. 462]. The Defendant then testified that when T [REDACTED] made a frenzied attack (after she broke down the bathroom door), he grabbed her by the hair and “threw her around the bathroom a little bit until she flew into the bathtub.” [Tr. 463]

A Like I said, I threw her around, hit her a few times, grabbed her by the hair, I mean just trying to restrain her. [Tr. 464].

After he cut up her clothing, he testified that she again became the aggressor and attacked him, when he again grabbed her by the hair and hit her some more, “*to make her quit.*” [Tr. 467]. The prosecution had presented testimony, in its case in chief, that the Defendant perpetrated a vicious sexual and physical assault on T [REDACTED] which was brought on by his extreme jealousy and enabled by her fear of him. Defendant’s direct testimony sought to counter this by claiming that he was defending himself and that, in fact, that was their usual routine. She would attack him, and he would chuckle, to get her to stop.

The prosecution made an offer of proof after the Defendant’s direct testimony respecting four separate prior occasions when the Defendant assaulted T [REDACTED] out of jealousy. There was an assault at the Skydancer Casino (which had been charged in Tribal Court and resulted in a conviction); an assault occurring near Uniband (where the Defendant and the victim

worked); an assault in a motor vehicle in Jamestown; and another assault at T [REDACTED]'s residence. This evidence was offered to prove that the defendant's state of mind was one of suspicious jealousy; not, as he claimed, of "chuckling" pacifism. Moreover, these prior instances show the basis for T [REDACTED]'s fear of the defendant, explain the relationship, and rebut the defendant's claims as to their "usual routine". The prosecution and defense counsel presented the court with argument after reviewing the caselaw.

The court ruled that the prosecution could present only one of these incidents: the assault at the Skydancer Hotel [Tr. 514]:

As I see it there is a requirement, first of all, substantial evidence and clear and convincing, and apparently as Judge Christofferson basically said, the only one that he allowed in was the one where there was an actual conviction. However, you can't talk about the conviction. You can only talk about the facts. The Jamestown thing I think would definitely have to be out because . . . Well the problem here actually is that the State was making the motions. This is being attempted in cross examination, so I don't think the Jamestown thing can be used. I don't think the breaking and entering can be used because that's not dealing with assaults. The other . . . It looks like it would appear that the one in Belcourt dealing with the one at the casino, and the other one apparently no charges were - - or nothing ever came of that or - - well it was ended. So I don't see that that can be used either. So as far as I can see, the only one that would be permissible at this point would be the one where there was actually a plea, and I mean that that simply be as to the facts and circumstances that he could testify - - or you could cross examine him on. The rest of them I don't think would be admissible at this point.

On cross examination of the Defendant, the prosecution asked if he

remembered the incident. He testified that he did, and that he grabbed her by the hair and dragged her down the hallway, and threw her up against the wall several times. [Tr. 575-578]. He only stopped because he was afraid that security would come because of the security camera. [Tr. 578].

The Defendant opened the door to the evidence of this incident by his testimony about their usual routine and the breaking of the bathroom door. This incident was necessary to rebut the false impression that T [REDACTED] was ordinarily the aggressor in their relationship and that he was inclined to “chuckle” rather than fly into a jealous rage.

Evidence of specific instances of other crimes, wrongs or acts is admissible to rebut “evidence of a pertinent trait of character offered by an accused.” Rule 404(a)(1), North Dakota Rules of Evidence. In *State v. Jensen*, 282 N.W.2d 55 (1979), the defendant’s testimony implied that he was not the aggressor and that he in fact acted in self defense. The State offered evidence, through testimony of third persons, of a prior altercation, to show that the defendant “had a propensity for hostility and aggressiveness.” Since this purpose was indistinguishable from the purpose of showing that the defendant acted in conformity, the Court observed that the evidence would not be admissible under Rule 404(b). However, since the defendant opened the door, the evidence was nevertheless admissible [282 N.W.2d at 68-69]:

What we have approved today in permitting receipt of otherwise incompetent evidence, is something similar to what some courts

have permitted and certain authorities have described as *fighting fire with fire*, or permitting receipt of incompetent evidence when the adversary has *opened the door*, or permitting receipt of incompetent evidence under the doctrine of *curative admissibility*. See McCormick on Evidence, 131 (2d Ed. 1972); 1 Wigmore, Evidence §15; 31A C.J.S. Evidence §190; 29 Am.Jur.2d, Evidence §267; *further citations omitted*.

In this case, because the evidence is offered only in the cross examination of the Defendant and in response to his own character evidence, the evidence is competent under Rule 404(a)(1). Moreover, because it is not offered to show that the Defendant was acting in conformity, it is also competent evidence under Rule 404(b). Even if the evidence were not admissible and competent under those rules, it would be admissible under *Jensen* because the Defendant opened the door with his testimony.

