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 IN THE SUPREME COURT OF NORTH DAKOTA
 

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State of North Dakota,	)	<b>Supreme Court File No.</b>
	)	<b>20170261</b>
Plaintiffs and Appellees,	)	<b>McKenzie County Criminal No.</b>
	)	<b>27-2016-CR-1534</b>
v.	)	
	)	
John Daniel Isom,	)	<b>APPELLANT’S BRIEF</b>
	)	
Defendant and Appellant.	)	

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**APPEAL FROM THE CRIMINAL JUDGMENT IN MCKENZIE**  
**COUNTY DISTRICT COURT, NORTHWEST JUDICIAL**  
**DISTRICT, NORTH DAKOTA THE HONORABLE DANIEL S. EL-**  
**DWEEK, PRESIDING.**

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Transcript References:

The jury trial for this matter was conducted on April 17, 2017 and the sentencing hearing on July 5, 2017. The transcript of the July 5, 2017 hearing is referred to as [Tr. SH] and the jury trial is referred to as [Tr.] in this brief.

## **JURISDICTION**

[¶ 1] The Defendant, John Daniel Isom, timely appealed the final criminal judgment arising out of the district court and the North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.C.C. § 29-32.1-14 which provides that, “[a] final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.” The district court had jurisdiction under N.D.C.C. § 29-32.1-01. This Court has appellate jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-03; 06(1)(2)(4) and (5). Mr. Isom was found guilty of Aggravated Assault-Domestic Violence, in violation of N.D.C.C. §12.1-17-02, a class C Felony. The final criminal judgment was entered in this case on July 5, 2017.

## **STATEMENT OF THE ISSUES**

- I. Whether the district court imposed an illegal sentence.
- II. Whether the district court abused its discretion by substituting a juror after the original jury had been empaneled.
- III. Whether the district court erred in denying John Isom’s motion for judgment of acquittal.

## **STATEMENT OF CASE**

[¶ 2] This is a criminal matter on direct appeal from the Northwest Judicial District, McKenzie County Criminal Judgment. This matter was before the district court in State of North Dakota v. John Daniel Isom, #27-2016-CR-1534. The complaint was filed with the court on November 14, 2016, charging Mr. Isom with Aggravated Assault-

Domestic Violence, in violation of N.D.C.C. §12.1-17-02, a class C Felony. Mr. Isom was represented by Attorney John Bruhn.

[¶ 3] Mr. Isom was found guilty of Aggravated Assault-Domestic Violence and sentenced to five (5) years in the custody of North Dakota Department of Corrections and Rehabilitation with two and a half (2.5) years suspended, credit for time previously served, and five (5) years of supervised probation. Mr. Isom appealed the district court's final judgments in this matter on July 12, 2017.

### **STATEMENT OF FACTS**

[¶ 4] Mr. Isom and Ms. Appelgate have known each other for roughly five years before November of 2016. TR. p. 33. They had lived together for roughly one year. Tr. p. 34. On November 10, 2016 Ms. Appelgate returned home in Arnegard from work in Williston at roughly 8 in the evening. Tr. p. 35. Ms. Appelgate and Mr. Isom got into a verbal dispute that turn physical. Tr. pp. 37-38; 65. Ms. Appelgate stated Mr. Isom choked her around the neck twice, that she scratched Mr. Isom's neck, kicked him in the knee, and hit him a couple times. Tr. pp. 40; 48. Mr. Isom stated that Ms. Appelgate got upset with him and punched a hole in the wall. Tr. p. 65. Ms. Appellate agreed she had punch a hole in their wall, but that it did not happen on November 10, 2016. Tr. p. 75. Mr. Isom had a cut on his forehead. Tr. p. 50. Ms. Appelgate had redness on her chest area. Tr. p. 57. Mr. Isom did not have any injuries on his arms. Tr. p. 50. Mr. Isom called 911 for assistance. Tr. pp. 42; 66. Ms. Appelgate became worried about losing the apartment. Tr. p. 66. Mr. Isom handed the phone to Ms. Appelgate so that she could speak with the 911 operator. Tr. p. 67.

[¶ 5] Officer Ingram responded to the scene on that evening. Officer Ingram stated he could see bruising on Ms. Appelgate's "clavicle area." Tr. p. 57.

[¶ 6] Voir dire was held and a twelve (12) person jury was empaneled. Tr. p. 15. After the Jury was empaneled the state alerted the court to juror misconduct. Id. Juror number five had lied to the defense during voir dire. Id. Juror number 5 has a personal relationship with a member of law enforcement, and lied about it during voir dire. Tr. pp. 15-16.

