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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ernest Coppage,	)	
	)	**Supreme Court no. 20130180**
Petitioner/Appellant,	)	
	)	
	)	**District Court no. 08-06-K-2085**
-vs-	)	
	)	
State of North Dakota,	)	
	)	
Respondent/Appellee,	)	
	)	

Brief of Petitioner-Appellant Ernest Coppage

Appeal from Order Entered on May 30, 2013

In District Court, County of Burleigh, State of North Dakota
The Honorable Donald L. Jorgensen

MONTY G. MERTZ (#03778)
Supervising Attorney
Fargo Public Defender's Office
912 3rd Avenue South
Fargo, ND 58103-1707
Phone (701) 298-4640
Fax (701) 239-7110
Attorney for Ernest Coppage

¶ 1 Table of Contents

¶ 2 Table of Authorities

Rules

Cases

¶ 3 Issues

¶ 4 Whether the District Court's Order denying Coppage's application for Post Conviction Relief should be Reversed?

¶ 5 Whether the District Court erred by not ruling that Coppage's claim of Prosecutorial Misconduct entitles him to a new trial?

¶ 6 Whether the District Court erred by not ruling that Coppage's claim that his right to a fair trial was violated through obvious error?

¶7 Statement of the Case

¶ 8 A detailed procedural history will not be stated in that this is the fourth appeal. Coppage's conviction of attempted murder by a jury was affirmed in ***State v. Coppage*, 2008 ND 134, 751 N.W.2d 254**.

¶ 9 Coppage first applied for post-conviction relief in 2009. Doc ID# 88 & 89. After an evidentiary hearing, his application was denied. Doc ID# 105. This decision was inexplicably not appealed.

¶ 10 Coppage then filed the current application for post-conviction relief on October 6, 2010. App. 15-30. The application was summarily dismissed on grounds of res judicata and misuse of process. Doc ID#123. Coppage appealed and this Court reversed and remanded for an evidentiary hearing. ***Coppage v. State*, 2011 ND 227, ¶¶ 18, 19, 807 N.W.2d 585**.

¶11 An evidentiary hearing was held and the district court filed a Memorandum Opinion on May 24, 2012, vacating Coppage's conviction and ordering a new trial. App. 31-41. Findings of Fact, Conclusions of Law, and Order for Judgment were entered, and Judgment was entered on June 7, 2012. Doc ID# 153 & 154. The State filed its Notice of Appeal from the Memorandum Opinion on

June 6, 2012. Coppage filed his Notice of Appeal (Cross-Appeal) on June 20, 2012. Doc ID#161. This Court again reversed and remanded. ***Coppage v. State*, 2013 ND 10, 826 N.W.2d 320**. The District entered its Order Upon Remand on May 30, 2013, reversing itself and reinstating Coppage's conviction. App. #43-47. Coppage filed his Notice of Appeal on June 12, 2013. Doc ID #181; App. #48.

¶ 12 Statement of Facts

¶ 13 In October of 2006, Ernest Coppage was charged with attempted murder. App. 8. The matter was set for trial on July 24, 2007.

¶ 14 Before the trial, Coppage's attorney filed a motion in limine to exclude any evidence of Coppage's prior conduct under **N.D.R.Ev. 404(b)**. Doc ID# 34 which the state did not resist. The court granted the motion, T.Tr. 6:2-3. And, at no time in this case did the prosecutor provide notice to the defense that it intended to offer any evidence covered by **N.D.R.Evid. 404(b).** T.Tr. 502.

¶ 15 Prior to the trial, the prosecutor knew Coppage had a prior conviction for a misdemeanor assault in Minnesota, and possessed a certified copy of that conviction, which was admitted into evidence at the trial. T.Tr. 509.

¶ 16 The state had not disclosed the prior assault conviction to the defense as required by **N.D.R.Crim.P. 16**. T.Tr. 502. Coppage's trial attorney testified at the evidentiary hearing that he had served a Rule 16 discovery request on the prosecutor which required the prosecutor to disclose Coppage's prior criminal record. However, the first time he saw the certified copy of Coppage's Minnesota misdemeanor assault conviction was during the trial when

the prosecutor offered it into evidence. Transcript of Evidentiary Hearing, 34: 9-24. (Hereinafter (T.Ev.H.).

¶ 17 The State knew exactly what the underlying facts of the prior assault conviction were; that Coppage had pleaded guilty to the misdemeanor assault charge based upon pushing a woman out of his way, who then fell and suffered some degree of pain. T.Tr. 504; T.Ev.H. 38: 10-25.

¶ 18 At the evidentiary hearing, Coppage's trial counsel testified that he took care, and the trial transcript of Coppage's direct testimony establishes, that Coppage in no manner "opened the door" to cross examination about his past conduct. T.Ev.H. 33: 12-24.

