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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, vs. Kelvin Antone McAllister, Defendant and Appellant.	)))))))))	Supreme Court No. 20190188

Appeal from Criminal Judgment filed on May 28, 2019
Order to Amend Judgment filed on July 17, 2019, and
Amended Criminal Judgment filed July 19, 2019

Mountrail County District Court
North Central Judicial District
The Honorable Gary H. Lee
Case No. 31-2018-CR-00273
Oral Argument Requested

BRIEF OF APPELLEE

Wade G. Enget (#04165)
Mountrail County State's Attorney
P.O. Box 69
Stanley, ND 58784-0069
Telephone: (701) 628-2965
wenget@nd.gov
Attorney for State of North Dakota

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

¶1. **JURISDICTIONAL STATEMENT**

¶2. This appeal, as authorized by N.D.C.C. §29-28-06, is from a jury verdict finding McAllister guilty of Assault in violation of N.D.C.C. §12.1-17-01.1, with the Criminal Judgment having been filed on May 28, 2019, the Order to Amend Judgment filed on July 17, 2019, and the Amended Criminal Judgment filed July 19, 2019, with all having been signed by the Hon. Gary H. Lee, North Central District Court Judge. This Appeal was filed with the Mountrail County District Court on June 18, 2019, with an Amended Notice of Appeal filed on July 2, 2019, and Second Notice of Appeal filed on July 24, 2019.

¶3. **ISSUES PRESENTED**

¶4. A. Whether the District Court erred in refusing to grant Challenges for Cause to the jury panel.

B. Whether the District Court erred in refusing to grant Motion for Mistrial based upon the jury pool.

C. Whether the District Court erred in restricting McAllister's counsel questioning of the victim during cross-examination.

D. Whether the District Court erred in not allowing the Defendant to argue his Motion for Acquittal immediately after the State closed its case in chief.

E. Whether the District Court erred in denying Defendant's Motion for Acquittal.

F. Whether the District Court erred:

1. By not giving the Use of Force in Defense of Premises and Property jury instruction requested by McAllister.

2. By not giving the Use of Deadly Force Presumption of Fear of Death or Serious Bodily Injury jury instruction requested by McAllister.

3. By not giving a Duress jury instruction requested by McAllister.

4. By not giving Excuse jury instruction requested by McAllister.

G. Whether the District Court erred by not giving McAllister's requested jury instruction on Vague or Ambiguous Instruction to be Interpreted Against the State as requested by McAllister.

H. Whether the District Court erred by giving the pattern jury instruction on Direct and Circumstantial Evidence rather than the Direct and Circumstantial Evidence instruction requested by McAllister.

I. Whether the District Court erred by giving a lesser included offense instruction for Assault and Simple Assault.

J. Whether the District Court erred in not allowing McAllister's counsel to argue his Rule 29 N.D.R.Crim.P. motion for acquittal when the State closed its case in chief.

K. Whether the jury verdicts of Not Guilty to Aggravated Assault but Guilty to Assault are inconsistent.

L. Whether the District Court erred in ordering McAllister to pay $32,063.68 in restitution.

¶5. **STATEMENT OF THE CASE**

¶6. This is an appeal pursuant to N.D.C.C. § 29-28-06 is from a jury verdict finding McAllister guilty of Assault in violation of N.D.C.C. § 12.1-17-01.1, with the Criminal Judgment having been filed on May 28, 2019, the Order to Amend Judgment filed on July 17, 2019, and the Amended Criminal Judgment filed July 19, 2019, with all having been signed by the Hon. Gary H. Lee, North Central District Court Judge.

¶7. **STATEMENT OF FACTS**

¶8. McAllister and the John Doe (the victim) both worked for Jason's Super Foods in New Town, North Dakota. Doe knew McAllister each other, had worked together in that store, and considered themselves friends. Tr. #1, p. 134: 8-17. Three days prior to the assault, an argument occurred between the two which resulted in McAllister striking the victim. Tr. 1, p. 135: 1-16.

¶9. On August 17, 2018, the incident involving the assault was captured on a video surveillance camera located in the storeroom of Jason's Super Foods, and admitted into evidence at trial by stipulation of the parties. Tr. #1, p. 127: 21-15, 128: 1-14. The victim was off work and was walking through the storeroom of Jason's Super Foods. Tr.1, p. 132: 9-25. The victim was talking to another worker, Vera, in the storeroom. Tr. 1, p. 138: 16-24. McAllister came into the storeroom with others to retrieve supplies, and he and the victim came into contact with each other and began talking "smack" to each other. Tr. #1, p. 141: 17-25, 142: 1-6. The victim began to leave the storeroom, but turned around due to something was said to him by

McAllister. Tr. #1, p. 142: 12-22. The victim and McAllister then came close together with the victim throwing a punch in the direction of McAllister, with the punch not hitting McAllister. Tr. #1, p. 155: 12-20; Tr. #2, p. 62: 8-12. McAllister then hit the victim about the victim's face and head several times with a closed fist, causing the victim to fall to the floor, with the victim then appearing to lie almost motionless while McAllister continues to punch the victim about the head. Tr. #2, pp. 70-85. At trial, after having seen the video surveillance clip, McAllister stated that he honestly thought that his actions were excessive. Tr. #2, p. 68: 12-13.