[¶ 7] The state proposed to allow Mr. Bruhn to exercise one of his preemptive strikes for Juror number 5, then the state would use another preemptive strike on Juror Number 19, because she had a conflict through her husband. Juror number 20 would be selected in place of the already empaneled Juror number 5. Tr. pp. 16-17. All parties agreed to proceed as the state suggested. Tr. p. 17. At this time the new jury is empaneled with Juror number 20, but without the court discharging the prior jury, as the twelfth juror. Tr. p. 18.

[¶ 8] After the close of the State's case Mr. Isom motioned the court for a judgment of acquittal. Tr. p. 58. The court denied Mr. Isom's motion. Tr. p. 59. The jury found Mr. Isom guilty of the charge of Aggravated Assault-Domestic Violence. Tr. p. 100.

[¶ 9] At the sentencing hearing on July 5, 2017 the court ordered Mr. Isom to incarceration with the ND DOCR and five (5) years of supervised probation. Tr. SH. p. 17 line 17.

[¶ 10] On July 12, 2017 Mr. Isom wrote to the court requesting to directly appeal his case. Notice of appeal was given to the district court of the appeal on July 13, 2017.

[¶ 11] On July 26, 2017 the court filed a letter in response to concerns raised by the department of corrections indicating Mr. Isom’s sentence was illegal. Docket ID #44.

## **LAW AND ARGUMENT**

### **I. Whether the district court imposed an illegal sentence.**

[¶ 12] The appellate standard of review for interpretation of the probation statutes is de novo. “Statutory interpretation is a question of law, fully reviewable on appeal.” State v. Stavig, 2006 ND 63, ¶ 12, 711 N.W.2d 183 (2006). “Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears[.]” N.D.C.C. § 1-02-02. When a statute is ambiguous, this Court may consider external information, including legislative history, to determine a statute’s meaning. N.D.C.C. § 1-02-39.

[¶ 13] N.D.C.C. § 12.1-32-06.1(2) states,

Except as provided in this section, the length of supervised probation imposed in conjunction with a sentence of probation or a suspended execution or deferred imposition of sentence may not extend for more than five years for a felony offense subject to section 12.1-32-09.1, a felony offense subject to section 12.1-32-02.1, which involves the use of a firearm or dangerous weapon, a second or subsequent violation of section 12.1-17-07.1, a second or subsequent violation of any domestic violence protection order, a violation of chapter 12.1-41, or a violation of section 14-09-22; three years for any other felony offense...

[¶ 14] Judge El-Dweek in his July 26, 2017 letter indicated N.D.C.C. § 12.1-32-06.1(1) allowed a maximum of five years of supervised probation. However, subsection one (1) very specifically deals only with unsupervised probation. It states, “Except as provided in this section, the length of **unsupervised** probation...” N.D.C.C. § 12.1-32-06.1(1) *emphasis added*. Whereas, subsection two (2) deals with supervised probation. It



states, “Except as provided in this section, the length of **supervised** probation imposed... may not extend for more than...three years for any other felony offense...”

N.D.C.C. § 12.1-32-06.1(2) *emphasis added*.

[¶ 15] The statute in question is not ambiguous, therefore the words supervised and unsupervised are understood in their ordinary sense. N.D.C.C. § 12.1-32-06.1(2) allows only three years of supervised probation for this offense therefore a sentence of five years of supervised probation is illegal. This Court should find the sentence is illegal and remand the case to the district court to sentence in accordance with N.D.C.C. § 12.1-32-06.1(2).

**II. Whether the district court abused its discretion by substituting a juror after the original jury had been empaneled.**

[¶ 16] The United States’ Constitution under the Sixth and Fourteenth Amendment guarantees a defendant the right to a fair and impartial trial by his peers. “Generally, granting a mistrial is an extreme remedy which should be resorted to only when there is a fundamental defect or occurrence in the proceedings of the trial which makes it evident that further proceedings would be productive of manifest injustice.” State v. Skarsgard, 2007 ND 160, ¶ 16, 739 N.W.2d 786 (*quoting State v. Klose*, 2003 ND 39, ¶ 14, 657 N.W.2d 276). In Gray v. Mississippi, the Court said the “relevant inquiry is whether the composition of the jury panel as a whole could possibly have been affected by the trial court’s error.” Gray v. Mississippi 481 U.S. 648, 665. This Court has said that a “court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or it misinterprets or misapplies the law.” State v. Ratliff, 2014 ND 156, ¶ 13, 849 N.W.2d 183.