¶ 19 Notwithstanding all of the above, while Coppage was being cross-examined at trial, the prosecutor asked whether Coppage "would have hit her if you hadn't been drunk?" T.Tr. Vol. 3, 500:24-25; Coppage responded, "I've never done that to a woman ever in my life. My thirty-eight years I've never hit a woman." T.Tr. Vol. 3, 501: 1-2. That statement by Coppage was literally true; in his prior assault case, there was no allegation that Coppage had hit a woman. T.Ev.H. 39, L. 2-5.

¶ 20 Yet, again, notwithstanding all of the above, the prosecutor then asked, "You've never assaulted a woman in your life?" T.Tr. Vol. 3, 501:3. Coppage's trial counsel did not object to this question. T.Tr. Vol. 3, 501. Coppage answered, "Not like that." T.Tr. Vol. 3, 501:4. The prosecutor asked several follow-up questions, concluding with, "You've never hit a woman." T.Tr. Vol. 3,

501:5-11. Trial counsel again failed to object. T.Tr. Vol. 3, 501. Coppage answered, "No." T.Tr. Vol. 3, 501:12. App. 49 & 50.

¶ 21 Coppage's trial counsel testified at the evidentiary hearing in this matter on that the state's line of questioning took him by surprise, and he failed to object. He agreed that Coppage's testimony that he had not hit a woman was true, and that the prosecutor's line of questioning was improper, and that Coppage had not opened to door to questioning about his past, and certainly not his prior misdemeanor assault conviction. T.Ev.H. 33 – 34: 1-6.

¶ 22 The prosecutor then asked for a sidebar and sought to admit evidence of Coppage's prior assault conviction for impeachment purposes. T.Tr. Vol. 3, 501:13-25; App. 50. In 2004, Coppage pled guilty to assault after he "pushed [a woman] and she fell against the toilet." T.Tr. Vol. 3, 504:1-8. Coppage later testified that she had trapped him in the bathroom during an argument, so he pushed past her to get out of the situation. T.Tr. Vol. 3, 542:8-12. At this point, Coppage's attorney finally objected, stating that Coppage's prior convictions were excluded by the motion in limine, and that the prejudicial value of allowing the evidence outweighs the probative value. T.Tr. Vol. 3, 502:2-3.

¶ 23 The prosecutor then argued that Coppage opened the door by answering "I have never hit or assaulted another woman in my life." T.Tr. Vol. 3, 507:4-7. That was a misstatement of Coppage's testimony.

¶ 24 The trial court allowed the evidence on the basis that "the witness has asserted his innocence of any prior conduct of alleged assault or assaultive

behavior." T.Tr. Vol. 3, 507:4-11, App. 57. The prosecutor then introduced the prior conviction into evidence. T.Tr. Vol. 3, 509.

¶ 25 Coppage's prior conviction was not admissible under any theory during his trial. The prosecutor improperly argued that said conviction was admissible under **N.D.R. Evid. 609 or 403**. The conviction was not of a felony and did not involve false statements. The prosecutor's citation of **Rule 403** was also improper, in that **Rule 403** is a rule to exclude prejudicial evidence, not for its admission. See App. 40-43.

¶ 26 The prosecutor then compounded the error of admitting Coppage's prior conviction into evidence by repeatedly calling him a liar in open court, during continued examination and during closing argument. T.Tr. 510, 596, 600.

¶ 27 Coppage's trial counsel did not ask for a limiting instruction, and the court did not, sua sponte, instruct the jury concerning the appropriate uses of the prior conviction. T.Tr. Vol. 3, 637-650. Coppage was convicted of both attempted murder and aggravated assault, despite the fact that Coppage was tried on only one count, and aggravated assault had been submitted to the jury as a lesser included offense.

¶ 28 Admitting Coppage's prior conviction and the prosecution's improper painting of Coppage as a liar was highly prejudicial in the context of the totality of this case; Coppage conceded that he was guilty of aggravated assault. The central focus of the trial was whether Coppage had acted with the requisite intent to allow the jury to find him guilty of attempted murder. See Memorandum Opinion, App. 38-41. Testimony at trial established that Coppage's victim

suffered serious injuries from the assault in the form of soft tissue injuries, a right orbital fracture, and brain hemorrhaging. She spent three days in the hospital. Her treating ..."physician indicated the victim's wounds were consistent with stabbing with a scissors and forceful application of a wooden rod against her throat area." ***State v. Coppage*, 2008 ND 134 ¶ 28, 751 N.W.2d 254.** Coppage conceded that he had committed an aggravated assault and the evidence of record amply supports that charge. The admission of his prior misdemeanor assault conviction, the attending prosecutorial misconduct, and the failure to give a limiting instruction all loom large in the light of the narrow focus of the trial, that being whether Coppage had the requisite specific intent to sustain the attempted murder charge.