¶10. Law enforcement was summoned and later arrived at Jason's Super Foods due to report that a male had slipped and fell. Tr. #1, p. 169:19-24. In the investigation, New Town Officer Halonen determined that an assault had occurred and that the victim sustained swelling to the left side of his head, a cut on his left eye, a bloody nose and blood coming from his mouth. Tr. #1, p. 174:5-15. The assault by McAllister on the victim also caused a half-moon-like cut on the victim's scalp. Tr. #1, p. 177:4-12. When Halonen interviewed McAllister, he admitted that he had struck the victim in the face and also had continued to strike the victim once the victim was on the ground. Tr. #1, p. 181:15-23.

¶11. Officer Halonen stated that when she tried to talk to the victim after the assault that he was basically in and out of consciousness. Tr. #1, p. 172: 15-19. The victim testified that he had no further memory of the incident once he landed on the floor. Tr.#1, p. 144: 19-20. The victim testified that the next thing he remembered was being released from the hospital. Tr. #1, p.145: 3-7. The victim was removed from

the storeroom by ambulance personnel and transported to the hospital. Tr. #1, p.. 173: 1-5. The victim remained in the hospital for a period of six days after the assault. Tr. #1, p. 145: 6-9.

¶12. Vera Navarette was present during the entire time period leading up to and including the assault. Tr. #1, pp. 192-203. Navarette testified that when the victim threw the first punch at McAllister, the punch hit her instead on the side of the head. Tr. #1, p. 201: 24-25; 202:1, 25. Her testimony was called in to question as she agreed that the incident was captured on video and it appeared from the video that when Navarette testified that she had been hit in the side of her head, the victim had already moved away from where he had initiated his punch. Tr.#1, p. 209:3-11. Further, Officer Halonen did not find or observed anything significant on the side of Navarette's head to indicate that she was assaulted. Tr. #1, p. 188: 2-6.

¶13. **STANDARDS OF REVIEW**

¶14. A trial court's jury selection process is to be reviewed using an abuse of discretion standard. State v. Isom, 2018 ND 60, ¶12, 907 N.W.2d 340.

¶15. A trial court's denial of Motion for Mistrial based upon jury selection is reviewed using the abuse of discretion standard or that a manifest injustice would occur. State v. Lang, 2015 ND 181, ¶10, 864 N.W.2d 401.

¶16. A trial court's limitation of cross-examination is reviewed under the abuse of discretion standard. State v. Ness, 2009 ND 182, ¶21, 774 N.W.2d 254.

¶17. A trial court's denial of a Motion for Acquittal is reviewed under the abuse of discretion standard. State v. Shick, 2017 ND 134, ¶9, 895 N.W.2d 773.

¶18. A trial court's jury instructions are reviewed under a clearly erroneous standard. State v. Eldred, 1997 ND 112, ¶33, 564 N.W.2d 283.

¶19. The standard of review for an allegation of insufficient evidence is that 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. Knowles, 2003 ND 180, ¶6, 671 N.W.2d 816.

¶20. The standard of review for an allegation of an inconsistent jury verdict is whether the verdict is legally inconsistent. State v. Jahner, 2003 ND 36, ¶17, 657 N.W.2d 266.

¶21. When reviewing the sufficiency of the evidence, the Appellant bears the burden of convincing this Court that the evidence, when viewed in the light most favorable to the verdict, permits no reasonable inference of guilt. State v. Strutz, 2000 ND 22, ¶7, 606 N.W.2d 886, State v. Ebach, 1999 ND 5, ¶24, 589 N.W.2d 566, State v. Kinsella, 2011 ND 88, ¶7, 796 N.W.2d 678. On appeal, this Court does not weigh conflicting evidence, will not judge the credibility of witnesses, and even if there is conflicting testimony or other explanations of the evidence, a fact finder may reach a guilty verdict beyond a reasonable doubt. State v. Muhle, 2007 ND 132, ¶47, 737 N.W.2d 647; State v. Truelove, 2017 ND 283, ¶7, 904 N.W.2d 342. This Court should reverse the conviction only if "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. Igou, 2005 ND 16, ¶5, 691 N.W.2d 213.

¶22. The standard of review of a restitution order is whether the district court acted outside the limits set by statute, which is similar to an abuse of discretion standard. State v. Gendron, 2008 ND 70, ¶7, 747 N.W.2d 125.

¶23. **LAW AND ARGUMENT**

¶24. **A. The District Court did not err in refusing to grant Challenges for Cause to the jury panel.**

¶25. McAllister asserts that the district court erred in refusing to grant challenges for cause to the jury panel relating to twenty-nine jurors whom either knew the prosecuting attorney or had legal work done by the prosecuting attorney in the past.

¶26. The process for jury selection in a criminal case is set forth in N.D.C.C. Chapter 29-17. The specific sections addressing challenges to a jury pool for cause include § 29-17-33, § 29-17-34, § 29-17-35 and § 29-17-36 of that Chapter.

¶27. N.D.C.C. § 29-17-33 states that a challenge for cause is an objection to a particular juror and is either:

> 1. General, that the juror is disqualified from serving in any case or trial; or
> 2. Particular, that the juror is disqualified from serving in the case on trial.

¶28. N.D.C.C. § 29-17-34 states that general causes of challenges are:

> 1. A want of any of the qualifications prescribed by law to render a person a competent juror, including a want of knowledge of the English language as used in the courts; and
> 2. Unsoundness of mind or such defect in the faculties of the mind or organs of the body as renders the juror incapable of performing the duties of a juror.

¶29. N.D.C.C. § 29-17-35 states that particular causes of challenge are of two kinds:

> 1. A bias which, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this title as implied bias; and
> 2. The existence of a state of mind on the part of the juror, with reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion, that the juror cannot try the issue impartially without prejudice to the substantial rights of the party challenging, and which is known in this title as actual bias.

¶30. N.D.C.C. § 29-17-36 states a challenge for implied bias of a juror may be taken for all or any of the following causes, and for no other:

> 1. Consanguinity or relationship to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.
> 2. The relationship of guardian and ward, attorney and client, master and servant, landlord and tenant, or debtor and creditor, or membership in the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or employment by either.
> 3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by the defendant in a criminal prosecution.
> 4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the action.
> 5. Having served on a trial jury which has tried another person for the offense charged.
> 6. Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict, after the cause was submitted to it.
> 7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.
> 8. Repealed by S.L. 1975, ch. 106, § 673.
> 9. Having served as a member of the jury panel within two years.

¶31. Again, McAllister asserts that his "for cause" motion was based upon twenty-nine jurors whom either knew the prosecuting attorney or had legal work done by the

prosecuting attorney in the past. Just knowing the prosecutor is not, under N.D.C.C. § 29-17-36, a statutory challenge for implied bias of a juror. McAllister's motion was correctly denied by the district court in that just knowing the prosecuting attorney is not a statutory allowable challenge for cause. Tr. #1, p. 104:1-5.

¶32. If a juror never had a direct attorney-client relationship with the prosecutor, or if any attorney/client relationship between a prospective juror and the prosecutor had ended by the time of trial, the trial court does not abuse its discretion in declining to excuse the challenged juror for implied bias. State v. Smaage, 547 N.W.2d 916, 920 (N.D. 1996). When the record fails to show a direct and current client relationship of a juror with the attorney for the opposite party, the district court does not abuse its discretion by denying an implied bias challenge under N.D.C.C. § 29-17-36(2). State v. Thompson, 552 N.W.2d 386, 388 (N.D. 1996).

¶33. In this case, the district court, having presided over the entire voir dire, found that none of the prospective jurors had an ongoing attorney-client relationship with the prosecutor. Tr. #1, p. 104: 6-25, p. 105:1-21. As such, the district court properly denied McAllister's challenge for cause for implied bias of a juror(s).

¶34. **B. The District Court did not err in refusing to grant McAllister's Motion for Mistrial based upon the jury pool.**

¶35. As to McAllister's challenge to the composition of a jury panel, N.D.C.C. § 29-17-20 is the applicable statute, which states: "[a] challenge to a jury panel must be taken before a juror is sworn and must be in writing specifying plainly and distinctly the facts constituting the ground of challenge." McAllister failed to make such challenge

prior to the jury was sworn, failed to make such a challenge in writing, and failed to specify plainly and distinctly the facts constituting the ground of challenge. Tr. #1, p. 105:22-25; p. 106:1-25; p. 107:1-2. Due to McAllister's failure to follow the direct language of N.D.C.C. §29-17-20, his challenge to the juror panel as a whole was correctly denied by the district court.

¶36. McAllister's assertion that the aggregate effect of many factors involved in the juror selection process did not allow for a fair and impartial trial. However, McAllister again only asserts that his argument of potential implied bias is based upon him "being forced to use his limited peremptory challenges in light of the dangers of having jurors who began the trial with a bias in favor of the state." McAllister fails to show any remarks in the record that support such an assertion made by any of the jurors. Instead, the record shows that when voir dire had concluded all remaining jurors had stated on the record that they could be fair and impartial. Tr. #1, p. 104:1-3. As such, the district court did not abuse its discretion in denying McAllister's Motion for Mistrial during the jury selection process.

¶37. **C. <u>The District Court did not err in limiting McAllister's cross-examination of the victim regarding his financial interest in the outcome of the case.</u>**

¶38. McAllister argues that the district court erred in limiting his cross-examination of the victim about the victim's medical bills. During cross-examination of the victim, McAllister's attorney asked the following question:

> Q: Now, you have made some reference to having gone to the hospital, correct? And also you missed some days of work?

A: Uh-huh.

Q: Okay. And you're wanting that Mr. McAllister would have to have to pay for that, correct?

Tr.#1, p. 157:23-25; p. 158:1-3

¶39. Later on, the district court allowed McAllister's attorney to make a record of the sidebar as it related to his question, the state's objection, and the court's ruling. Tr. #1, p. 163:20-25 through p. 166:18. In the court's sustaining of the state's objection, the court stated:

> Court: Okay. Well, my earlier ruling is going to stand. There's an instruction that the jury is not to consider the consequences of the case. They're supposed to only look at the facts and determine whether the crime, as charged, was committed. The consequences, a sentence and imprisonment and those sorts of things, are not within their purview. And restitution, if any is to be paid, is not within the purview as well. And so really, it has no purpose, Mr. Baumann. And so I'm sustaining the objection.

Tr. #1, p. 165:13-21. The district court also stated that it was sustaining the objection in that under Rule 404 N.D.R.Ev., in it may confuse or mislead the jury as to collateral issues. Tr. #1, p. 166:9-18.

¶40. The latitude and extent of cross-examination has always been held to be within the trial court's reasonable discretion. Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968). The determination of whether or not evidence is relevant, and 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. State v. Haugen, 458 N.W.2d 288, 291 (N.D. 1990). References by defense counsel as to the

financial status of the victim may also be improper and prejudicial. Id. On appeal, the district court's decision will not be overturned regarding the admission or exclusion of evidence on the ground of relevancy unless the trial court abused its discretion. Id.

¶43. In this case, there has been no showing of prejudice caused to McAllister by the district court's ruling. The hospital bill's of the victim were irrelevant to the testimony presented by the victim, and he stated that he has virtually no recollection of the assault. In fact, the prosecution's case consisted mostly of video evidence from the store security camera and from testimony of witnesses other than the victim. Therefore, McAllister suffered no prejudice from the district court's ruling.

¶44. **D. The District Court did not err in not allowing McAllister's counsel to argue his motion for acquittal immediately after the State closed its case in chief**.

¶45. Rule 29(a) N.D.R.Crim.P. states as follows:

> (a) Before Submission to the Jury. After the prosecution closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the prosecution's evidence, the defendant may offer evidence without having reserved the right to do so.

¶46. McAllister asserts that the district court erred by not allowing him to make his Rule 29 N.D.R.Crim.P. motion for acquittal immediately following the close of the State's case. McAllister fails to tell this court is that he in fact was able to argue in

full his Rule 29 motion for acquittal outside of the presence of the jury later in that same day after one defense witness had been called and prior to the submission of the case to the jury. (Tr. 1, p. 212 through p. 219).

¶47. In essence, the first part of McAllister's argument is based on the time during the trial that he was allowed to argue his Rule 29 motion for acquittal. However, there is nothing within Rule 29(a) N.D.R.Crim.P. that requires the court to hear a defendant's motion for acquittal immediately after the prosecution closes its evidence. In fact, Rule 29 N.D.R.Crim.P. allows the court to hear and consider a defendant's motion after the prosecution closes it evidence *or after the close of all the evidence*. (emphasis added). In this case, the district court allowed McAllister to fully argue his Rule 29 motion for acquittal and denied McAllister's motion for acquittal prior to submission of the case to the jury. As such, the district court complied with the plain language of Rule 29(a) N.D.R.Crim.P. and, therefore, committed no error.

¶48. **E. <u>The District Court did not err in denying McAllister's motion for acquittal</u>**.

¶49. McAllister alleges that the district court erred in not granting his Rule 29 N.D.R.Crim.P. motion for acquittal. Before granting a motion for acquittal, the court must find the evidence is insufficient to sustain a conviction. <u>State v. Gunn</u>, 2018 ND 95, ¶6, 909 N.W.2d 701, <u>cert. denied</u>, 139 S. Ct. 231 (2018). A district court abuses its discretion in denying a motion under N.D.R.Crim.P. 29 if the evidence is insufficient to sustain a conviction. <u>State v. Gonzalez</u>, 2000 ND 32, ¶ 20, 606 N.W.2d 873. In reviewing challenges to the sufficiency of the evidence on

appeal, 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. State v. Rai, 2019 ND 71, ¶ 13, 924 N.W.2d 410.

¶50. To grant a motion for judgment of acquittal under Rule 29 N.D.R.Crim.P., a trial court must find the evidence is insufficient to sustain a conviction of the offenses charged. State v. Romero, 2013 ND 77, ¶24, 830 N.W.2d 586. On appeal, the burden is on the defendant to show the evidence, when viewed in the light most favorable to the verdict, permits no reasonable inference of guilt. State v. Evans, 2013 ND 195, ¶10, 838 N.W.2d 605 (quoting N.D.R.Crim.P. 29(a). This Court reviews the record to determine if there is competent evidence allowing the trier of fact to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. Id. When considering a challenge to sufficiency of the evidence, this Court views the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the verdict to decide whether a reasonable fact finder could have found the defendant guilty beyond a reasonable doubt. State v. Wangstad, 2018 ND 217, ¶23, 917 N.W.2d 515 (internal citation omitted). This Court assumes the jury believed all evidence supporting a guilty verdict and disbelieved any evidence to the contrary. Id.

¶51. Further, this Court does not sit as a "thirteenth juror" to make independent determinations of credibility of witnesses or other evidentiary weight. State v. Barendt, 2007 ND 164, ¶21, 740 N.W.2d 87. In State v. Kaloustian, 212 N.W.2d 843, 845 (N.D. 1973), the court stated that at the appellate level the court does not

substitute its judgment for that of the jury or trial court where the evidence is conflicting, if one of the conflicting inferences reasonable tends to prove guilt and fairly warrants a conviction. *See also* State v. Olmstead, 246 N.W.2d 888, 890 (N.D. 1976).