[¶ 17] In the present case the trial court abused its discretion and committed reversible error by not complying with N.D.R.Crim.P. 24 (Rule 24) thereby denying the defendant the right to a fair and impartial trial by his peers. Rule 24 requires that “[a] challenge to a prospective juror **must** be made before the juror is sworn to try the case, unless the court permits it to be made after the prospective juror is sworn **but before jeopardy has attached.**” N.D.R.Crim.P. 24(b)(1)(B) *emphasis added*. Jeopardy attaches in a jury case when the jury is empaneled and sworn State v. Berger, 235 N.W.2d 254, 257 (N.D. 1975) *see also* Serfass v. United States, 420 U. S. 388, 389. (1975). Jeopardy had attached in Mr. Isom’s case because the initial jury had been sworn in and empaneled. Tr. pp. 13 line 14, 15 line 6. After that occurred the state made the court aware that there had been juror misconduct which if left would have denied Mr. Isom the right to a fair and impartial trial. Tr. p. 15.

[¶ 18] All parties agreed that the Juror misconduct was based on lying about an unfair bias, this would have been grounds for a challenge for cause. The state proposed a remedy that was illegal and the trial court allowed the misapplication of Rule 24, despite the Jury having already been empaneled. By not complying with Rule 24 the trial court abused its discretion and committed reversible error.

[¶ 19] After jeopardy attached in Mr. Isom’s case the only remedy available to the trial court was to declare a mistrial. Because the trial court abused its discretion when re-empaneling a jury without dismissing the previous one Mr. Isom requires a new trial to insure his right to a fair and impartial trial.

### **III. Whether the district court erred in denying John Isom’s motion for judgment of acquittal.**

[¶ 20] The appellate standard of review regarding a claim of insufficiency of evidence is well-established. In State v. Schmeets, 2007 ND 197, ¶8, 742 N.W.2d 513, the court stated: “When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction.” State v. Igou, 2005 ND 16, ¶5, 691 N.W.2d 213. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. Id. “A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor.” State v. Knowels, 2003 ND 180, ¶6, 671 N.W.2d 816.

[¶ 21] Mr. Isom was found guilty of Aggravated Assault-Domestic Violence. To obtain a conviction, the jury must find that the State has proven beyond a reasonable doubt each element of the crimes charged.

[¶ 22] The essential elements of the offense: The State’s burden of proof is satisfied if the evidence shows beyond a reasonable doubt the following essential elements:

1. On or about November 10, 2016 in McKenzie County, North Dakota;
2. The Defendant, John Daniel Isom;
3. Willfully engaged in conduct;
4. Which caused serious bodily injury to another human being, as follows: That he blocked the airway of Ms. Appelgate during a physical altercation; and

5. That he and Ms. Appelgate were family or household members.

[¶ 23] Mr. Isom in his motion to the court specifically challenged element four (4). The picture's taken of Ms. Appelgate show redness around her chest. Officer Ingram stated he could see bruising on Ms. Appelgate's "clavicle area." Tr. p. 57. This statement by the officer supports the photographic evidence that some type of contact occurred below the neck. Therefore, Ms. Appelgate's airways could not have been constricted as they are above the clavicle.

[¶ 24] This Court should reverse the verdict and judgment of the trial court based on insufficient evidence. Because there was insufficient evidence that the alleged offense was committed, Mr. Isom requests this Court to reverse the Order denying Motion for Judgment of Acquittal and the Criminal Judgment and remand this case for judgment of acquittal. State v. Gonzalez, 2000 ND 32, 606 N.W.2d 873 (N.D. 2000) (reversing denial of trial court's denial of motion for judgment of acquittal).

### **CONCLUSION**

[¶ 25] The district court imposed an illegal sentence upon Mr. Isom. The district court abused its discretion by re-empaneling a jury instead of declaring a mistrial. Additionally, the district court erred when it denied Mr. Isom's motion for acquittal.

[¶ 26] WHEREFORE Mr. Isom respectfully requests the Court reverse the district court's denial of the Motion for Judgment of Acquittal and the Criminal Judgment and remand this case for judgment of acquittal. Alternatively, if this Court finds there is sufficient evidence then Mr. Isom prays this Court will find the district court abused its discretion when re-empaneling a jury without dismissing the previous one and grant Mr.

Isom a new trial. Finally, if this Court does not find the district court abused its discretion Mr. Isom prays this Court will correct the illegal sentence imposed by the district court.

Dated this 11<sup>th</sup> day of December, 2017

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**State of North Dakota,**

**VS.**

**DEFENDANT/APPELLANT.**

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## CERTIFICATE OF SERVICE

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