¶ 29 Coppage's trial attorney filed a motion for a new trial, arguing, among other things, the verdict form was logically and legally inconsistent. The court denied the motion, and the decision was upheld. ***See State v. Coppage*, 2008 ND 134 ¶ 5, 751 N.W.2d 254.** The issues of prosecutorial misconduct and the resulting admission into evidence of Coppage's prior conviction were not raised in either in the motion for a new trial or in the appeal. ***Id.*** The state has not provided any evidence which would excuse these failures by Coppage's attorney.

¶ 30 Coppage then filed for post-conviction relief, arguing, among other things, that his trial counsel was ineffective in his assistance because he failed to call the witnesses that Coppage said would corroborate his self-defense theory. His first post-conviction counsel did not raise the issues concerning the

prosecutor's improper questioning or the admission of Coppage's prior conviction.

¶ 31 Coppage's first post-conviction attorney testified that although she has handled about 20 post-conviction matters, she has never filed an amended petition. She simply proceeds from the papers filed pro se by the client. She could not accurately describe the provisions of either **N.D.Evid. 404(b) or 609**. She did not recognize the significance of the issues of prosecutorial misconduct or the impact of admission of Coppage's prior conviction. T.Ev.H. 56-65.

¶ 32 The judgment denying relief in the first post-conviction proceeding was inexplicably not appealed.

¶ 33 Coppage filed a second post-conviction relief petition, arguing that his trial counsel's representation was ineffective because counsel did not object to the prosecutor's improper questions concerning his prior assault conviction. App. 28-30. Additionally, when the evidence was admitted, trial counsel failed to ask for a limiting instruction which would have advised the jury only to consider Coppage's conviction for impeachment purposes. App. 29. Finally, Coppage argued that his trial counsel failed to raise the issue of the improper admission of his prior assault conviction and prosecutorial misconduct on appeal. App. 29. The State filed a motion to summarily dismiss Coppage's post-conviction relief petition based on res judicata and misuse of process, arguing these issues should have been raised in the first post-conviction petition. In response, Coppage argued that his first post-conviction counsel failed to raise these issues, and was also therefore ineffective. App. 28.

¶ 34 At the evidentiary hearing Coppage testified that he relied on his attorney's advice about which arguments to raise, and because she failed to raise these issues, his failure to raise them in his first post-conviction proceeding was excusable. T.Ev.H. 9-11.

¶ 35 Coppage has a GED and has worked odd jobs. Coppage has no legal training and has received assistance with all of his pro se filings. As to his trial, his direct appeal, and his first post-conviction petition, he was at the mercy of his appointed attorneys to properly protect his rights and raise issues in a proper and timely manner. T.Ev.H. 2-4.

¶ 36 Argument

¶ 37 **The Order Denying Coppage post Conviction relief should be reversed.**

¶ 38 Given the record of this case, Coppage was deprived of a fair trial and due process through a combination of prosecutorial misconduct, ineffective assistance of counsel, and obvious error.

¶ 39 **Standard of Review.**

¶ 40 The standard of review for ineffective assistance of counsel was stated by this Court in ***Sambursky v. State*, 2008 ND 133, ¶ 7, 751 N.W.2d 247.** The Standard of Review has been recited in this post conviction action in the briefs filed by counsel in the two prior appeals and by this Court in its prior opinions.

¶ 41 To succeed on a claim for ineffective assistance of counsel, a petitioner must prove counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. ***Strickland v.***

***Washington*, 466 U.S. 668 (1984); *State v. Robertson*, 502 N.W.2d 249, 251 (N.D. 1993).** The prejudice element requires the petitioner to establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and the petitioner must point out with specificity how and where trial counsel was incompetent and the probable different result. ***Decoteau v. State*, 1998 ND 199, ¶ 6, 586 N.W.2d 156.**

¶ 42 **The First Prong of the *Strickland* test has been met in all Respects.**

¶ 43 On this second remand, the trial court has yet again failed to fully address this Court's directives in ***Coppage v. State*, 2013 ND 10, 826 N.W.2d 320.** However, the trial court did arrive at the correct conclusion that Coppage received ineffective assistance of counsel by his trial attorney, his attorney on direct appeal and his attorney in first his post conviction action. Order Upon Remand ¶7. App. 45; Doc ID# 178. This satisfies the first prong of the ***Strickland*** test for each stage of the proceedings.

¶ 44 **The Second Prong of the *Strickland* test has been met in all respects.**

¶ 45 Despite its ruling that Coppage received ineffective assistance of counsel, and that he was prejudiced by his counsels' failures, the trial court's conclusion that there is not a reasonable probably that the outcome would have been different is inexplicable and erroneous. In its "Order Upon Remand" the trial court did not conduct any analysis of the evidence at trial to support its conclusory statements that there was no reasonable likelihood that the outcome of the trial, direct appeal,