¶52. In this case, the district court made the following findings in denying McAllister's Rule 29 N.D.R.Crim.P. motion for acquittal:

> Court: Tentatively, I'm going to rule that I'm going to deny your motion. I think there is evidence that the defendant stated he was dazed. He was kind of in of it, out of it. The officer testified when she talked to him, he couldn't respond or didn't respond appropriately, would just simply closed his eyes. That was the officer's testimony, was nonverbal and just closed his eyes when she asked him questions.
> He also testified that when he was in the hospital for six days, the doctors kind of kept him chemically knocked out. I don't know why they did that, but clearly there was some kind of trauma that was suffered. That coupled with the video that shows him lying on the floor motionless for - - and I didn't time it, but it appears to be a minute or so, way more than a ten count in a price fight, lying motionless on the floor, you've got to use the - - when words aren't defined in a statute, you have to give them their usual and ordinary meaning. The usual and ordinary meaning isn't some medical sense of the word. It's what would the lay person think about this? And I'm going to hold that a person watching that video and hearing the testimony and the evidence given could determine beyond a reasonable doubt that *John Doe* (victim, redacted) lost consciousness.
>
> Tr. #1 p. 218: 7-25, p. 219: 1-2.

¶53. The State asserts that the district court specifically made a finding that the evidence was sufficient to sustain a conviction based upon all of the testimony presented to the district court prior to the end of the State's case in chief. In view of all the evidence

and all reasonable inferences that may be drawn therefrom in the light most favorable to the verdict, the State asserts that a reasonable fact finder could have found the defendant guilty beyond a reasonable doubt.

¶54. **F. <u>Jury instructions given by the trial court must be considered as a whole based upon the evidence presented at trial</u>**.

¶55. The District Court did not err:

1. By not giving the Use of Force in Defense of Premises and Property jury instruction requested by McAllister.
2. By not giving the Use of Deadly Force Presumption of Fear of Death or Serious Bodily Injury jury instruction requested by McAllister.
3. By not giving a Duress jury instruction requested by McAllister.
4. By not giving Excuse jury instruction requested by McAllister.

¶56. McAllister argues that the district court erred by denying his request to include certain jury instruction that he requested.

¶57. Rule 30, N.D.R.Crim.P., allows parties to request and object to proposed jury instructions. Upon review, the Court generally reviews jury instructions as a whole to determine whether the jury instructions fairly and adequately informed the jury of the applicable law. <u>City of Fargo v. Nikle</u>, 2019 ND 79, ¶6, 924 N.W.2d 388 (quoting <u>State v. Zajac</u>, 2009 ND 119, ¶12, 727 N.W.2d 825). The standard for review of jury instructions is:

> We review jury instructions as a whole to determine whether they fairly and adequately advise the jury of the applicable law. A defendant is entitled to a jury instruction on a defense if there is

> evidence that creates a reasonable doubt about an element of the charged offense. We view the evidence in the light most favorable to the defendant to determine whether there is sufficient evidence to support a jury instruction. A trial court errs if it refuses to instruct the jury on an issue that has been adequately raised. A court, however, may refuse to give an instruction that is irrelevant or inapplicable.

State v. Ness, 2009 ND 182, ¶13, 774 N.W.2d 254.

¶58. The Court may also review jury instructions to see if obvious error has occurred. In reviewing whether obvious error has occurred, this Court has stated:

> The power to notice obvious error is one we exercise cautiously and only in exceptional circumstances. It should be exercised only where a serious injustice has been done to the defendant. In assessing the possibility of error concerning substantial rights under N.D.R.Crim.P. 52(b), we examine the entire record and the probable effect of the actions alleged to be error in light of all the evidence.

State v. Johnson, 2009 ND 76, ¶10, 764 N.W.2d 696.

¶59. In this case, McAllister argues that the district court erred when it failed to include in the jury instructions any of the following requested pattern jury instructions: a) Duress; b) Use of Force in Defense of Premises and Property; c) Excuse; and d) Use of Deadly Force-Presumption of Fear of Death or Serious Bodily Injury.

¶60. McAllister argues that the district court erred by denying his request for an instruction on Use of Force in Defense of Premises and Property. However, McAllister never presented any testimony or other evidence at trial that he was defending his own property, or that he was authorized to defend the premises or property of Jason's Super Foods, the site of the assault. A court may refuse to give an instruction that is irrelevant or does not apply. State v. Clark, 2012 ND 135, ¶8,

818 N.W.2d 739. As such, the district court's refusal to give such an instruction was supported by the actual evidence presented at trial.

¶61. Likewise, McAllister argues that the district court erred by denying his request for an instruction on Use of Deadly Force-Presumption of Fear of Death or Serious Bodily Injury. However, McAllister never presented any testimony or other evidence at trial that he was in fear of death or serious bodily injury to himself. As such, the district court's refusal to give such an instruction was supported by the actual evidence presented at trial. Again, a court may refuse to give an instruction that is irrelevant or does not apply. State v. Clark, 2012 ND 135, ¶8, 818 N.W.2d 739.

¶62. In this case, it should be noted that the district court gave the following jury instructions relating to McAllister's claim of defense: Additional Elements of Offense-Nonexistence of Defense (Appellant's App. 41), Self-Defense After Provocation (Appellant's App. 42), Self-Defense (Appellant's App. 42-43), Reasonableness of Accused's Belief (Appellant's App. 43), and Defense of Others (Appellant's App. 44). The State asserts that all of these instructions were warranted by the testimony and video evidence presented at trial. It should be noted that these instructions *required* the State to prove *beyond a reasonable doubt* that McAllister was not acting in self-defense or defense of others.

¶63. Duress and Excuse are affirmative defense instructions as requested by McAllister, which would have placed the burden of proof upon McAllister to prove their existence in this case. It seems illogical for McAllister to now argue that he should have been given an instruction requiring him to prove the existence of an affirmative

defense of either duress or excuse, when the jury, following the district court's instructions, found that the State had proved *beyond a reasonable doubt* that McAllister was not acting in self-defense or defense of others when he assaulted the victim. As such, based upon the evidence presented at trial, the district court did not err in not giving a jury instruction on the Use of Force in Defense of Premises and Property, Use of Deadly Force Presumption of Fear of Death or Serious Bodily Injury, Duress and/or Excuse.

¶64. **G. The district court did not err in failing to include non-pattern jury instructions submitted by McAllister entitled "Vague and/or Ambiguous Jury Instructions must be Interpreted Against the Prosecution and in Favor of the Defendant."**

¶65. McAllister argues that the district court erred in failing to include a jury instruction submitted by him entitled "Vague and/or Ambiguous Jury Instructions must be Interpreted Against the Prosecution and in Favor of the Defendant." (App. 13) In support of his position, McAllister cites to the case State v. Brossart, 1997 ND 119, ¶14, 565 N.W.2d 752. McAllister reliance of that cited case is misplaced, as the specific language of the Brossart states "[w]e construe *an ambiguous criminal statute* against the government and in favor of the accused." Id. at ¶14 (emphasis added). There is not a word or phrase within Brossart that says that jury instructions must be interpreted against the prosecution and in favor of the defendant. Since McAllister's requested jury instruction is not supported by Brossart, the very case that he cites as

being supportive of his position, the district court did not err in failing to include it in the jury instructions at trial.

¶66. **H. The district court did not err in giving the pattern jury instruction entitled Direct and Circumstantial Evidence**.

¶67. McAllister argues that the district court erred by giving the current North Dakota pattern jury instruction on Direct and Circumstantial Evidence. (Appellant's App. at 55). That same argument was made before this court in State v. Grajczyk, 2016 ND 180, ¶1, 885 N.W2d 579. This court summarily affirmed the district court's use of the current North Dakota pattern jury instruction on direct and circumstantial evidence. Id. Therefore, McAllister argument must fail as the holding in the Grajczyk case is directly on point.

¶68. **I. The District Court did not err in giving lesser included offense instructions for Assault and Simple Assault**.

¶69. McAllister argues that the district court erred when giving a lesser included offense instruction to the jury, over the objection of McAllister. The State has the right to request the lesser-included instruction over the objection of the defendant. State v. Landrus, 2019 ND 162, ¶17, 930 N.W.2d 176, State v. Weidrich, 460 N.W.2d 680, 684 (N.D. 1990). For an offense to be a lesser included offense, it must be impossible to commit the greater offense without committing the lesser. State v. Ellis, 2001 ND 84, ¶11, 625 N.W.2d 544; State v. Carlson, 1997 ND 7, ¶35, 559 N.W.2d 802. For a lesser-included-offense instruction, there must be evidence on which a jury could rationally find beyond a reasonable doubt that the defendant is not

guilty of the greater offense and to find beyond a reasonable doubt that the defendant is guilty of the lesser. State v. Carlson, at ¶34. Either the prosecution or the defense may request a lesser-included-offense instruction, or the court may on its own give such an instruction. State v. Keller, 2005 ND 86, ¶31, 695 N.W.2d 703. A lesser included offense is a crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime. Id. at ¶9. For an offense to be a lesser included offense, it must be impossible to commit the greater offense without committing the lesser. State v. Ellis, 2001 ND 84, ¶11, 625 N.W.2d 544; State v. Carlson, 1997 ND 7, ¶35, 559 N.W.2d 802.

¶70. N.D.C.C. §12.1-01-04(14) defines an"Included offense" as an offense:

> a. That is established by proof of the same or less than all the facts required to establish commission of the offense charged;
> b. That consists of criminal facilitation of or an attempt or solicitation to commit the offense charged; or
> c. That differed from the offense charged only in that it constitutes a less serious harm or risk of harm to the same person, property, or public interest, or because a lesser degree of culpability suffices to establish its commission.

¶71. In this case, the State charged McAllister with committing the crime of Aggravated Assault in violation of N.D.C.C. §12.1-17-02, by willfully causing serious bodily injury to another human being. (Appellant's App. 7). The essential elements of the crime of aggravated assault were given to the jury. (Appellant's App. 38). The district court included in the jury instructions the definitions of "willfully" and "serious bodily injury." (Appellant's App. 46-47).

¶72. The district court further instructed the jury regarding the essential elements of the crime of Assault as a lesser included offense. (Appellant's App. at 39). The district court included in the jury instructions the definitions of "willfully" and "substantial bodily injury." (Appellant's App. 46-47).

¶73. It is apparent that these jury instructions by the district court are a correct reflection of the law. N.D.C.C. §12.1-17-02(1)(a) states "[e]xcept as provided in subsection 2, a person is guilty of a class C felony if that person: a. Willfully causes serious bodily injury to another human being." N.D.C.C. §12.1-17-01.1 states "[a] person is guilty of a class A misdemeanor, except if the victim is under the age of twelve years in which case the offense is a class C felony, if that person: 1. Willfully causes substantial bodily injury to another human being."

¶74. In this case, Assault is a lesser included offense of Aggravated Assault, in that it is impossible to commit the greater offense (Aggravated Assault) without committing the lesser offense (Assault). Therefore, the district court correctly allowed the lesser included offense of Assault and correctly instructed the jury on that lesser included offense in this case.

¶75. **J. <u>The jury verdicts of Not Guilty to Aggravated Assault but Guilty to Assault are not inconsistent</u>**.

¶76. McAllister argument is summarized by this quote from his brief: "The jury's verdict of not guilty for Aggravated Assault, but guilty of Assault, cannot be rationally reconciled and indicates that they did not follow their jury instructions."

¶77. The district court specifically instructed the jury that they should first consider whether the State had, beyond a reasonable doubt, proved all the elements of the crime of aggravated assault. (Appellant's App. at 62). The district court then instructed the jury that if they did not believe that the State had not proven, beyond a reasonable doubt, all the elements of the crime of aggravated assault, then the jury was to consider whether the State had proven, beyond a reasonable doubt, all the elements of the crime of assault. (Appellant's App. at 62).

¶78. The first jury verdict form that was filled out, signed, returned and read in open court found McAllister NOT GUILTY of the crime of aggravated assault. (Appellant's App. at 63). The second jury verdict form that was filled out, signed, returned and read in open court found McAllister GUILTY of the crime of assault. (Appellant's App. at 64).

¶79. In North Dakota, an inconsistent verdict is defined as a situation where the jury has not followed the court's instructions and the verdicts cannot be rationally reconciled. State v. McClary, 2004 ND 98, ¶9, 679 N.W.2d 455.

¶80. In State v. Swanson, 225 N.W.2d 283 (N.D. 1974), the Court considered an argument made by the defendant about inconsistent jury verdicts. In Swanson, the defendant was charged with two counts of assault and battery for acts against a husband and wife. Id. at 284. The trial court instructed the jury on assault and battery and the lesser included offense of assault, with the jury finding the defendant not guilty on both counts of assault and battery, yet finding the defendant guilty of one count of assault. Id. Swanson argued that his acquittals on both counts of assault and battery

were inconsistent with his assault conviction. Id. The Court noted that not every battery was a consummated assault, but not every assault was a battery. Id. The Court concluded that the jury may well have found there was an unlawful offer or threat to use force, but the subsequent use of force was justified on the basis of self-defense. Id. at 284-85. Therefore, the Court concluded that the verdicts could be rationally explained and, therefore, were not inconsistent. Id. at 285. Further, the Court stated that strict standards of logical consistency did not apply to jury verdicts in criminal cases. Id.

¶81. In this case, it is un controverted that McAllister punched the victim several times. It is further un controverted that from McAllister's actions, the victim sustained swelling to the left side of his head, a cut on his left eye, a bloody nose and blood coming from his mouth. Tr. #1, p. 174:5-15. The assault by McAllister on the victim also caused a half-moon-like cut on the victim's scalp. Tr. #1, p. 177:4-12. When Halonen interviewed McAllister, he admitted that he had struck the victim in the face and also had continued to strike the victim once the victim was on the ground. Tr. #1, p. 181:15-23.

¶82. In this case, the jury acquitted McAllister of the crime of Aggravated Assault, but convicted him of the crime of Assault. As discussed hereinabove, Assault is a lesser included offense of Aggravated Assault. Therefore, the jury verdicts were not inconsistent as the facts presented at trial were sufficient to find McAllister guilty of an Assault while acquitting him of Aggravated Assault.

¶83. **K. <u>The District Court did not err in ordering McAllister to pay $32,063.68 in restitution</u>**.

¶84. The Supreme Court's review of a restitution order is limited to whether the district court acted within the limits set by statute, which is similar to an abuse of discretion standard. State v. Tupa, 2005 ND 25, ¶3, 691 N.W.2d 579. A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets the law. Id.

¶85. The statutory authority for the imposition of restitution, as a part of a criminal judgment, is found at N.D.C.C. ¶12.1-32-08(1), which states in pertinent part:

> Before imposing restitution or reparation as a sentence or condition of probation, the court shall hold a hearing on the matter with notice to the prosecuting attorney and to the defendant as to the nature and amount of restitution. The court, when sentencing a person adjudged guilty of criminal activities that have resulted in pecuniary damages, in addition to any other sentence the court may impose, shall order that the defendant make restitution to the victim or other recipient as determined by the court.... [I]n determining the amount of restitution, the court shall take into account the reasonable damages sustained by the victim or victims of the criminal offense, *which damages are limited to those directly related to the criminal offense and expenses actually incurred as a direct result of the defendant's criminal action*. This can include an amount equal to the cost of necessary and related professional services and devices relating to physical, psychiatric, and psychological care.

(emphasis added).

¶86. As stated in the above-quoted statute, restitution is limited to those damages directly related to the criminal offense and expenses actually incurred as a direct result of the defendant's criminal action. This direct relationship requires an immediate and

intimate casual connection between the criminal conduct and the damages or expenses for which restitution is ordered. State v. Pippin, 496 N.W.2d 50, 53 (N.D. 1993). The State has the burden in a restitution hearing to prove the amount of restitution by a preponderance of the evidence. State v. Gill, 2004 ND 137, ¶7, 681 N.W.2d 832.

¶87. Whether an injury directly resulted from a defendant's criminal conduct is a question of fact, and such finding will not be set aside unless the finding is clearly erroneous. State v. Clayton, 2016 ND 131, ¶7, 881 N.W.2d 239. A finding of fact is clearly erroneous only if it is induced by an erroneous view of the law or, although there is some evidence to support it, on the entire record we are left with a definite and firm conviction a mistake has been made. McAllister v. McAllister, 2010 ND 40, ¶13, 779 N.W.2d 652.

¶88. McAllister argues that he cannot be required to pay restitution for injuries he was found not guilty of causing. To support his argument, he cites to the cases of State v. Pippin, 496 N.W.2d 50 (N.D. 93), and State v. Steinolfson, 483 N.W.2d 182 (N.D. 1992). However, both of these cases are distinguishable. In Pippin, the damages incurred by victims for the cleaning of their house were not connected to Pippin's offense of possession of stolen property. Pippin, 496 N.W.2d at 53. In Steinolfson, although the restitution award was upheld on other grounds, the Court noted that since the damages had occurred prior to the criminal act, such order may have been erroneous. Steinolfson, 483 N.W.2d at 185.

¶89. In this case, there is no doubt that the injuries and resultant medical bills incurred by the victim, including hospital care, are directly related to the criminal assault that the jury found, beyond a reasonable doubt, that McAllister committed. Testimony elicited and shown at trial showed McAllister punching the victim numerous times in and about his face. Further, the testimony at trial pointed out that the victim was attended to by an ambulance crew, taken away from the scene of the assault by ambulance, that the ambulance immediately transported the victim to Trinity Hospital in Minot, and that the victim remained in Trinity Hospital for six consecutive days thereafter while being treated for the injuries as a result of the assault. The facts in this case show that there was a direct relationship and an immediate and intimate casual connection between the criminal conduct and the damages or expenses for which restitution is ordered. Therefore, the district court's order imposing restitution in the amount of $32,063.68 as part of the criminal judgment should be upheld.

¶90. **CONCLUSION**

¶91. Based upon the foregoing, the State respectfully requests that the jury verdict and the district court's criminal judgment be affirmed.

¶92. Dated at Stanley, North Dakota, this 10th day of December, 2019.

(s) Wade G. Enget
Wade G. Enget (04165)
Mountrail County State's Attorney
P.O. Box 69
Stanley, ND 58784
(701)628-2965
wenget@nd.gov
Attorney for State of North Dakota

¶93. **CERTIFICATE OF COMPLIANCE**

¶94. The undersigned hereby certifies that this Brief of Appellee complies with the page limitation set forth in N.D.R.App.P. 32(a)(8)(A).

(s) Wade G. Enget
Wade G. Enget (04165)
Mountrail County State's Attorney
P.O. Box 69, Stanley, ND 58784
(701)628-2965
wenget@nd.gov
Attorney for State of North Dakota

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	
	)	
vs.	)	Supreme Court No. 20190188
	)	
Kelvin Antone McAllister,	)	
	)	
Defendant and Appellant.	)	

AFFIDAVIT OF ELECTRONIC SERVICE

Cherlyn K. Biwer, being first duly sworn on oath, does depose and say: That she is a citizen of the United States, over the age of eighteen years, and not a party to the above entitled matter.

That on the 10th day of December, 2019 this affiant did transmit via electronic mail, a true and correct copy of the following documents filed in the above captioned action:

BRIEF OF APPELLEE AND AFFIDAVIT OF ELECTRONIC SERVICE

That a copy of the above document was addressed as follows:

North Dakota Supreme Court (supclerkofcourt@ndcourts.gov)
Eric P. Baumann (minotpublicdefender@nd.gov)

To the best of your affiant's knowledge, information and belief, such e-mail address as given above was the e-mail address as provided on the website of the North Dakota Supreme Court of the party intended to be so served.

That the above documents were duly electronically transmitted in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Cherlyn K Biwer

Subscribed and sworn to before me this 10th day of December, 2019.

Tera K. Skaar

Tera K. Skaar, Notary Public
Mountrail County, North Dakota

TERA K SKAAR
Notary Public
State of North Dakota
My Commission Expires April 14, 2022