ORIGINAL

IN THE

SUPREME COURT OF NORTH DAKOTA 20000316

SUPREME COURT CASE # 20000316
WARD COUNTY No. 99-K-0563

State of North Dakota,
Plaintiff/Appellee,

vs.

Randall Shawn Ballard,
Defendant/Appellant.

APPELLEE'S BRIEF

Appeal from the Ward County District Court
for the Northwest Judicial District

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North Dakota Constitution and Statutes Cited:

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STATEMENT OF CASE

A. PROCEEDING BELOW

On April 26, 1999, a complaint was filed charging Defendant Randall Ballard (hereinafter "Defendant") with Criminal Attempt-Murder and Aggravated Assault occurring on or about April 23, 1999, in Ward County. [D. 09] The Defendant waived his preliminary hearing. [D. 14] The information was filed on June 7, 1999. [D. 22] This case went to trial the first time in December 1999 and the Defendant was convicted of one count of Criminal Attempt-Manslaughter and one count of Aggravated Assault. [D. 119 and 125] On January 5, 2000 and prior to the Defendant being sentenced, the Defendant filed a motion for a new trial, alleging perjury by Tina Micke along with prosecutorial misconduct, and the State resisted. [D. 133 to 144] When it became apparent that the trial court failed to instruct the jury on the burden of proof for self-defense, the Defendant and the State each separately moved to vacate the conviction and to order a new trial. [D.166 and 171] The Defendant's motion was granted and Judge Holte recused himself. [D. 225] Judge Rustad was appointed trial judge. [D. 229] At the September 2000 Pre-Trial Conference, the State moved to amend the Information in this case so that the Defendant faced two counts of class C felony Aggravated Assault. [D. 279] The State also filed notice of the Special Dangerous Offender. [D. 281] Jury trial began on October 23, 2000 and on October 26, 2000 the Defendant was found guilty on both Aggravated Assault charges. [D. 321 and 322] The

Defendant filed motions for perjury, acquittal and for a new trial. The State resisted the motions and also resisted the defendant's second attorney's alleged "reply" to the State's response. A hearing was held on November 8, 2000, and the trial court denied said motions. [Tr. 557-559]. The Defendant was sentenced on December 26, 2000. [D. 368 to 370].

B. STATEMENT OF FACTS

At or just after 2:30 am on the morning of April 23, 1999, the Defendant entered an apartment building to go to the apartment of Michelle Cleveland, a female whom he had met just 3 to 4 hours before in a bar. The Defendant had never been to her apartment before and he found her apartment door open and walked in. He had his cigarettes and a box of condoms, so he sat down on the couch and waited for her to return.

The Defendant initially met Cleveland at an east Minot bar through Cleveland's sister, Melissa Williams, and the sister's boyfriend, Brandon Hanna. There was talk of a post bar closing party at Hanna's place and so Cleveland led the way for the Defendant to get there while Hanna and Williams followed a short time later with others. Williams had Tina Micke babysit for her at Hanna/Williams place. Cleveland spoke to Micke and neither the Defendant or Cleveland ever spoke to each other at Hanna's place. The Defendant spoke to Hanna. Tina and Micke left Hanna's without telling the Defendant and went to Micke's place to get some things for her stay the night with Cleveland. The Defendant asked Williams if Cleveland was coming back and when he found out she wasn't,

he cajoled Williams to call Cleveland at Micke's place to see if he could come and see her. Williams testified that she did this and Cleveland said it would be alright and then gave the Defendant her sister's address. Cleveland each testified that Williams told Cleveland that Williams had given the Defendant Cleveland's address.[Tr.201,207,209,214] Williams testified that she had set up her sister in the past. [Tr.417]

After Cleveland and Micke got to Cleveland's place, John Elkins called and asked if it was alright if he and Tom Weltikol stopped by and Cleveland said OK. Elkins had trouble finding Cleveland's place so he called a second time. She came outside to help him find the place and Tina Micke followed her out a short time later. The four were visiting in the parking lot and they saw the Defendant drive up and first go to the wrong building. Cleveland and Micke got into the vehicle with Weltikol and Elkins. The Defendant then entered Cleveland's building and when he didn't exit within a reasonable time, Cleveland wanted him out since the door had been left open by Micke and Cleveland's roommate was sleeping in her bedroom. Weltikol went to check out the situation and returned stating that the Defendant sitting on Cleveland's couch reading a paper.

Elkins and Weltikol went to ask the Defendant to leave. Weltikol posed as Cleveland's boyfriend and asked the Defendant to leave. Elkins said he should leave before things got physical. While this was going on, Cleveland and Micke went around the apartment building to look in the window of

the Cleveland apartment.[Tr. 190, 238] The Defendant really didn't know Cleveland other than he was introduced to her some 3-4 hours earlier by Hanna and Williams and they were part of a large group of people at the bar that evening [Tr. 101, 421]; the group that came over to Hanna's place. This included Melissa Scheen and her boyfriend John Cocker.

After being asked to leave Cleveland's apartment, the Defendant left and went to his pickup to get a knife for his own protection. He got his knife, took it out of the sheath and put it in his rear pocket. [Tr. 451] After the Defendant left, Cleveland and Micke came in the apartment building from another door and went into the apartment. The four were talking and laughing about this early morning incident when Cleveland went to the door and looked out the eyehole and saw the Defendant listening to them. She told the others and went back to tell her sleeping roommate. Weltikol moved to the door and was followed by Elkins and Micke (she stood behind the door).

Ballard testified that "(T)he only reason I brought the knife was for my own protection" [Tr. 337] and that "he (Ballard) went out to get the knife because there was two of them and one of him, and he wasn't going to get beat up without some protection." [Tr. 338]

There were a couple of knocks at the door before Weltikol answered the door. The Defendant asked to see Michelle since he didn't even know her last name. Weltikol claimed there was arguing between the two of them as the Defendant persisted in

trying to see Michelle and he was refused access to the apartment. As to the Defendant coming back to Cleveland's apartment, Defense Attorney Bosch had Micke read a portion of her testimony from the first trial that included:

> "all of the sudden we heard a knock. And, ah it was him. And, Tom (Weltikol) opened the door and was talking to him and...Randy said 'Is Michelle there?' Cuz he wanted to talk to Michelle. And, Tom goes, No. She doesn't wanna talk to you. So please leave.' Well, he goes, 'Why can't I talk to her?'. 'Because they don't want to talk to you.' And, he wouldn't leave, and he kept on budging. And then he finally tried to getg Tom out of the way, pushing the door open....Randy threw the first punch." Who did?
>
> Randy threw the. Yaw, I saw him throw.
>
> There was a physical punch?
>
> Because I was standing behind the door."

[Tr. 253] Bosch then continued with his live cross examination of Micke and asked her: "Stop right there. You were standing behind the door when he threw the first punch. Now (from your testimony on direct), you (said you were) ... in the kitchen. What do you say about that, my dear?

A. (No response).

MR. MATTSON: Is that a question?.

MR. BOSCH: Huh? She -- if she is not going to answer -- we went through that before."

[Id] Bosch put Micke's April 1999 statement in as Exhibit A and then went through the height differences of Micke and Weltikol with Micke and asked:

Q. In other words, you can't see over it, can you?

A. No.

Q. You couldn't see around it because --

A. I saw him through the crack, though.

Q. Huh?

A. I saw him through the crack in the crack.

Q. What crack in -

A. The door.

Q. Threw a punch at the crack?

A. Yes.

Q. So you are saying then that Randy was out here and not in here (indicating) when he threw the punch.

A. Yeah, he was.

Q. He was pushing -- tried to get the door pried open, right?

A. Yes.

Q. He persisted - he was persistent about seeing Michelle, right?

A. Yes.

[Tr. 255-256] After Micke saw the Defendant throw the first punch, she got out of the way of the door. [Tr. 265] Weltikol, who later went into shock from the injuries he suffered, claimed to not know who threw the first punch but that he and the Defendant were arm to arm and he eventually moved the Defendant across the hallway. Elkins said he was busy talking to Micke and the Defendant claimed he did not throw the first

punch. He said that after he was refused access, he then put the knife to Weltikol's throat thinking he wouldn't do nothing [Tr. 446] but in an effort to get him to see it and back up [Tr. 436] or to scare them. [Tr. 433] The Defendant admitted that holding a knife to another's throat was a dangerous act when there was tension in the air [Tr. 451] and that there was tension in the air when he put the knife to Weltikol's throat. [Tr. 450] That was followed by Elkins' buddy striking the Defendant in the face. [Id] The Defendant said that he was moved into a corner and was being struck by Weltikol and/or Elkins. {Tr. 438] The Defendant was not exactly sure what happened since it all happened so fast. [Tr. 435] He said that he was in a corner for about 10 to 15 seconds when he started to stab people with his knife. [Tr. 439-440] He was not sure how or when he stabbed anyone. [Tr. 450] The Defendant said he could have stabbed Weltikol at the south end of the hallway. [Tr. 457]

The Defendant told Galgerud that when he returned to Cleveland's apartment, and prior to being hit, "he put the knife to his (Weltikol's) throat." [Tr. 325] The Defendant also said that Galgerud also testified the Defendant "showed a little emotion" [Tr. 335] and the Defendant said "he knew that he done wrong." [Id.] Ballard told Galgerud that he (Ballard) "was honest as I am going to be." [Tr. 338]

At trial, the Defendant admitted to holding his knife to Weltikol's throat at a time when there was tension in the air [Tr. 450] and that his action was a dangerous act. [Tr. 451]

Weltikol had four main wounds. [Tr. 279] He had two complex wounds to the front of his neck that were long slashing wounds. And he had two penetrating wounds to the back of neck and head that were stabbing type wounds. [Tr. 279-280] The front neck wounds appeared to be slashed two to four times with the left side of the neck having deeper wounds from what appeared to be sawing action with the knife. His left carotid artery and left jugular vein were lacerated. [Tr. 280] Weltikol had a stab wound to the left back side of his shoulder. He was also pithed between the first and second vertebra wherein the angle of the wound was in an upward manner so the knife hit the base of the skull and went inward toward the brain. His vertebral artery was transected between the first vertebra and the base of the skull. [Tr. 284] Weltikol could not give exact testimony as to what happened but he said that as he came to he saw the Defendant chasing Elkins and so he took off after the Defendant and was found on the floor on the south end of the hallway.

After having qualified as an expert in the identification of offensive and defensive wounds, Dr. Lane Lee testified that the wounds sustained by Weltikol were life threatening [Tr. 289] and were offensive wounds. [Tr. 296]. Dr. Lee clarified that "(T)o sustain an offensive wound means you were offended, you were stabbed, you are sliced, you were cut." [Id] The basis of Dr. Lee's opinion was the multiple wounds, the trajectory of the wounds and his prior experience of wounds of a similar nature. [Tr. 295-296] On cross, it was brought out

that if all four wounds were inflicted at the same time, that the wound to the base of the skull through the vertebral artery would cause the victim to lose consciousness. [Tr. 299] Dr. Lee said it may have been possible for Weltikol, after having sustained the vertebral artery injury, to run 30 feet [Tr. 300] but he could not imagine Weltikol could run and jump an object. [Id] The Defendant testified that he could have stabbed Weltikol in the back of his neck at the south end of the hallway in question but that he was not certain since everything happened so fast. [Tr. 457, 461]

Dr. Dennis Arce, who headed up the medical teams for Weltikol and Elkins, also testified that the wound Weltikol had at the back of his neck was an upward wound that went to the middle, [Tr. 384] and that "it is basically impossible to be in front of someone and do this." [Tr. 385] Arce testified the wound was offensive since "there is no way you can-someone can be behind you and are trying to fend them off. Apparently he (Weltikol) was unable to defend himself at that point." [Id]

Elkins had five tendons cut on his right forearm [Tr. 132] and also had a stab wound to his front right chest. Elkins also had a stab wound in his back and the back of his head. He stated that when he initially felt he was cut in his arm, that he turned to leave and ran away and was chased by the Defendant. He said that he felt he was being stabbed from behind. Remembering that a friend's father faked being killed to avoid death in a grain elevator robbery, Elkins dropped to

the ground. [Tr. 132] He said the Defendant and Weltikol went by him and so he tried to get back into the apartment but the door was closed. Elkins could not use his hands since the Defendant cut up his right arm and the left was stopping the bleeding.[Tr. 132-133] Elkins kicked at the bottom of the door and it was opened. He went into the bathroom and later passed out as the police arrived.

As to Elkins, Dr. Arce testified that the forearm laceration to him was a defensive wound [Tr. 387], the chest wound on Elkins' right side was consistent with a face to face interaction [Id] and that the T-4, T-5 wound was not done from a face to face confrontation [Tr. 388]. As to the wound to the back of Elkins' scalp, Dr. Arce testified that it was a defensive wound unless "someone on the ground or kneeling down or something in front, you could kind of reach over the top of their head and cut them that way." [Tr. 388-389] Elkins testified that he was stabbed in the back of his head and his back by the Defendant as he tried to get away from him. [Tr. 132]

The Defendant fled from Cleveland's apartment and went back to Brandon Hanna's residence. The Defendant created two self defense stories. The Defendant told Melissa Scheen and Brandon Hanna that two guys jumped him and one of them had a knife so he (the Defendant) had to use his knife. [Tr. 96, 97,346,348,349,350, and 360]. The Defendant told them this at Brandon Hanna's residence when the Defendant returned from Michelle Cleveland's place and Scheen and Hanna each testified

separately as to what the Defendant told them. [Id.]

Brandon Hanna testified along the lines of Melissa Scheen concerning the Defendant's statement that one of two guys had a knife and so he had to use his knife. [Tr. 346, 349, 350, and 360] Hanna admitted that his testimony was inconsistent with this portion of his April 1999 statement to Galgerud and claimed that was due to him being afraid of getting into trouble. [Tr. 348] Bosch cross examined Hanna on the discrepancy in Hanna's testimony. [Tr. 354-358] Hanna remained firm on re-direct that Ballard said one of the two guys had a knife and he had to use his knife. [Tr. 360]

The Defendant's next self-defense story was given when he went to the police department from Hanna's place. The Defendant gave a statement to Minot Police Detective M.B. Galgerud (and this was after he had spoken to Scheen and Hanna) wherein the Defendant claimed "that when he put the knife to the throat (of Weltikol), it was his (Weltikol's) friend (Elkins) that struck him... in the face." [Tr. 325-326] Galgerud said Ballard claimed he told the other to not to do that. Ballard further claimed "he just went with a motion with his hand, ... with a slicing motion with the knife in his right-hand....several times, and in a stabbing motion as well." [Tr. 326] In response to Galgerud's question on whether he was honest with him, the Defendant told Galgerud that he (Defendant) was honest as I am going to be." [Tr. 338]

ISSUES

I. THERE WAS SUFFICIENT EVIDENCE AS A MATTER OF LAW TO CONVICT RANDALL BALLARD ON EACH AGGRAVATED ASSAULT CHARGE.

A. DID THE COURT PROPERLY TAKE INTO ACCOUNT BALLARD'S STATE OF MIND WHEN HE KNIFED WELTIKOL AND ELKINS?

B. DID THE COURT PROPERLY APPLY JUSTIFICATION AND EXCUSE TO THIS CASE?

II. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL.

A. THE TRIAL COURT PROPERLY RULED THERE WAS NO PERJURED TESTIMONY AT THE TRIAL.

B. THE PROSECUTOR'S CLOSING REMARKS DID NOT VIOLATE THE DEFENDANT'S RIGHT OF DUE PROCESS.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR ACQUITTAL AS A MATTER OF LAW.

The State had sufficient evidence to support the two Aggravated Assault charges against the Defendant and for the jury to find the Defendant guilty of both charges. Rule 29(a) of the NDRCrimP governs a defendant's motion for acquittal. "In determining whether there was sufficient evidence to convict [the defendant], [the Supreme Court] will look only to the evidence most favorable to the guilty verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction." *State v. McKing*, 1999 ND 81, ¶8, 593 N.W.2d 342 [citing *State v. Kunkel*, 548 N.W.2d 773, 773 (N.D. 1996)]. "Substantial evidence exists when a rational fact finder could have found the defendant guilty beyond a reasonable doubt." Id. Additionally, North Dakota case law with regard to a claim of insufficiency of evidence to support a criminal conviction is well settled. A guilty verdict is sustained by the reviewing court, unless the evidence viewed in a light most favorable to the prosecution, giving the prosecution the benefit of all inferences which can reasonably be drawn in it's favor, is such that a rational fact finder could not have found the defendant guilty beyond a reasonable doubt. *State v. Gonderman*, 531 N.W. 2d 11, 16 (N.D. 1995), citing, *State v. Schill*, 406 N.W. 2d 660 (N.D. 1987). Further, the reviewing court does not weigh the conflicting evidence, nor does it judge the credibility of the

witnesses. *Id.*

In an apparent effort to retry the case, the Defendant improperly ignores the ***McKing*** standard that the Supreme Court "will look only to the evidence most favorable to the guilty verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction." ***State v. McKing***, 1999 ND 81, ¶8, 593 N.W.2d 342. In his re-argument of the case, the Defendant, failing to cite any authority, asserted that there was no competent evidence that would allow the jury any reasonable inference tending to prove guilt or warranting a conviction." [Appellant's Brief, p.20] In his denial of the Defendant's Motion for Acquittal, Judge Rustad said that "there was an awful lot of evidence at the trial from an awful lot of sources. And as is normal in a long contested trial, each side remembers the testimony that is favorable to their theories. Each side falls in love with them and forgets there is other testimony or other explanations as to why the testimony might have this slant or that slant or another slant." [Tr. 557-558].

Certainly, favorable to the State was the testimony by Melissa Scheen and Brandon Hanna wherein Defendant Ballard initially claimed one of the two other guys drew a knife on him and so he had to use his knife, [*Supra* pages 10-11] along with the medical testimony of the extensive offensive wounds to Weltikol and Elkins (***supra***, pages 8-10), and Elkins' own testimony as to how he was stabbed in the back of his head and back [Tr. 132] and Tina Micke's testimony concerning

Defendant Ballard budging at the door to get in the apartment [Tr. 255-256; R. 307 Exhibit A, p.2] and throwing the first punch and then she got out of the way of the door. [Tr. 255, 258, 261, 265, 266, Exhibit A].

The Defendant mis-characterizes Weltikol and Elkins as the initial aggressors and improperly asserts Weltikol admitted "that he flew out of the apartment and pushed and shoved Randy into the hallway corner." [Appellant Br. 28]. Defendant ignores that he put Weltikol in shock [Tr. 377] and the injuries affected Weltikol's memory [Tr. 71] along with the Defendant's claim that Tina Mickee testified that she saw the Defendant throw the first punch with his claiming that there is no testimony that was not credible. [Appellant's Brief, 20] The weight and credibility of Micke's testimony was a matter the jury decided; not the Defendant. Weltikol's testimony that there was mutual shoving between himself and the Defendant [Tr. 77] certainly flies in the fact of the Defendant's claim of Weltikol "flying out" of the apartment.

The Defendant could not answer why he didn't go to the police department or call 9-1-1 when he left the first time other than he thought Michelle was in trouble. [Tr. 448] He testified that he had no knowledge that Cleveland was hurt [Tr. 451], or that she was in any danger of death, a victim of serious bodily injury or of a violent felony [Tr. 452, 453], or that she told him she was in any personal danger involving violence [Tr. 452]. He admitted in his testimony that he testified he never saw or talked to Michelle Cleveland

both times he was at her apartment. [Tr. 447]

Moreover, the Defendant willfully inflicted extensive offensive injuries to Weltikol and Elkins [Tr. 296, 385, 388-389] "An offensive wound is a wound intending to maim someone." [Tr. 273] The Defendant testified he could not remember where or how he knifed Elkins or Weltikol. [Tr. 449-450] Yet, after the Defendant took out the knife and purposely put it to Weltikol's throat that the Defendant later chased Elkins and stabbed him in the back of his head and back. [Tr.132] Elkins passed out. [Tr. 251] Testimony was that Weltikol suffered a major life threatening wound to the back of his neck [Tr. 296, 385] and the Defendant was the only one in the hall who had a knife. [Tr.447] Elkins testified that the Defendant chased Elkins and Elkins went down on the floor at or near the time he was stabbed in the back and the back of the head and the Defendant and Weltikol ran by him. [Tr. 132] Weltikol said that he saw the Defendant as he was coming to and he chased him. [Tr. 63] Dr. Lee indicated that Weltikol could not have given chase if he had to jump over an object during the chase if he received all four wounds in the north end of the hallway. [Tr. 300] Dr. Arce gave similar testimony. [Tr. 391] The Defendant testified that he could have stabbed Weltikol behind the back of the neck in the south end of the hallway. [Tr. 457] In light of the testimony from Dr. Arce that it would be highly unlikely for one to run 30 feet with the nature of all the injuries that Weltikol had [Tr. 391], the Defendant used excessive deadly force against Weltikol

when he pithed Weltikol after having inflicted prior injuries to Weltikol (remember, he chased the Defendant only after he came to, meaning he had been stabbed prior to him getting to the south end of the hall).

In the Defendant's Appeal Brief, he makes the isolated claim that it is not a crime to possess a knife. [Appellant's Br., p.21] Standing alone, this is correct. Yet, the Defendant did not possess the knife in isolation. The Defendant admitted to holding his knife to Weltikol's throat at a time when there was tension in the air [Tr. 450] and that his action was a dangerous act. [Tr. 451] Galgerud testified that the Defendant testified that Ballard told him he (Ballard) knew what he did was wrong. [Tr.335]

The Defendant's two different "self-defense" stories within a relatively short time of the incident, his "to protect himself" statement to Galgerud, the concentrated and extensive offensive injuries to Weltikol and Elkins and Tina Micke's testimony that the Defendant threw the first punch, all certainly provide the jury sufficient reason to find the Defendant's actions lacked self-defense and his credibility left something to be desired. The Defendant's lack of credibility is evident when one takes into account Elkins' testimony about being stabbed in the back of his head and his back by the Defendant as he tried to get away from him [Tr. 132] and the Defendant, who testified he could not remember where or how he knifed Elkins or Weltikol [Tr. 449-450], denied that he stabbed Elkins as Elkins tried to get away from

him. [Tr. 461-462] Despite his testimony that he didn't remember where or how he knifed either Weltikol or Elkins [Tr. 449-450], the Defendant was somehow able to testify extensively at the second trial as to what his state of mind was throughout his fighting and knifing of Weltikol and Elkins. [Tr. 434-444]

Obviously, the jury weighed the evidence and determined the credibility of the witnesses in this case in the jury's role of determining guilt or innocence. Thus, the testimony of all the witnesses was taken into account and the jury reached their decision as to the weight and credibility of the witnesses' testimony.

The apparent areas of where the Defendant seeks to apply his slant to is whether the Defendant acted with the requisite culpability and whether he acted in self defense, defense of others or excuse. It appears from the Appellant's Brief to be undisputed that the Defendant knifed both Weltikol and Elkins and inflicted on both of them serious bodily injury. To keep the self-defense argument going, the Defendant claims that Weltikol and Elkins were the aggressors. The Defendant's attempt to retry this case is contrary to the *McKing* decision, but the Defendant goes even further afield by asserting evidence only favorable to himself and such an approach is certainly beyond the standards put forth in the *McKing* case. Factual matters concerning culpability and self-defense were presented to the jury and the jury decided the State met its burden and found the Defendant guilty of both offenses. The

State asserts there certainly was sufficient evidence for the case to go to the jury.

A. Culpability

The Defendant attacks the trial judge's comments at the sentencing hearing as a means to establish the State failed to sufficiently establish the Defendant had the requisite culpability in this case. [Appellant's Brief, p.21] Such comments are relevant for sentencing purposes and did not enter into a determination of the Defendant's guilt. This point is supported by the fact that the jury, the finder of facts in this case, returned the two guilty verdicts over two months previous to the trial judge's sentencing comments.

In an apparent effort to retry the case, the Defendant improperly ignores the *McKing* standard that the Supreme Court "will look only to the evidence most favorable to the guilty verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction." *State v. McKing*, 1999 ND 81, ¶ 8, 593 N.W.2d 342. The Defendant claims that the jury was not impartial [Id, 22] and that State still needs to establish culpability. The jury was impartial and the Defendant's culpability was established. As to culpability, it can be established by circumstantial evidence. [Final Jury Instructions, Docket 311] The extensive offensive physical injuries to Weltikol and Elkins shows culpability. [*Supra* p 8-10] The Defendant threw the first punch and was the initial aggressor. [Tr.253, 255, 258, 261, 265, 266, Exhibit A-p.2] Also, the Defendant admitted that putting his

knife to Weltikol's throat before he was hit [Tr. 325] but when there was tension in the air was a dangerous act. [Tr. 451] This helps establish culpability.

Additionally, the Defendant could not answer why he didn't go to the police department or call 9-1-1 when he left the first time other than he thought Michelle was in trouble. [Tr. 448] He testified that he had no knowledge that Cleveland was hurt [Tr. 451], or that she was in any danger of death, being a victim of serious bodily injury or of a violent felony [Tr. 452, 453], or that she told him she was in any personal danger involving violence [Tr. 452]. He admitted in his testimony that he testified he never saw or talked to Michelle Cleveland both times he was at her apartment. [Tr. 447] Hanna testified the Defendant never asked about Cleveland's well-being when he returned to Hanna's place. {Tr. 351]

Galgerud testified that the Defendant told him he left Cleveland's apartment the first time "to retrieve a knife" [Tr. 324] and that "he (Ballard) went out to get the knife because there was two of them and one of him, and he wasn't going to get beat up without some protection." [Tr. 338] Galgerud also testified the Defendant "showed a little emotion" [Tr. 335] and said that the Defendant knew that he done wrong. [Id.] Ballard told Galgerud that he (Ballard) "was honest as I am going to be." [Tr. 338] By his own words, despite having been an ordeal, the Defendant was selective with Galgerud and was not totally honest with him.

When he returned to the apartment the second time, the Defendant persisted in his efforts to get into Cleveland's apartment [Tr.246, 253, 255-256, Exhibit A-p.2], Randy threw the first punch [Tr.253, 255, 258, 261, 265, 266, Exhibit A-p.2], he entered into mutual combat with Weltikol when they were arm to arm [Tr.77], and then the Defendant purposely took out the knife and put it to Weltikol's throat [Tr.436,] when such an act was dangerous to do so. [Tr. 451] Certainly, such use of force by the Defendant was, at the very least, reckless on his part, especially when one takes into account that the Defendant had no knowledge of Michelle Cleveland being in danger of death when he put the knife to Weltikol's throat. [Tr. 452]

The evidence shows the Defendant certainly used the knife, at the very least, with reckless, if not greater, culpability. The State established culpability in this case.

B. Justification and Excuse

The Defendant's brief fails to adequately address portions of NDCC 12.1-05-08 and NDCC 12.1-05-01(2). NDCC 12.1-05-01(2) makes unavailable the justification defense when a person acts recklessly or negligently and injures or creates a risk of injury to others. NDCC 12.1-05-08 provides that if a belief is negligently or recklessly held then it is not an excuse in a prosecution of an offense for which negligence or recklessness establishes culpability. In the case at hand, the Defendant admitted that his putting a knife to Weltikol's throat when there was tension in the air [Tr.

450] was a dangerous act. [Tr. 451] It would be certainly reasonable for the jury to determine that such a dangerous act was at the very least reckless on the Defendant's part and thereby deem neither justification or excuse to be available to the Defendant. Thus, finding the Defendant guilty.

1. Reasonableness of the Defendant's Belief in the need for self-defense, defense of others or excuse

Regarding self-defense, defense of others and excuse, the trial court instructed the jury the Defendant's reasonable belief must be viewed as set out in the jury instruction entitled "Reasonableness of Accused's Belief". [Final Jury Instructions, Docket 311]

In an apparent effort to retry the case, the Defendant improperly ignores the ***McKing*** standard that the Supreme Court "will look only to the evidence most favorable to the guilty verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction." ***State v. McKing***, 1999 ND 81, ¶ 8, 593 N.W.2d 342. The Defendant threw the first punch and then Tina Micke got out of the way of the door. [Tr.253, 255, 258, 261, 265, 266, Exhibit A-p.2] As the initial aggressor, the Defendant is not entitled to the benefits of self-defense. [Final Jury Instructions, Docket 311] Defendant was budging at the door to get in the apartment. [Tr. 255-256; R. 307 Exhibit A, p.2] Also, the Defendant admitted that his putting his knife to Weltikol's throat when there was tension in the air [Tr. 450] was a dangerous act. [Tr. 451] One is not entitled to the benefits

of self-defense, defense of others or excuse if they were the initial aggressor, mutual combatant, provoker of an unlawful action, or user of excessive force. In support of the Defendant being the initial aggressor is the Defendant's self-defense claim to Melissa Scheen and Brandon Hanna that two guys jumped him and one of them had a knife so he (the Defendant) had to use his knife. [Tr. 96, 97,346,348,349,350, and 360]. Weltikol testified that was mutual combat between the Defendant and himself. [Tr. 77] As to the stabbing of Elkins as he ran away from the Defendant and the pithing of Weltikol in the south end of the hallway, such extreme use of offensive force was clearly excessive. This last point is buttressed by the fact the Defendant said he had been punched or struck for just some 10 to 15 seconds when he decided to use his knife. [Tr.439-440] In the end, any one of these factors would have stopped the Defendant's claim for self-defense, defense of others or excuse.

Certainly, favorable to the State was the testimony by Melissa Scheen and Brandon Hanna wherein Defendant Ballard initially claimed one of the two other guys drew a knife on him and so he had to use his knife, along with the medical testimony of the extensive offensive wounds to Weltikol and Elkins (***supra***, pages 10-11), and Elkins' own testimony as to how he was stabbed in the back of his head and back [Tr. 132] and the Defendant threw the first punch [Tr. 255,258,261,265, 266, Exhibit A].

Certainly if the jury deemed this matter to be applicable

during their deliberations they would have placed themselves in the Defendant's shoes. The jury would have probably looked at the Defendant as a knowledgeable and experienced knife man who knew full well how to use a knife and had already admitted that it was dangerous [Tr. 451] for him to place a knife to Weltikol's throat when there was tension in the air. [Tr 450] The use of the knife in the extreme manner it was used by a knowledgeable knife person is clearly excessive for the reasons stated above.

2. Intentional Provocation of an Unlawful Act By Another to Cause Bodily Injury or Death to Such Other Person

Part of a jury instruction given to the jury entitled "Self-Defense" included the provision that "One is not justified in using force if one can cause bodily injury or death to the other person and had intentionally provoked the danger defended against...." [Final Jury Instructions, Docket 311]

In an apparent effort to retry the case, the Defendant improperly ignores the ***McKing*** case. [See authority and text to Section II. B. 1 of this Brief] The Defendant's admission to putting his knife to Weltikol's throat when there was tension in the air [Tr. 450] was a dangerous act and comes close to an intentional act of provocation. Even if it does not, the initial aggressor act by the Defendant negates self defense.

3. Mutual Combat and Initial Aggressor

Part of a jury instruction given to the jury entitled "Self-Defense" included the provision that "One is not

justified in using force if one ... has entered into mutual combat with another person or is the initial aggressor, unless resisting force that is clearly excessive in the circumstances." [Final Jury Instructions, Docket 311]

In the continued apparent effort to retry the case, the Defendant improperly ignores the ***McKing*** case. [See authority and text to Section II. B. 1 of this Brief] Contrary to the Defendant's positioning, the Defendant threw the first punch and was the initial aggressor. [Tr.253, 255, 258, 261, 265, 266, Exhibit A-p.2] He was also the initial aggressor when the Defendant purposely took out the knife and put it to Weltikol's throat [Tr.436,] when such an act was dangerous to do so. [Tr. 451] The Defendant entered into mutual combat with Weltikol when they were arm to arm. [Tr.77]

The Defendant was not entitled to a self defense finding.

4. Use of Defensive Force After Withdrawal

Part of the jury instruction given to the jury entitled "Self-Defense" included the provision that "A person's use of defensive force is justified if, after one withdraws from an encounter and has indicated to the other person that one has done so, the other person nevertheless continues or menaces unlawful action."[Final Jury Instructions, Docket 311] This provision is not available to the initial aggressor.

Again, the Defendant improperly ignores the ***McKing*** case. [See authority and text to Section II. B.]

Contrary to the Defendant's positioning, the Defendant threw the first punch and was the initial aggressor. [Tr.253,

255, 258, 261, 265, 266, Exhibit A-p.2] He was also the initial aggressor when the Defendant purposely took out the knife and put it to Weltikol's throat [Tr.436,] when such an act was dangerous to do so. [Tr. 451] In support of the Defendant being the initial aggressor is the Defendant's self-defense claim to Melissa Scheen and Brandon Hanna that two guys jumped him and one of them had a knife so he (the Defendant) had to use his knife. [Tr. 96,97,346,348,349,350, and 360]. Even if this defensive force provision was applicable to the Defendant, the clearly excessive amount of offensive force inflicted by the Defendant against Weltikol at the south end of the hallway negates any form of self-defense, defense of others or excuse being available. After all, Weltikol had been previously slashed by the Defendant in the corner and blacked out.

5. No More Force and What Was Necessary and Appropriate Under the Circumstances

Part of a jury instruction given to the jury entitled "Limits on Use of Excessive or Deadly Force" included the provision that "A person is not justified in using more force than is necessary and appropriate under the circumstances." [Final Jury Instructions, Docket 311] This provision is not available to an initial aggressor.

Again, the Defendant improperly ignores the ***McKing*** standard to simply re-argue her case. [See authority and text to Section II. B. 1 of this Brief]

Again, this self defense provision is not applicable to

initial aggressors and the Defendant was the initial aggressor in this case as previously determined by the jury and stated in the proceeding sections.

6. Deadly Force Justified

Part of a jury instruction given to the jury entitled "Limits on Use of Excessive or Deadly Force" included the provision that "Deadly force is justified if it is used in lawful self-defense, or in lawful defense of others, and the force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence." [Final Jury Instructions, Docket 311] This provision is not available to an initial aggressor and as previously discussed in this Brief, the Defendant was the initial aggressor in this case.

Again, the Defendant improperly ignores the ***McKing*** standard. [See authority and text to Section II. B. 1 of this Brief] Tying in the previous discussions in this Brief as to the Defendant's initial aggressor actions in this case, this matter was adequately addressed when the jury was instructed by the trial court. Moreover, the use of deadly force when one engages in a fist fight is clearly excessive and not justified, especially in light of the minimal injuries to the Defendant.

7. ***Excuse and Defense of Others***

The jury was properly instructed on excuse, defense of others and deadly force. The Defendant's desire to reargue the case is curious since the jury already decided this case

and under the ***McKing*** standard the Supreme Court "will look only to the evidence most favorable to the guilty verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction." ***State v. McKing***, 1999 ND 81, ¶ 8, 593 N.W.2d 342. Neither Excuse or defense of others is available to initial aggressors and the Defendant was the initial aggressor in this case. [Tr. 253, 255, 258, 261, 265, 266, Exhibit A-p.2]

8. Application of NDCC 12.1-05-01(2)

The jury was properly instructed on NDCC 12.1-05-01(2) since it was a portion of the jury instruction entitled "Use Of Force Justified Or Excused" [Final Jury Instructions; Docket 311] The Defendant's desire to reargue the case is curious since the jury already decided this case and the ***McKing*** ruling applies to this case. [See authority and text to Section II. B. 1 of this Brief] Neither Justification or Excuse is available to initial aggressors and the Defendant was the initial aggressor in this case. [Tr. 253, 255, 258, 261, 265, 266, Exhibit A-p.2] Additionally, the Defendant was reckless in his belief on the use of force (use of the knife to Weltikol's throat) as being necessary to protect himself from unlawful imminent serious bodily injury. The Defendant was involved for the most part in an argument with Weltikol when he decided to put the knife to Weltikol's throat. He was the initial aggressor when the Defendant purposely took out the knife and put it to Weltikol's throat when there was tension in the air [Tr.436, 450] and the Defendant agreed such an act was

dangerous. [Tr. 451]

The Defendant left Michelle Cleveland's apartment the first time and went to his vehicle, got his knife, took it out of the sheath and put it in his rear pocket. [Tr. 451] The Defendant testified that he returned with the knife since he "didn't know what was going on.... And as a measure.... To scare them, if anything." [Tr.433] Yet, the Defendant certainly intended to use the knife, at the very least, in a reckless, if not deadly, fashion. The Defendant testified he purposefully held the knife to Weltikol's throat in an effort to get "him to see it, get him to back up." [Tr. 436] He said he put his "knife to his (Weltikol's) throat thinking he won't do nothing. And, then his buddy pounded my face in." [Tr. 446] The Defendant admitted that holding a knife to another's throat was a dangerous act when there was tension in the air. [Tr. 451] He admitted that there was tension in the air when he held the knife to Weltikol's throat. [Tr.450]

In his re-argument of the case, the Defendant, failing to cite any authority, asserted that there was no competent evidence that would allow the jury any reasonable inference tending to prove guilt or warranting a conviction." [Appellant's Brief, p.20] In denying the Defendant's Motion for Acquittal, Judge Rustad said that "there was an awful lot of evidence at the trial from an awful lot of sources. And as is normal in a long contested trial, each side remembers the testimony that is favorable to their theories. Each side falls in love with them and forgets there is other testimony or other

explanations as to why the testimony might have this slant or that slant or another slant." [Tr. 557-558].