Rule 404(b) of the North Dakota Rules of Evidence provides for the admission of prior bad acts evidence when the evidence is being admitted for a purpose other than to show that the defendant acted in conformity with such acts:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, it may be *admissible for other purposes*, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Defendant was convicted of gross sexual imposition, felonious restraint, and aggravated assault. Intent is an element of each of these offenses. Moreover, the Defendant raised self defense based upon his usual routine testimony. Certainly the evidence of the SkyDancer Casino incident was substantially relevant to the Defendant's state of mind or intent, and the evidence was properly admitted for that purpose.

In *State v. Gefroh, supra*, the court permitted the prosecution to present evidence of a prior assault on the alleged victim, to show the defendant's state of mind, and to provide context [495 N.W.2d at 654]:

Under these criteria, admission of Gefroh's previous assault on Kim was proper. Evidence of the prior bad act was clear and convincing because Gefroh had been criminally convicted for the assault. Furthermore, proof of the terrorizing charge itself was abundant. Lastly, the trial court balanced full disclosure with fairness to Gefroh and found disclosure of the charged assault to be the best alternative under the rule. The evidence of a previous assault was properly admitted to show Gefroh's intent or state of mind, and to give meaning to his threatening words. The evidence provided "a more complete story of the crime by putting it in context of happenings near in time and place." [citations omitted].

The evidence of the SkyDancer Casino assault was clear and convincing because there was a criminal conviction, because it was on surveillance tape, and because all of the evidence about the incident came in through the Defendant's testimony on cross examination, in which the

Defendant admitted the facts of the incident.² Proof of all three charges was substantial, and the physical evidence and T█████'s testimony would support a jury verdict independent of the prior incident evidence. Finally, there is no real conflict between the aims of full disclosure and fairness to the defendant under the circumstances of this case. It would have been fundamentally unfair to exclude this evidence. The evidence is unquestionably admissible under Rule 404(b).

Defendant argues, nevertheless, that the district court failed to consider Rule 403 in determining the admissibility of this evidence. Although the court below did not mention Rule 403, its careful consideration of the parties' arguments shows that it did balance the potential for prejudice and probative value. In *Gefroh*, the Court held that "the balancing of the evidence's probative value against its prejudicial effect are also matters for the trial court to resolve in the exercise of its sound discretion." [*citations omitted; quoting State v. Haugen*, 458 N.W.2d 288, 291 (N.D. 1990). 495 N.W.2d at 654. The Court then stated:

We find no abuse of discretion in this instance. The trial court considered the arguments of both parties before ruling on the admissibility of the previous assaults on Kim by Gefroh. Furthermore, it limited the evidence to one incident, even though Kim claimed there were several. The trial court did not allow the State to delve into graphic details of the assault, but only to use the evidence as a brief background of the relationship between

²See *State v. Ramsey*, 2005 ND 42, ¶24, 692 N.W.2d 498, [evidence clear and convincing where defendant did not deny its occurrence].

Kim and Gefroh. The decision to allow the previous assault was not arbitrary, unconscionable, or unreasonable.

The district court below, like the trial court in *Gefroh*, listened to the arguments of both parties before ruling; and it also limited the evidence to the bare facts of one incident out of several. The incident is clearly probative of the Defendant's jealous state of mind and his intent with respect to the sex acts and the physical blows. The evidence was properly admitted for this purpose, and the probative value plainly exceeds the potential for unfair prejudice. The decision to allow this evidence was not arbitrary, unconscionable, or unreasonable.

CONCLUSION

Based upon the arguments and authorities presented herein, Appellee respectfully requests that the decision below be affirmed.

Dated this 24th day of May, 2005.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mary O'Donnell", written over a horizontal line.

Mary O'Donnell
Rolette County State's Attorney
Attorney #04352
Box 1079
Rolla, ND 58367

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,)
)
 Appellee,)
 vs.)
)
Travis Parisien,)
)
 Appellant.)

Dist.Ct. No.02-K460, 461, 03-K52
Supreme Ct. 20040348-20040350
AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NORTH DAKOTA
COUNTY OF ROLETTE

Dawn Halone, being first duly sworn on oath, deposes and says that she is a citizen of the United States and is over the age of twenty-one years of age, and on May 25, 2005 said affiant deposited in a sealed envelope a true copy of the following:

Brief of Appellee

In the above entitled action, in the United States Post Office in Rolla, North Dakota, postage prepaid, directed to:

Robin Olson
Attorney at Law
405 Bruce Ave., Suite, 100A
Grand Forks, ND 58201

Dawn Halone
Dawn Halone

Subscribed and sworn to before me this 25th day of May, 2005.

Maud Richard
Notary Public
Rolette County, ND

My commission expires:

