ORIGINAL (e-filed)

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20060300

State of North Dakota, Appellee, vs. Joseph Rogers, Appellant.	Supreme Court No.: 20060300 Ward Co. No.: 51-04-K-1873 (001/002) Appellant's Brief

Brief of Appellant Joseph Rogers

Appeal from the District Court

Judgment of Conviction of October 3, 2006

Ward County, North Dakota

Northwest Judicial District

Honorable Gary Lee

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STATEMENT OF ISSUES

[¶1] I. Whether the District court erred when it denied Defendant's motion for a directed verdict on the grounds the evidence presented was legally insufficient to support a guilty verdict of a Class C felony violation of sexual assault in violation of NDCC 12.1-20-07.

[¶2] II. Whether the district court erred when it refused to allow a lesser included jury instruction regarding the criminal trespass charge.

STATEMENT OF THE CASE

[¶3] In this matter, Defendant/Appellant Joseph Rogers (Rogers) had sexual intercourse with Carrie Hopponen in her hotel room at the Sleep Inn, on or about July 21, 2004. Rogers was employed by the Sleep Inn and working the front desk at the time of the encounter. Carrie Hopponen invited Rogers into her room and asked him to come back later that night. From this incident, Rogers was charged with Criminal Trespass, a Class C Felony and Sexual Assault, also a Class C Felony.

[¶4] The Information that was filed on May 4, 2006, charges Rogers with Criminal Trespass, a class C felony, and Sexual Assault, a class C felony, claiming that Rogers was "in violation of Section(s) 12.1-22-03 and 12.1-20-07 of the North Dakota Century Code." (Information, May 4, 2006):

> "Count 1: The defendant, knowing that he was not licensed or privileged to do so, entered or remained in a dwelling or in a highly secured premise, to wit, the defendant, knowing he was not licensed or privileged to do so entered the motel room registered to Carrie Hopponen. Said offense is a class C felony.
>
> Count 2: The defendant knowingly had sexual contact with another person, and knew or had reasonable cause to believe that the contact was offensive to the other person and/or knew or had reasonable cause to believe that the other person suffered from a mental disease or defect

> which rendered that other person incapable of understanding the nature of that other person's conduct, to-wit the defendant knowingly had sexual contact with Carrie Hopponen, and knew or had reasonable cause to believe that Carrie Hopponen was passed out from intoxication which rendered her incapable of understanding the nature of his conduct. Said offense is a class C felony." (Information. May 4, 2006).

[¶5] Defense counsel. Tom Slorby. at the end of the preliminary hearing held on May 4, 2006, with regards to the Sexual Assault charge moved to dismiss the felony complaint on the grounds that there was no evidence of the victim suffering from a mental disease or defect, nor was there any evidence that Joseph Rogers administered or furnished Carrie any intoxicants or controlled substances. The Court stated:

> "With respect to the sexual assault one, I am not sure either, Mr. Slorby, whether this is the appropriate section to be involved in this but I guess I am not sure what other section would be involved. Basically. Mr. Rogers, the State states that you---their version of this is that you saw a young woman who was intoxicated and you took advantage of her, which would constitute sexual assault." pages 36 beginning on line 23 through line 8 page 37 of the preliminary hearing transcript.

[¶6] During the trial on June 22 -23, 2006, several objections were raised regarding jury instructions, both of which were denied by District Court Judge Gary Lee (Tr. of Proceedings June 22-23, 2006 and October 2. 2006, page 204-209). The first objection was that the Prosecution presented no evidence that the victim "...suffered from a mental disease or defect which rendered that person incapable of understanding the nature of that other person's conduct." (Tr. of Proceedings June 22-23. 2006 and October 2. 2006, page 206, lines 15-17). Thus, the jury instructions should not have included "mental disease or defect" since "intoxication does not. in itself constitute a mental disease or defect," (N.D.C.C § 12.1-04-02). This motion was denied.

[¶7] The second objection was in reference to the criminal trespass jury instruction. Rogers requested the misdemeanor instruction that states "...that a person enters or remains in any building or occupied or storage structure, or separately secured or occupied portion thereof; or enters or remains in any place so enclosed as manifestly to exclude intruders," (Tr. of Proceedings June 22-23, 2006 and October 2, 2006, page 205, lines 8-12), be included in the jury instructions since a hotel room is not a "dwelling or highly secured premise" (Tr. of Proceedings June 22-23, 2006 and October 2, 2006, page 205, line 13-15). This motion was also denied.

[¶8] A jury convicted Rogers of one count Criminal Trespass and one count Sexual Assault on June 23, 2006. On October 2, 2006, Rogers was sentenced by the trial court. On count 1, Criminal Trespass, Rogers was sentenced to five (5) years in the North Dakota State Penitentiary. On count 2, Sexual Assault, Rogers was sentenced to a consecutive sentence of five (5) years at the North Dakota State Penitentiary, with four (4) years suspended for ten (10) years (Tr. of Proceedings June 22-23, 2006 and October 2, 2006, page 296, lines 13-17). Rogers was also ordered to register as a sex offender after his release from incarceration and pay restitution, even though the victim had already been compensated under a civil lawsuit (Tr. of Proceedings June 22-23, 2006 and October 2, 2006, page 287, lines 19-20). A criminal judgment was entered on October 3, 2006.

[¶9] At the close of the State's case, Defendant made a motion for a directed verdict with regard to subsection 2 of 12.1-20-07 (b): "that person knows or has reasonable

cause to believe that the other person suffers from a mental disease or defect which renders that other person incapable of understanding the nature of that other person's conduct;"

[¶10] On appeal, Rogers requests that this Court reverse the convictions from the trial court and reduce the Criminal Trespass and Sexual Assault charges from Class C felonies to Class A misdemeanors, thereby reducing his punishment.

ARGUMENT AND AUTHORITIES

[¶11] This Court has jurisdiction under N.D.C.C. § 29-28-03, an appeal may be taken as a matter of right from all verdicts, judgments or orders enumerated under N.D.C.C. § 29-28-06

[¶12] THE EVIDENCE PRESENTED WAS LEGALLY INSUFFICIENT TO SUPPORT A GUILTY VERDICT TO A CLASS C FELONY VIOLATION OF SEXUAL ASSUALT.

[¶13] To successfully challenge the sufficiency of evidence on appeal, defendant must show that the evidence, when viewed in the light most favorable to the verdict, permits no reasonable inference of guilt. (State v. Fasching, 461 N.W.2d 102 (N.D. 1990)).

[¶14] In State v. Himmerick, 499 N.W.2d 568, 572 (N.D. 1993):

> "We announced a departure from a well-established rule of law, which required any defendant to make a motion of acquittal under N.D.R.Crim.P. 29 to preserve an issue of sufficiency of the evidence for appellate review. We held the

procedural requirement of making a motion for acquittal under N.D.R.Crim.P. 29 was unnecessary in bench trials, where a judge rather than a jury acts as factfinder. Id. Nonetheless, we expressly declared in Himmerick this new rule did not apply in civil cases, criminal jury cases, or "challenges based on the weight of the evidence" as opposed to challenges based on the sufficiency of the evidence." Id.

[¶15] Evidentiary sufficiency and evidentiary weight are distinct concepts. In State v. Kringstad, 353 N.W.2d 302 (N.D. 1984), we explained:

> "A conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. When a court, be it an appellate court or a trial court on motion for entry of a judgment of acquittal, concludes that evidence is legally insufficient to support a guilty verdict, it concludes that the prosecution has failed to produce sufficient evidence to prove its case. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial in such a case."

[¶16] Joseph Rogers was charged in the information with the crime of sexual assault in violation of 12.1-20-07 of the North Dakota Century Code. Count two of the information charging Joseph Rogers with the crime of sexual assault reads as follows:

> "The defendant, knowingly had sexual contact with another person, and knew or had reasonable cause to believe that the contact was offensive to the other person and/or knew or had reasonable cause to believe that that the other person suffered from a mental disease or defect which rendered that other person incapable of understanding the nature of that other person's conduct, to wit, the defendant knowingly had sexual contact with Carrie Hopponen and knew or had reasonable cause to believe that such contact was offensive and/or knew or had reasonable cause to believe that Carrie Hopponen was passed out from intoxication which rendered her incapable of understanding the nature of his conduct. Said offense is a class C felony."

[¶17] North Dakota Century Code 12.1-20-07. Sexual assault reads:

1. A person who knowingly has sexual contact with another person, or who causes another person to have sexual contact with that person, is guilty of an offense if:

a. That person knows or has reasonable cause to believe that the contact is offensive to the other person;

b. That person knows or has reasonable cause to believe that the other person suffers from a mental disease or defect which renders that other person incapable of understanding the nature of that other person's conduct;

c. That person or someone with that person's knowledge has substantially impaired the victim's power to appraise or control the victim's conduct, by administering or employing without the victim's knowledge intoxicants, a controlled substance as defined in chapter 19-03.1, or other means for the purpose of preventing resistance;

d. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over that other person;

e. The other person is a minor, fifteen years of age or older, and the actor is the other person's parent, guardian, or is otherwise responsible for general supervision of the other person's welfare; or

f. The other person is a minor, fifteen years of age or older, and the actor is an adult.

2. The offense is a class C felony if the actor's conduct violates subdivision (b), (c), (d), or (e) of subsection 1, or subdivision (f) of subsection 1, if the adult is at least twenty-two years of age, a class A misdemeanor if the actor's conduct violates subdivision (f) of subsection 1 if the adult is at least eighteen years of age and not twenty-two years of age or older, or a class B misdemeanor if the actor's conduct violates subdivision (a) of subsection 1. (Emphasis added).

[¶18] Subsections (c), (d), (e), and (f) are not applicable to this case. As to subsection (c), the evidence is clear that Joseph Rogers did not drink with or furnish Carrie Hopponen with any alcohol or other beverages. As to subsection (d), Carrie Hopponen was not detained or in custody in any institution where Joseph Rogers had supervisory or disciplinary authority over her. As to subsection (e) and (f), Carrie Hopponen was more than fifteen years of age and Rogers was not her parent or guardian.

[¶19] Subsection (b) of the statute states that a person having sexual contact with a person and knowing such contact is offensive to the other person violates subsection (1) (a) and is a class B misdemeanor.

[¶20] To sustain a class C felony conviction in violation of 12.1-20-07 (b), the State must prove two elements; One, that the victim suffers from a "mental disease or defect," and two, the actor knew or had reasonable cause to believe that the other person suffered from a mental disease or defect which renders that other person incapable of understanding the nature of the actor's conduct:

[¶21] No evidence was presented that Carrie Hopponen suffered from a "mental disease or defect" She admitted to having undergone alcohol treatment and treatment for depression. On cross examination she testified (Tr. of Proceedings June 22-23, 2006 and October 2, 2006, page 56, lines 23-25, page 58, lines 1-19):

"Q: Now, you earlier stated you were socially drinking, correct?
A: Yes.
Q: Later on you said you were probably pretty drunk, correct?
A: Yes.
Q: And then you also testified earlier that as a result of this you had been depressed and in treatment, correct?
A: Yes.
Q: But you have been in treatment before this event, haven't you?
A: Yes.
Q: For drinking, right?
A: Depression.
Q: And drinking?
A: Well, once I was in there.
Q: What?
A: Once I was in there for depression and they did an evaluation for me and they thought I should have some sort of addiction counseling also.
Q: Prior to you ever coming up – by the way, when did that happen?
A: 2001, I believe.
Q: What?

A: 2001.
Q: You also take antidepressant pills?
A: Yes.
Q: You didn't tell Joe that you had a drinking problem, did you?
A: No.
Q: You didn't tell him that you were taking any kind of medication, did you?
A: No.
Q: And other than you drinking and your – you didn't tell Joe that you had any kind of mental disease or defect, did you?
A: No.
Q: You don't have one, do you?
A: I suffer from depression.
Q: You don't have a mental disease or defect, do you? You know what you are doing?
A: Yes.
Q: You have done a good job working for Applebee's, haven't you?
A: I hope so.
Q: You were suffering from depression prior to your – this incident in Minot?
A: Yes."

[¶22] Carrie Hopponen is a bright young lady; she is not mentally retarded nor does she have a borderline IQ. Carrie Hopponen held a managerial position with Applebee's restaurant; a position which required her to make important day to day decisions. Carrie Hopponen, by her own admission, does not have a mental disease or defect.

[¶23] The North Dakota Century Code in the Chapter 25 relating to Mental Health

> **25-01-01. Definitions.** In this title, unless the context or subject matter otherwise requires:
>
> 3. "Mentally deficient person" means any person, minor or adult other than a mentally ill person, who is so mentally defective as to be incapable of managing that person's affairs and to require supervision, control, and care for that person's own or the public welfare.
>
> 4. "Mentally ill individual" means an individual having a psychiatric or other disease which substantially impairs the individuals health.
>
> .W.2d 302, 306 (N.D. 1984) (citations omitted).

[¶24] Carrie Hopponen was not a minor, nor was she detained in a hospital, prison or other institution. No evidence was presented that she was suffering from an organic, mental, or emotional disorder. Nor did she exhibit any manifestations of a substantial disturbance in behavior, feeling, thinking, or judgment to such an extent that she required care, treatment, and rehabilitation.

[¶25] Arguing the facts most favorable to the prosecution that she was highly intoxicated, the Prosecution has at best proved a class B misdemeanor violation of NDCC 12.1-20-07. Evidence was presented that Carrie Hopponen was drinking on the evening in question with friends from work. However, no evidence was presented that Joseph Rogers was aware of the degree of her intoxication. Assuming, however, Rogers was aware of her degree of intoxication; this does not raise his acts to the level of a class C felony. It may, for purpose of argument, negate her consent to having sexual contact with Rogers which would at most violate subsection 1 (a) of 12.1-20-07, a class B misdemeanor.

[¶26] Carrie Hopponen's voluntary intoxication does not constitute a mental disease or defect. The North Dakota Century Code 12.1-04-02. Intoxication.

> 1. Intoxication is not a defense to a criminal charge. Intoxication does not, in itself, constitute mental disease or defect within the meaning of section 12.1-04-04. Evidence of intoxication is admissible whenever it is relevant to negate or to establish an element of the offense charged.
>
> 2. A person is reckless with respect to an element of an offense even though his disregard thereof is not conscious; if his not being conscious thereof is due to self-induced intoxication.

[¶27] The extent of a victim's state of intoxication is relevant only to the issue of whether the victim consented to the alleged sexual contact. Mere intoxication does not in itself negate consent to engaging in a sexual act. It may be relevant where a person is so intoxicated that they are unaware of the act as where a person is "passed out." In which case. the offense would be a violation of NDCC 12.1-20-07(1) (a), a class B misdemeanor.

[¶28] Joseph Rogers did not know Carrie Hopponen. He first met her in the lobby of the motel. He had no knowledge or reason to believe that Carrie Hopponen suffered from a mental disease or defect. Carrie Hopponen testified that she did not suffer from a mental disease or defect. She also testified that Joseph Rogers did not furnish her any alcohol or other drinks. Although she had been treated for alcoholism and depression, she did not relay this information to Joseph Rogers. Her intoxication was the result of voluntary acts on her part.

[¶29] The applicable section of 12.1-20-07 being: A person who knowingly has sexual contact with another person. or who causes another person to have sexual contact with that person, is guilty of an offense if:

> a. That person knows or has reasonable cause to believe that the contact is offensive to the other person;

[¶30] Voluntary intoxication is not a mental disease or defect.
12.1-04-02. Intoxication.
Text
1. Intoxication is not a defense to a criminal charge. Intoxication does not, in itself. constitute mental disease or defect within the meaning of section 12.1-04-

> 04. Evidence of intoxication is admissible whenever it is relevant to negate or to establish an element of the offense charged.
> 2. A person is reckless with respect to an element of an offense even though his disregard thereof is not conscious; if his not being conscious thereof is due to self-induced intoxication.

[¶31] Carrie Hopponen was neither mentally deficient nor mentally ill. She admitted she suffered from depression and had been treated for her depression as well as alcohol abuse. However, she was able to hold a steady job in a managerial position for some time, proving that she was not mentally deficient. The State failed to prove the two elements necessary to sustain a class C felony. First, they did not prove that Carrie Hopponen suffered from a mental disease or defect. Carrie Hopponen stated she did not have a mental disease or defect; she knew what she was doing and was not mentally deficient. She was voluntarily intoxicated. According to N.D.C.C. 12.1-04-02(2):

> "A person is reckless with respect to an element of an offense even though his disregard thereof is not conscious; if his not being conscious thereof is due to self-induced intoxication."

[¶32] Second, the State failed to prove that Mr. Rogers knew or had reasonable cause to believe that Carrie Hopponen suffered from a mental disease or defect. Mr. Rogers had never met Carrie Hopponen before July 21, 2004, and she did not mention that she suffered from depression or any mental disease or defect that would render her incapable of understanding the situation. Thus, he would have no reasonable cause to believe she suffered from any mental disease or defect.

[¶33] THE DISTRICT COURT ERRED WHEN IT REFUSED TO ALLOW A LESSER INCLUDED JURY INSTRUCTION REGARDING THE CRIMINAL TRESPASS CHARGE. There was no legally sufficient evidence to prove that Rogers committed a felony criminal trespass

[¶34] In the information, Joseph Rogers was charged with criminal trespass, a class C felony, in violation of 12.1-22-03 of the North Dakota Century Code. Count one of the information charging Joseph Rogers with the crime of criminal trespass reads as follows:

> "Count 1: The defendant, knowing that he was not licensed or privileged to do so, entered or remained in a dwelling or in a highly secured premise, to wit, the defendant, knowing he was not licensed or privileged to do so entered the motel room registered to Carrie Hopponen. Said offense is a class C felony."