The Defendant's attempt to retry this case is contrary to the ***McKing*** decision, but the Defendant goes further afield by asserting evidence only favorable to himself and such action is certainly beyond the standards put forth in the ***McKing*** case. The testimony of Weltikol, Elkins, Melissa Scheen, Brandon Hanna, Dr. Lee, Dr. Arce and Detective Galgerud established sufficient evidence for the case to go to the jury. The trial court did not error in denying the Defendant's motion for acquittal.

II. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR NEW TRIAL.

A. The Defendant's Claim That Tina Micke Committed Perjury Is Without Merit.

In ***State v. Mertz*** 535 NW2d 834, this Court stated that "If the State knowingly uses perjured testimony the defendant's due process right to a fair trial is violated, and the conviction must be set aside if there is any reasonable likelihood the false testimony could have affected the verdict. ***E.g., United States v. Agurs***, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342, 349-350 (1976); ***Napue v. Illinois***, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217, 1221 (1959); ***State v. Thiel***, 515 N.W.2d 186, 190 (N.D.1994). However, merely showing that the witness has made prior statements inconsistent with her trial testimony does not establish that the State knowingly used false or perjured testimony." [authority omitted] ***Mertz v. State***, 535 NW2d 834 at ¶¶ 10 and 11, 535 N.W.2d 834 at 838 (ND

1995).

In the Defendant's argument for a new trial due to the prosecutor's use of perjured testimony, the same allegation of perjury by Tina Micke was raised as what was previously improperly raised (failed to meet the 7 day deadline in Rule 33(c), NDRCrimPro) in the Defendant's Reply Brief to the trial court. [Compare Appellant's Brief 34-40 to Clerk's Docket Number 337, p. 10-15] Even taking into account the late and untimely issues raised by the Defendant, the trial court denied the Defendant's claim of perjury. [Tr. 558-559]. In denying the Defendant's claim of perjury by Tina Micke, the trial court commented that "[A]s to the perjury, because parties had alerted me to that potential early on that there was earlier trials and inconsistent statements, obviously I paid considerable attention to the testimony to determine if there was trouble in those areas. And I will agree there were inconsistent statements made from the time that initial interviews were made, through the first trial, through the second trial. Most of the differences related to what question was asked and how the question was phrased rather than a difference in describing what they may have seen or said or heard." [Tr. 558]

In support of the trial court's ruling, Tina Micke testified that she saw Defendant Ballard throw the first punch [Tr. 247][*Supra* pages 5-6] and that she, at most, was impeached as to her location when she saw Defendant Ballard throw the first punch. Tina Micke testified on direct examination that

she was in the kitchen when she saw Defendant Ballard throw the first punch. [Tr. 248] On cross examination she testified that she was behind the door and saw "through the crack in the door" [Tr. 255; also 261] Ballard throw the first punch. Defense attorney Bosch brought out that Tina Micke has a disability and is a slow learner. [Tr. 256] Micke testified that she has problems remembering what is said but not what she sees. [Tr. 257] On redirect, Tina Micke testified that she was behind the door when she saw Defendant Ballard throw the first punch. [Tr. 265]

When asked on re-direct to clarify her testimony in cross examination about seeing through a crack in the door, Tina Micke testified "Well, I saw them through -- I am confused myself when you were asking me the question. I saw him (Ballard) throw the punch through the crack of the door, and then I moved out of the way." [Id] Micke was asked to further clear up this matter. She then showed the jury where she was when she saw the Defendant throw the first punch as she testified "Yes. This is the door right here, and there is the crack. I was standing like right here (behind the door), and then I saw him throw the punch, and then I moved out of the way." [Id]

Further, at the first trial, Tina Micke testified that she "was behind the door." [1st Trial Tr., 102] and that Randy threw the first punch. [Id., at 103] This is consistent with her clarifying in the second trial. The fact she gave inconsistent testimony in the second trial as to her location does not

transform her testimony to that of perjury. ***Mertz,*** 535 NW2d at ¶ 12, 535 N.W.2d at 838 ("The Rules of Evidence specifically envision impeachment by prior inconsistent statements. ***See*** Rules 613(b) and 801(d), N.D.R.Evid.") Rather, impeachment of Tina Micke by way of her inconsistent "location" statement was a weight and credibility matter to argue before the jury. Defendant Ballard's counsel made such an argument. [Tr.510-511] In response to the Defendant's argument that it was impossible for a person to be between the door and the wall behind the door [Tr. 510-511], the State played a portion of Exhibit 7 (the video) that showed the jury that the door frame to Michelle Cleveland's apartment was not immediately next to the wall [Tr. 523-524] which was contrary to the Defendant's closing argument claim (and also contrary to the Defendant's impermissible non-record diagram with editorial comments that the Defendant improperly included with the State's copy of the Appellant's Brief) that there was no space for Tina Micke to be behind the door. The State was merely responding to the Defendant's closing argument attack on Tina Micke since the Defendant needed to create doubt on her credibility. The State also pointed out that Tina Micke told Galgerud on April 23, 1999 that she was standing behind the door and saw Defendant Ballard throw the first punch. [Tr. 533]

The inconsistent testimony by Micke on her location cannot be deemed tantamount to be a false statement so to trigger the remedy set out in ***Mertz,*** since Mickie's inconsistent testimony on her location did not have a "reasonable likelihood" to have

affected the verdict with the matter having been clarified on both cross-examination and re-direct before the case was submitted to the jury. This point is consistent with the fact the jury in this case was instructed by the trial court in the preliminary instructions to "not decide any issue in this case until all the evidence is in and the case is finally submitted to you for your deliberation under the instructions of the Court." [Appellant's Appendix,] At most, the inconsistent testimony of Tina Micke goes to issues of weight and credibility. ***Mertz***, 535 NW2d ¶ 12. Also, it is significant that the ***Agurs*** case cited in the Appellant's Brief (page 39) and in the ***Mertz*** case involved an instance were the evidence of the victim's criminal record was not revealed to the jury prior to their deliberations. ***Agurs***, 427 U.S. 97, 100, 96 S.Ct. 2392, 49 L.Ed.2d 342, 348 (1976) Such was not the case here.