or initial post conviction proceeding would have been different but-for counsels' deficient performance. However, in its Memorandum Opinion following the Evidentiary hearing, the trial court did find and conclude that, in the narrow context of the central issue at trial, Coppage was so prejudiced by admission of his misdemeanor assault conviction that his conviction for attempted murder should be vacated. App. 31-41. Admitting Coppage's prior conviction and the prosecution's improper painting of Coppage as a liar was highly prejudicial in the context of the totality of this case; Coppage conceded that he was guilty of aggravated assault. The central focus of the trial was whether Coppage had acted with the requisite intent to allow the jury to find him guilty of attempted murder. After the impeachment evidence was allowed in, the jury should have been instructed to limit their consideration of the evidence of his prior conviction to the impeachment of his statements. Defense counsel never asked for such an instruction, and no instruction was given. T.Tr. Vol. 3, 637-650; App. 49-59. The jury was left to believe that they could use that evidence for whatever purposes they wished, including evidence that because of his previous assault conviction, Coppage was more likely to be a violent person, i.e. had a "propensity for violence." Finally, although defense counsel attempted to preserve the issue for appeal, he did not appeal the judge's erroneous decision to admit the prior conviction evidence. In its Memorandum Opinion, the trial court carefully analyzed the circumstances leading up to the admission of Coppage's prior conviction, and correctly found and concluded that he was prejudiced, because Coppage's credibility was vitally important to his theory of defense, which was

that he did not intend to kill the victim. The trial court analyzed the evidence at trial in light of the admission of the misdemeanor assault conviction and implicitly concluded that there was a reasonable probability that the outcome of the trial, the direct appeal and the initial post conviction action would have been different. ***See Memorandum Opinion***, App. 39.

¶ 46 Following the Evidentiary Hearing the trial court ruled that: "Coppage's motion for post-conviction relief is granted as to the attempted murder conviction. This Court finds Coppage is entitled to a new trial due to ineffective assistance of his trial counsel, and the failure of this court to give a limiting instruction regarding Coppage's prior misdemeanor assault conviction. This decision renders moot any further claims for relief Coppage seeks." App. 41

¶ 47 Thus, the trial court's decision rested on both the ineffective assistance of counsel and its own failure to protect Coppage's right to a fair trial by giving a limiting instruction *sua sponte*. The trial court was correct on both points. The trial court has now reversed itself without any analysis. The trial court's Order Upon Remand should be reversed and Coppage's Attempted Murder Conviction should be vacated.

¶ 48 <u>Coopage did not "Open the Door" to admission of his misdemeanor assault conviction.</u>

¶ 49 Compounding the trial court's errors is the fundamental axiom of this post conviction action, that Coppage did not "open the door" to the admission of his misdemeanor assault conviction. In its most recent order, the trial court assumes that Coppage "opened the door" to his misdemeanor assault conviction.

The trial court's analysis focuses solely on the concrete fact that no limiting instruction was requested and the trial court failed to give a limiting instruction *sua sponte*. Order Upon Remand, App.43-47.

¶ 50 The prosecutor has continuously argued in his trial and appellate briefs that Coppage "opened the door" to introduction of his prior misdemeanor conviction for assault. The prosecutor claims that when Coppage said "he had never hit a woman" this opened the door. As the record demonstrates, the prosecutor knew and knows that Coppage's statement that he had never hit a woman was a true statement. The factual basis for the prior conviction was that Coppage was accused only of pushing past a woman causing her to fall and suffer some amount of pain. The prosecutor knew full well that Coppage was not accused of nor convicted of hitting the woman in the prior case. It is disconcerting that the prosecutor continues to make this argument in the face of the undeniable facts in the record. He did, in fact, engage in a subterfuge to gain admission of that prior conviction by misstating both the testimony and the law to the court.

¶ 51 In its most recent opinion this Court cited some federal cases for the proposition that relevant evidence may be admitted to contradict a witness's testimony as to a material issue. ***Coppage v. State*, 2013 ND 10, ¶ 17, *citing* *United States v. Gilmore*, 553 F.2d 266 (3rd Cir. 2009), *United States v. Norton*, 26 F3d 240 (1st Cir. 1994); *United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992).** Every one of those cases is fully distinguishable. In each of those cases a criminal defendant testified ***on direct examination*** unambiguously and

emphatically to a fact, which was demonstrably false.

> The doctrine of "Opening the Door" applies to testimony, evidence, and questions elicited by the defense. The government contends that Midkiff opened the door to its cross-examination when he testified that he is not a businessman and that he did not know what a receiver was in December 2005. "The doctrine of opening the door allows a party to explore otherwise inadmissible evidence on cross-examination when the opposing party has made unfair prejudicial use of related evidence on direct examination." ***United States v. Durham,* 868 F.2d 1010, 1012 (8th Cir.1989)** (internal quotations and citations omitted). If the defendant has "opened the door" to objectionable evidence, there can be no reversible error. ***Beason,* 220 F.3d at 968 (citing *United States v. Finch,* 16 F.3d 228, 233 (8th Cir.1994)** (under "opening the door" theory, evidence introduced must rebut something that has been elicited by defense counsel), and ***United States v. Womochil,* 778 F.2d 1311, 1315 (8th Cir.1985)** (no abuse of discretion in allowing the government to clarify a false impression created on cross-examination)); *see also* ***Durham,* 868 F.2d at 1012** (finding no abuse of discretion in allowing the government to clarify a false impression made by defense counsel's direct examination)."

U.S. v. Midkiff*, 614 F3d 431, 442-443 (8th Cir. 2010)**. "Opening the Door" does not apply to the situation in this case, where the state relied upon its own improper line of questioning to claim that Coppage opened the door to being impeached by his prior conviction. For example, in ***Gilmore, the defendant testified on direct examination that he had "never sold drugs," when in fact he had two prior convictions in the same jurisdiction for selling drugs. The court allowed the prosecution to question the defendant on cross examination about his prior convictions to contradict his specific testimony on direct. The court gave a limiting instruction at the time of the testimony and again in its final instructions. **553 F.2d at 270-72.** The contrast to what happened here could hardly be more vivid. Regardless of the state's repeated claims to the contrary, Coppage's testimony was literally true, rendering the state's entire line of questioning

improper at its inception. Coppage did not "open the door" to the introduction of his prior misdemeanor assault conviction. That conviction should have never been admitted under any theory on this record, compounding the error when the court did not issue a limiting instruction.

¶ 52 **Coppage is separately entitled to post conviction relief because of prosecutorial misconduct.**

¶ 53 There are professional standards which apply to prosecutors, not just the rules of ethics. **See *National District Attorneys Association National Prosecution Standards Third Edition with Revised Commentary, 2009; American Bar Association, Criminal Justice Section Standards, Prosecution Function, 2013.*** However, it seems that some prosecutors never understand their proper role. A criminal trial is not a game, and certainly not one where the State tries to see what they can get away with while ignoring the obvious language and provisions of the rules of procedure and evidence. Regardless of the burden of proof and the presumption of innocence, the State has a substantial advantage in every criminal case. The State can zealously present its case without engaging in misconduct by subterfuge and "gilding the lily."

¶ 54. The prosecutor's improper actions constituted prosecutorial misconduct. Prosecutorial misconduct may "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Kruckenberg*, 2008 ND 212, ¶ 20, 758 N.W.2d 427 (citations omitted)**. The misconduct must be so significant that it denies the defendant the right to a fair

trial. ***Id.*** The court must consider "the probable effect the prosecutor's improper comment would have on the jury's ability to fairly judge the evidence." ***Id.*** **(citation omitted).**

¶ 55. Those things the prosecutor did and failed to do in this case are: (1) he knew the factual basis for the prior conviction (that Coppage had not even been ***accused*** of hitting the woman); (2) he got certified copies of two prior convictions but did not disclose the same as required specially by **N.D.R.Crim.P. 16; (3)** he did not give a **N.D.R.Evid. 404(b)** notice at any time; (4) he knew the court had granted the defense motion in limine barring evidence of any of Coppage's prior conduct; (5) he knew that Coppage had not opened the door to disclose the conviction on direct; (6) he knew Coppage did not open the door even on cross, because all of Coppage's testimony was literally true; (7) he misrepresented the testimony to the court to persuade it to admit the prior conviction; (8) he intentionally cited **Rule 609** to justify admission of the conviction, even though **Rule 609** does not even arguably apply; and (9) he referred to Coppage as a liar both on re-cross and during his closing arguments, all the while knowing full well that Coppage had not lied. (T. Tr. 510, 596, & 600); App. 49-59.

¶ 56. In ***State v. Chacano*, 2013, ¶ 23, ND 8, 826 N.W.2d 294,** this Court held that the prosecutor's statement that the "Defendant's testimony is a lie" was improper. The Court held that in the context of the record in that trial, this isolated comment did not deprive the Defendant of a fair trial. ***Id.*** In ***State v. Rivet*, 2008 ND 145, 752 N.W.2d 611** this Court reversed convictions for

Robbery and Attempted Murder based upon improper cross-examination of the defendant by the prosecutor. Improper argument constituting prosecutorial misconduct was also raised as an issue. In ***Rivet***, as in this case, the state argued the line of questioning by the prosecutor was proper impeachment, and this Court soundly rejected that argument. ***Id.* at ¶ 11**. In ***Rivet***, the court ruled that the prosecutor's questioning deprived the defendant of a fair trial. ***Id.* at 15**. In that case, defense counsel did not lodge any objection either to the line of questioning or the prosecutor's arguments. Further, the trial court did not intervene, nor did it issue any cautionary instructions. ***Id.* at ¶ 6.** There are many similarities between what the prosecutor did in this case and what the prosecutor did in ***State v. Mayhorn*, 720 N.W.2d 776 (Minn. 2006)**. In ***Mayhorn,*** the Minnesota Supreme Court reversed convictions for aiding and abetting first-degree premeditated murder and aiding and abetting second-degree assault, ruling that the cumulative effect of evidentiary errors and multiple incidents of prosecutorial misconduct deprived defendant of a fair trial. As in this case, most of the prosecutor's improper conduct happened during cross examination. ***Id.*** Coppage respectfully commends the entire ***Mayhorn*** opinion to this Court's study. The ***Mayhorn*** court held that essentially calling a Defendant a liar during cross examination constituted misconduct, stating:

> During her cross-examination of Mayhorn, the prosecutor asked, "You wouldn't know the truth if it hit you in the face, would you, Mr. Mayhorn?" Mayhorn did not object. The state conceded at oral argument that this comment was inappropriate. We agree. We have held that it is improper for a prosecutor to give her own opinion about the credibility of a witness in closing argument. ***See State v. Porter,* 526 N.W.2d 359, 364 (Minn.1995).** It follows that a prosecutor may not do the same during cross-examination. We

> conclude that this remark about Mayhorn's ability to recognize the truth constituted misconduct.

Mayhorn*, 720 N.W.2d at 786.** The ***Mayhorn court also concluded that the prosecutor had engaged in misconduct by misstating the evidence. ***Id.* at 788**. In this case, the prosecutor's assertions that Coppage had lied were a misstatement of the evidence because Coppage's answers on cross examination were literally true, in the context of his prior conviction and the evidence in Coppage's trial. In ***Mayhorn*** the court also decided that "... [T]he prosecutor appears to have used impeachment devices as a thinly-veiled character attack." The court also noted in her closing argument the prosecutor called Mayhorn an "habitual liar" referring to his responses to her questions. The court held that this character attack was improper. ***Id.* at 789**. The ***Mayhorn*** court noted that a reasonable jury could have found Mayhorn guilty based upon the admissible evidence. ***Id.* at 791**. However, in explaining its reversal of Mayhorn's convictions, the court stated:

> But even the strongest evidence of guilt does not eliminate a defendant's right to a fair trial. The role of the prosecutor and trial court is not simply to convict the guilty, they are also responsible for providing a procedurally fair trial. The state has an overriding obligation, shared by the court, to see that the defendant receives a fair trial, regardless of the defendant's culpability. Here, the state and the court failed to satisfy this overriding obligation. The prosecutor's misconduct was a pervasive force at trial.

***Id.* (Citations omitted).**

¶ 57 Just as in ***Mayhorn***, in this case the prosecutor's misconduct was egregious for several reasons. This record establishes a premeditated, calculated effort by the prosecutor to deprive Coppage of a fair trial. The

prosecutor violated court rules, misled the trial court by misstating the evidence, and has made and continues to make legal arguments which are not supported by the law. Prosecutorial misconduct may "'so infect the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Kruckenberg*, 2008 ND 212, ¶ 20, 758 N.W.2d 427 (citations omitted).** The misconduct must be so significant that it denies the defendant the right to a fair trial. ***Id.*** The Court must consider "the probable effect the prosecutor's improper comment would have on the jury's ability to fairly judge the evidence." ***Id.* *(citation omitted).***

¶ 58 The prosecutor argued that he was not required to disclose the prior conviction to the defense, citing an inapplicable provision of **N.D.R.Crim.P. 16**. T.Tr. 502. Disclosure of that conviction was mandatory:

> (C) Defendant's Previous Record. Upon a defendant's written request, the prosecution must furnish the defendant with a copy of the defendant's prior criminal record, if any, that is within the prosecution's possession, custody, or control if the prosecuting attorney knows--or through due diligence could know--that the record exists.

Id. Defense counsel specifically testified that he had served a written request upon the State in this matter, and there is no evidence to the contrary. T.Ev.H. 34. The prosecutor's failure to cite or even acknowledge this mandatory provision of the law further demonstrates the prosecutorial misconduct in this case.

¶ 59 The prosecutor also claimed at trial that a court has the discretion to admit the prior misdemeanor assault conviction under **N.D.R.Crim.P. 609**. The prosecutor has finally admitted that the conviction does not "fit under the

categories expressly articulated therein." The State has not cited any case to support its argument that a prior conviction can come in under **Rule 609** in the "court's discretion." It defies credulity that an experienced prosecutor would argue that a court can ignore the obvious language of a rule.