The District Court erred when it refused to grant Rogers' request for a lesser included offense of entering or remaining in a building or occupied structure when he was not licensed to do so in violation of NDCC 12.1-22-03 (2)(a), a class A misdemeanor.

[¶35] N.D.C.C. § 12.1-22-03. Criminal trespass.
Text
1. A person is guilty of a class C felony if, knowing that he is not licensed or privileged to do so, he enters or remains in a dwelling or in highly secured premises.
2. A person is guilty of a class A misdemeanor if, knowing that he is not licensed or privileged to do so, he:
a. Enters or remains in any building, occupied structure, or storage structure, or separately secured or occupied portion thereof; or
b. Enters or remains in any place so enclosed as manifestly to exclude intruders.

[¶36] The jury instruction given by the Court is as follows:

> A person is guilty of criminal trespass if, knowing the person is not licensed or privileged to do so, the person willfully enters or remains in a dwelling or in a highly secured premises.

Rogers requested a lesser included offense in the jury instructions, but was denied by Judge Lee. His response is as follows:

> "THE COURT: That is going to be denied. The request has been made. With respect to criminal trespass, a further reason for my denying Mr. Gunderson's request for a misdemeanor charge, the C felony charge is that individual knowing he was not licensed or privileged to do so, enters or remains in a dwelling or in highly secured premises.
> Subsection two, which is the misdemeanor charge states that a person enters or remains in any building or occupied or storage structure, or separately secured or occupied portion thereof: or enters or remains in any place so enclosed a manifestly to exclude intruders. To me the central essential element is her hotel room which may be a highly secured or a temporary dwelling. It makes is more than just an occupied structure. So that being the case I am going to, as par of my reason for denying that, my reason for denying the requested A misdemeanor charge." (Tr. of Proceedings June 22-23, 2006 and October 2, 2006, page 205, lines 2-17).

[¶37] We apply a two-step analysis to determine whether a defendant is entitled to a lesser included offense instruction. State v. Carlson, 1997 ND 7, ¶ 34, 559 N.W.2d 802. The first step requires consideration of the legal elements of the offenses, while the second step requires an ad hoc factual determination. Under the first step, the defendant must show that the offense is a lesser included offense of the offense charged. The relevant portion of N.D.C.C. § 12.1-01-04(15) defines an "included offense" as an offense "[w]hich is established by proof of the same or less than all the facts required to establish commission of the offense charged." Put another way, "[a] lesser offense is necessarily included in a greater offense if it is impossible to commit the greater without

also committing the lesser." Carlson, 1997 ND 7, ¶ 35, 559 N.W.2d 802. Under the second step, the defendant must show there is evidence which creates a reasonable doubt as to the greater offense, but supports a conviction of the lesser offense beyond a reasonable doubt. Id. at ¶ 34; see also State v. Clinkscales, 536 N.W.2d 661, 663 (N.D. 1995). State v McKing. 593 N.W. 2d 342 (1999 N.D. 81).

[¶38] There is conflict as to whether a motel is a dwelling or simply a premise or occupied structure. Therefore, the Court erred in instructing the jury that, as a matter of law, a motel was a dwelling and/or a highly secured premise.

[¶39] NDCC § 12.1-05-12(2) & (4). Affirmative Defenses Definitions.

Text

In this chapter:

2. "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a person's home or place of lodging.

4. "Premises" means all or any part of a building or real property, or any structure, vehicle, or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein.

[¶40] N.D.C.C. § 12.1-22-06(4) Occupied Structure means "a structure or vehicle: ... (b) which is used for overnight accommodation of persons."

[¶41] A hotel room is an occupied structure within the meaning of North Dakota Century Code 12.1-22-03 (2)(a), and therefore is a lesser included offense of the criminal trespass charge. By examining the definition of an occupied structure, a hotel clearly falls into that part of the definition that states "which is used for overnight accommodation of persons." According to the definition provided by the North Dakota Century Code N.D.C.C. § 12.1-22-06(4), a hotel room can logically be considered an occupied structure.

[¶42] The jury instructions should have included the lesser included offense that Rogers entered or remained in a building or occupied structure when he was not licensed to do so, in violation of NDCC 12.1-22-03 (2)(a), a class A misdemeanor.

There is reasonable doubt as to whether the prosecution proved beyond a reasonable doubt the necessary elements or attendant circumstance specified in the definition and grading of NDCC 12-22-03 (1); 1. A person is guilty of a class C felony if. knowing that he is not licensed or privileged to do so, he enters or remains in a dwelling or in highly secured premises. (Emphasis added).

[¶43] A hotel room is a premise according to the definition contained in NDCC § 12.1-05-12(4): the primary purpose is for "overnight lodging of persons." However, a hotel room is not a "highly secured premises." N.D.C.C. § 12.1-22-06(2) Highly Secured Premises means "any place which is continuously guarded and where display of visible identification is required of persons while they are on the premises."

[¶44] A hotel room is not a dwelling. N.D.C.C. § 57-02-01(12) states that "'Residential Property' means all property. or portions of property, used by an individual or group of individuals as a dwelling, including property upon which a mobile home is located but not including hotel and motel accommodations required to be licensed under chapter 23-09 nor structures providing living accommodations for four or more separate family units nor any tract of land upon which four or more mobile homes are located." (Emphasis added)

[¶45] **dwelling house. 1.** The house or other structure in which a person lives: a residence or abode. **2.** *Real estate.* The house and all buildings attached to or

> connected with the house. **3.** *Criminal law.* A building. a part of a building, a tent, a mobile home, or another enclosed space that is used or intended for use as a human habitation. • The term has referred to connected buildings in the same curtilage but now typically includes only the structures connected either directly with the house or by an enclosed passageway. -- Often shortened to *dwelling*. -- Also termed (archaically) *mansion house*; (more broadly) *dwelling place*. Black's Law Dictionary (8th ed. 2004), dwelling house.

[¶46] In the instant case, in order to commit an offense of 12.1-22-03. (1) an actor would have to enter a building or occupied structure since a dwelling is by definition a house or other structure. The definition of dwelling. however, does not encompass a motel room.

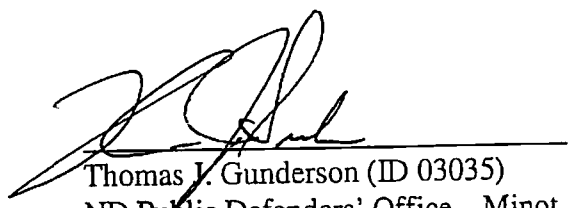
CONCLUSION

[¶47] The District Court erred in failing to give the lesser included instruction "A person is guilty of criminal trespass if. knowing the person is not licensed or privileged to do so, the person willfully enters or remains in [any building, occupied structure, or storage structure, or separately secured or occupied portion of a structure] [a place obviously enclosed to exclude intruders]. The Court. in effect, instructed the jury as a matter of law that a motel room was a dwelling. which is not clear from the authorities cited. Whether a motel room is a dwelling or merely an occupied structure is not certain. Rogers should have been allowed to argue that a motel was not a dwelling and therefore Rogers was not guilty beyond a reasonable doubt of committing a class C felony.

[¶48] As to the Sexual Assault charge, the District Court erred when it refused to grant Rogers' motion for a directed verdict. The State failed to prove that Carrie Hopponen suffered from a mental disease or defect and that Joseph Rogers was aware of the fact.

[¶49] Wherefore it is respectfully requested this Supreme Court reverse the criminal judgments.

Dated this 17th day of January, 2007



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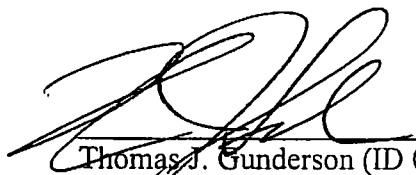

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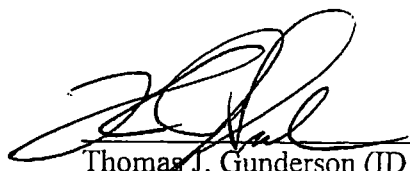

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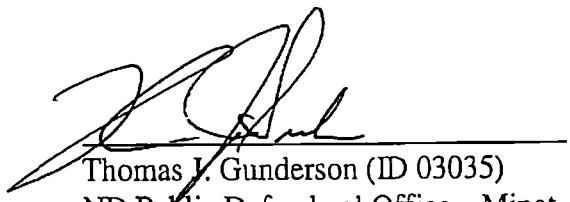

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