Even if Micke's inconsistent testimony is deemed to be false, though the State does not deem it to be, the other evidence in this implicating the Defendant prohibits there from being any reasonable likelihood the inconsistent testimony affected the guilty verdicts. This point is supported by, but not limited to, the previously discussed testimony of Dr. Lee and Dr. Arce concerning the extensive offensive wounds to Weltikol and Elkins (***supra, pages 8-10)***, and the testimony Melissa Scheen and Brandon Hanna wherein they each state separately that Defendant Ballard claimed to have been jumped by two individuals, one of whom had a knife, and so he had to use his knife (***supra, pages 10-11)***, and the Defendant's

admission that putting a knife to another's throat when there was tension in the air was a dangerous act. ***(supra, page 7).***

The trial court was correct in its ruling that there was no perjury by Tina Micke and that the differences in the answers was due to how the questions were asked of the witness. Moreover, the other evidence fails to support a new trial for the Defendant.

B. The Trial Court Properly Instructed the Jury on Self-Defense

The Defendant claims the prosecutor, during closing arguments, made an inappropriate argument by telling the jury to ignore the first paragraph of the Use of Force Justified or Excused Instruction. [Appellant's Brief, 40] In ***State v. Smith,*** 1999 ND 109, 595 NW2d 565, this Court cited with approval **State v. Thiel**, 411 N.W.2d 66, 71 (N.D.1987), that

> "'[g]enerally...inappropriate prosecutorial comments, standing alone, do not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding.' The control of closing arguments is largely within the discretion of the district court, and we will not reverse on the ground that a prosecutor exceeded the scope of permissible closing argument unless a clear abuse of discretion is shown.

State v. Weatherspoon, 1998 ND 148, ¶ 23, 583 N.W.2d 391 (citing ***State v. Ash***, 526 N.W.2d 473, 481 (N.D. 1995)). 'Argument by counsel must be confined to facts in evidence and

the proper inferences that flow therefrom.' ***Id.*** (quoting ***State v. Kaiser***, 417 N.W.2d 376, 379 (N.D.1987)). 'On appeal, this court ''must consider the probable effect the prosecutor's [inappropriate comments] would have on the jury's ability to judge the evidence fairly.'' ***Id.*** (quoting ***Grand Forks v. Cameron***, 435 N.W.2d 700, 704 (N.D.1989) (quoting ***United States v. Young***, 470 U.S. 1, 12, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985))). Improper argument is prejudicial when it causes the defendant substantial injury and a different decision would have resulted, absent the error. ***State v. Carlson***, 1997 ND 7, ¶ 43, 559 N.W.2d 802 (citing ***State v. Azure***, 525 N.W.2d 654, 656 (N.D.1994)). To preserve the issue for appeal, the defendant must object to the State's improper closing argument and request a curative instruction. ***Id.*** " ***State v. Smith***, 1999 ND 109, ¶ 7 and 8, 595 NW2d 565, 566-567. Defendant Ballard's counsel timely and properly objected to the statement, and the trial court immediately gave a curative instruction and told the jury to follow the Court's instruction. [Tr. 537] Absent the error, the State asserts, as set out in the prior portions of this Brief, there was sufficient evidence for the jury's finding Defendant Ballard guilty of two counts of Aggravated Assault and thus there was no prejudice to the Defendant.

In support of this last point, the State asserts that the trial court instructed the jury "not decide any issue in this case until all the evidence is in and the case is finally submitted to you for your deliberation under the instructions of the Court." [Preliminary Jury Instructions, Docket 310] The

State notes it's inappropriate closing argument that a portion of an instruction should be ignored was followed by the Defendant's objection and the trial court's immediate curative instruction. Defendant Ballard's chances for a fair trial were not affected due not only to the objection and the curative instruction given, but also since jury instructions are to be considered as a whole in determining whether a particular instruction was misleading. ***State v. Skjonsby***, 319 N.W.2d 764, 774 (ND 1982). Applying this "considered as a whole" approach to the case at hand, the inappropriate argument regarding a portion of the Use of Force Justified or Excused Instruction and was not directed at the other remaining jury instructions, including but not limited to, instructions entitled "Use of Force," "Self Defense," "Justification" and "Excuse". [See Final Jury Instructions, Docket 311] The remaining jury instructions, coupled with the objection and the curative instruction, clearly establish that Defendant Ballard's chance for a fair trial was not affected. Additionally, the trial court instructed the jury from the instruction entitled "Duty to Accept Law From The Court" that the jury had a "duty to accept the law as it is given by the Court in these instructions...." [Id] The jury was received the instruction entitled "Statements by Counsel and Judge" that: "If counsel have made any statements as to the law which are not supported by these instructions, you should disregard those statements." [Id] Thus, the inappropriate argument at issue here could not have affected the jury's ability to judge the evidence fairly

and does not justify reversal of the two guilty verdicts. ***State v. Smith***, 1999 ND 109 at ¶ 9.

In the end, the Defendant has failed to establish that the trial court abused it discretion when it denied the Defendant's Motion For A New Trial.

III. CONCLUSION

Based on the above, the Defendant failed to meet his burden of establishing the trial court abused its discretion when it denied the Defendant's Motion For Acquittal. Also, the Defendant has failed to establish that there was any perjury by Tina Micke. Nor has Defendant Ballard established that the Prosecutor's improper argument affected the jury's verdicts in this case since the trial court gave a curative instruction at the time of the defendant's objection and also instructed the jury that it had a duty to follow the law and to disregard counsel statements of the law that are not supported by the jury instructions.

The State respectfully prays that this Court deny the Defendant's requested relief for remand and the entry of a judgment of acquittal along with denial of the alternate remedy of a new trial from the jury's finding of guilty to both counts of Aggravated Assault and affirm in all things the Defendant's judgment of conviction.

Respectfully submitted this 20th day of July, 2001.

Doug Mattson (Id # 04292)
Ward County State's Attorney
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701/857-6480

STATE OF NORTH DAKOTA)
)ss
COUNTY OF WARD)

AFFIDAVIT OF MAILING

Doug Mattson, being first duly sworn, deposes and says:

That he is a citizen of the United States, over the age of eighteen years, and not a party to the within-entitled action;

That he served the attached Appellee's Brief and Appellee's Appendix upon the Appellant by placing a true and correct copy thereof in an envelope addressed as follows:

Debra Edwardson
Attorney at Law
#7A Central Ave. East Suite 303
Minot, ND 58701

and depositing the same, with postage prepaid, in the United States mail at Minot, North Dakota, on the 20th day of July, 2001.

That regular mail service exists between Minot, North Dakota, and the point of address.

Doug Mattson
Doug Mattson

Subscribed and sworn to before me this 20th day of July, 2001.

LeAnn J. Traeger
Notary Public
Ward County, North Dakota
My Commission Expires: 4-14-2004