¶ 60 The cases cited by the State, **i.e. *State v. Hernandez*, 2005 ND 241, 707 N.W.2d 449**, and all the cases cited in that opinion, involve limited admission of "otherwise inadmissible evidence" involved a defendant who obviously "opened the door" through testimony elicited or offered by the defense, not by the prosecution. None of those cases involve the situation here, and none of those cases support the admission of a conviction under **Rule 609** that does not fall within **Rule 609**. Furthermore, in ***Hernandez,*** the defense did not object to the prejudicial evidence when it came in at all, yet the trial court gave the jury a specific and detailed cautionary instruction, none of which happened in Coppage's trial. ***Id.* at ¶¶ 22 & 23**. ***Grant v. State*, 247 S.W.3d 360 (Tex. App. 2008)**, the Texas case cited by the State, is distinguishable in all important respects. First, the analogous rule of evidence in Texas contains an important exception the North Dakota Rule does not. The Texas rule allows admission of any felony conviction, regardless of age, if the "probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." ***Id.* at 365 n. 1**. Grant had an old felony conviction for stabbing three people in a bar fight, one of whom almost died. Grant testified emphatically on direct examination that he had no violent history at all. ***Id.*** It defies credulity for the prosecutor to continue to argue in this case that no error resulted from the

admission of Coppage's prior conviction when the prosecutor himself, through an improper line of questioning, manufactured the situation during his cross-examination.

¶ 61 The prosecutor here also claimed that he did not offer Coppage's prior conviction under **Rule 404(b)** and continues to assert that he did not rely on **Rule 404(b)** to justify its admission. The reality is that there was no factual or legal basis for the state to offer the undisclosed, inadmissible prior misdemeanor conviction into evidence, and then compound the error by calling Coppage a liar at least three times. T.Tr. 510, 596, 600.

¶ 62 During the trial, when Morrow stated that he had never seen the certified copies of the two prior misdemeanor assault convictions proferred by Suhr, Suhr asserted that he had no obligation to disclose impeachment material. Tr. T. 501 – 508. Suhr then asserted to the trial court that it had the discretion to admit the more recent misdemeanor assault conviction under **N.D.R.Ev. 609**. Tr. T. 506:19-23. There is literally no authority or any good faith argument to support Suhr's assertion. There is no theory under which a misdemeanor assault conviction could ever be admitted for impeachment purposes under **N.D.R.Ev. 609**. Suhr has had to concede there was no authority for that argument. Every authority the State has cited to justify introduction of Coppage's misdemeanor assault conviction is distinguishable. Suhr also has maintained continuously that the conviction was ***not*** offered under **N.D.R.Ev. 404(b).** Tr. T. 502:11-16. There is no evidence in the record that even if it had been offered under **Rule 404(b)** that the State provided Coppage appropriate notice under **Rule 404(b).**

¶ 63 There was no legitimate use of Coppage's prior misdemeanor assault conviction in this trial. The facts of that prior conviction bore no semblance to the facts in Coppage's trial in this case. Coppage's prior conviction was both irrelevant and immaterial. Mr. Morrow filed a motion in limine to exclude Coppage's prior conduct. The state did not object and this Court granted that motion. The trial court court necessarily concluded by granting the motion in limine that any probative value of Coppage's prior conduct was outweighed by the prejudicial effect of such conduct. Coppage did not open the door. The only remaining purpose Suhr had to offer the certified copy of Coppage's prior misdemeanor assault conviction was to establish that Coppage had the propensity for violence and acted in conformity with that propensity. The Rules of Evidence specifically prohibit this evidence for precisely the reason Suhr offered it. ***See State v. Stewart*, 2002 ND 102, ¶ 8, 646 N.W.2d 712. T. Tr. 596:24-25 & 597:1-20.**

¶ 64 The prosecutorial misconduct in this case is egregious because Suhr engaged in obvious planning and preparation to illegally and unfairly use the misdemeanor assault conviction. He intended all along to offer proof of Coppage's misdemeanor assault conviction. After all, he acquired not one but two certified copies of Coppage's prior misdemeanor convictions, neither of which fall within the scope of Rule 609. T.Tr. 501:17-25; 503:16-25; 504:1-25; 505:7-9. Suhr knew precisely what the factual basis was for Coppage's guilty plea in the more recent case, and that there was no allegation that Coppage had "hit" or "struck" or "beat" the victim in that case. T.Tr.503:16-25; 504:1-15. Suhr

did not provide any notice required by **N.D.R.Evid. Rule 404(b)** and did not object to Morrow's Motion in limine which the Court granted to exclude references to Coppage's past conduct. App. 9 & 10; T.Tr. 6:2-3; T.Tr. 502:1-10.

¶ 65 Without citing any authority to support his assertion, the prosecutor also attempted to hide behind that fact that, because he successfully persuaded the court to allow admission of Coppage's prior misdemeanor assault conviction, no error occurred. It is very strange indeed to argue that no error occurs when one is successful in persuading the court to rule in one's favor by misstating the record and the law.

¶ 66 As noted above, there is significant danger in allowing evidence of prior convictions. ***United States v. Harding*, 525 F.2d 84, 89, n. 12 (7th Cir., 1975)**. This is especially true if the prior conviction was for a crime similar to the crime charged. ***Stewart*, 2002 ND 102, ¶ 8.** The specific risk is that a defendant may be convicted because the jury may ascribe a propensity for criminal behavior to the defendant, rather than convicting the defendant based on the facts presented. ***Harding*, at 89, n. 12**.

¶ 67 In the present case, prosecutorial misconduct not only led to the admission of Coppage's prior assault conviction into evidence, improper statements by the prosecutor also encouraged the jury to consider Coppage's prior conviction when discussing culpability. The prosecutor asked Coppage inappropriate questions with the specific intention of entering his prior conviction under the pretense of impeachment. T.Tr. Vol. 3, 501:3-12. When Coppage answered those questions truthfully, the prosecutor misconstrued his answers to

this court in order to make it seem that Coppage was being untruthful. T.Tr. Vol. 3, 507:4-6. Finally, in his closing argument, while speaking about whether Coppage had the requisite intent for attempted murder, the prosecutor used Coppage's prior assault conviction not to show that he was untruthful, but to show that the expert witness Coppage called did not have the proper information to weigh in on Coppage's intent. T.Tr. Vol. 3, 596:7-12. Although the prosecutor attempted to cover the statements in the façade of impeachment, his purpose was to show that Coppage had a propensity to commit this crime because he had committed a similar crime in the past. T.Tr. Vol. 3, 596:7-12.

¶ 68 Coppage was deprived of a fair trial separately by prosecutorial misconduct. Coppage's conviction of attempted murder should be vacated on that basis alone.

¶ 69 **Coppage is also entitled to relief due to obvious error.**

¶ 70 The trial court did not rest its earlier decision solely upon ineffective assistance of counsel. The trial court also stated Coppage was entitled to relief because of "[t]he failure of this Court to give a limiting instruction regarding Coppage's prior misdemeanor assault conviction." App. 41. This constituted obvious error, violating Coppage's right to a fair trial, entitling him to a new trial. ***State v. Olander*, 1998 ND 50, 575 N.W.2d 658.** In its Memorandum Opinion, the trial court made a detailed, well reasoned analysis and factual findings of the circumstances surrounding how it came to admit Coppage's prior misdemeanor assault conviction. The trial court specifically found that Coppage was prejudiced by having his prior misdemeanor assault conviction admitted into

evidence for impeachment purposes, citing ***State v. Bohe*, 447 N.W.2d 277, 281 (N.D. 1989)** and ***State v. Eugene*, 340 N.W.2d 18, 35 (N.D. 1983).** App. 35-45. And, the court noted the importance of curative instructions to correcting prejudice. App. 31-41, citing ***State v. Laib*, 2005 ND 187 ¶ 1, 705 N.W.2d 845.** Essentially, with well crafted limiting or curative instructions, the trial court recognized that it could have ameliorated the prejudicial effect of the improper admission of the misdemeanor assault conviction to attack Coppage's credibility. That error was dramatically magnified when the prosecutor referred to that conviction in closing argument and called Coppage a liar on the record in front of the jury no less than three times. T.Tr. 510, 596, 600. The trial court has inexplicably and erroneously reversed itself.

¶ 71 Coppage was deprived of his constitutional right to a fair trial based upon three separate grounds, separately or based upon any combination of the three: 1) Ineffective Assistance of Counsel; 2) Prosecutorial Misconduct; 3) Obvious Error.

¶ 72 **Conclusion**

¶ 73 The Order Upon Remand of the District Court should be Reversed and Coppage's conviction of attempted murder should be vacated.

Respectfully submitted this 8th day of August, 2013.

MONTY G. MERTZ (#03778)
Supervising Attorney
Fargo Public Defenders Office
912 - 3rd Avenue South
Fargo, ND 58103-1707
Phone (701) 298-4640
Fax (701) 239-7110
Attorney for Ernest Coppage
E-Filing address: fargopublicdefender@nd.gov

IN RE Coppage v. State
Supreme Court No. 20130180
District Court No. 08-06-K-2085

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I, Monty G. Mertz, do hereby certify that, on the 8th day of August, 2013, I served the **Petitioner/Appellant's Brief "revised"** in this case on the following:

Julie Ann Lawyer
Attorney at Law
U.S. Attorney's Office
220 East Rosser Ave, PO Box 699
Bismarck, ND 58502-0699
Attorney for Respondent/Appellee

by sending an E mail to jalawyer@nd.gov, said documents attached in PDF format. To the best of my knowledge, this is the E mail address for Ms. Lawyer.

And on my client:

I, Monty G. Mertz, do hereby certify that, on the 8th day of August, 2013, a true copy of the **Brief of Petitioner/Appellant** "revised" in this case was mailed via the United States Postal Service to:

Mr. Earnest Coppage #032564
James River Corrections Center
2521 Circle Drive
Jamestown, ND 58401
Petitioner/Appellant

To the best of my knowledge, this is the mailing address for Mr. Coppage.

Dated this 8th day of August, 2013.

Monty G. Mertz, ND Bar ID#03778
Supervising Attorney
Fargo Public Defender Office
912 3rd Avenue South
Fargo, ND 58103-1707
Phone: 701-298-4640
Fax: 701-239-7110
Eservice: fargopublicdefender@nd.gov
Attorney for Ernest Coppage