

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE OFFICE OF THE
CLERK OF THE DISTRICT COURT

AUG 27 2113

Ernest Coppage

Petitioner-Appellant,

سکونت

State of North Dakota

Respondent-Appellee.

Supreme Ct. No. 20130180

District Cl. No. 08-06-K-2085

SA File No. F 747-06-10

STATE OF NORTH DAKOTA

BRIEF OF RESPONDENT-APPELLEE

APPEAL FROM ORDER ENTERED ON MAY 30, 2013

Burlington County District Court
South Central Judicial District
The Honorable Donald L. Jorgensen, Presiding

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STATEMENT OF THE ISSUES

- I. Whether the district court erred in denying Coppage’s application for postconviction relief.
- II. Whether Coppage was denied due process based upon prosecutorial misconduct.
- III. Whether Coppage’s right to a fair trial was violated when a limiting instruction was not provided to the jury regarding a prior assault conviction.

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STATEMENT OF THE CASE

Ernest Coppage was charged with one count of Attempted Murder, a class A felony for intentionally engaging in conduct, constituting a substantial step toward to the offense of murder. App. p. 8.

Following trial on July 24-27, 2007, Coppage was convicted by a jury and a Criminal Judgment was entered on October 11, 2007. App. pp. 9-10. Coppage appealed based upon arguments of sufficiency of the evidence and a legally inconsistent verdict but the conviction was affirmed. State v. Coppage, 2008 ND 134, 751 N.W.2d 254.

On June 18, 2009 Coppage filed an Application for Postconviction Relief. Doc ID # 88 and 899. On January 15, 2010 his request for relief was denied. Doc ID #105.

On October 6, 2010 Coppage filed a second Application for Postconviction Relief. App. pp. 15-19. Coppage filed a number of supplemental affidavits and memoranda in support of his second application for postconviction relief. App.20-30.

On February 28, 2011 his request for relief was summarily denied. Doc ID # 123. Coppage appealed and the matter was reversed and remanded for an evidentiary hearing. Coppage v. State, 2011 ND 227, 807 N.W.2d 585.

Following a hearing on April 20, 2012 the district court issued a Memorandum Opinion vacating the conviction and ordering a new trial. App. pp. 31-41. The State appealed and the matter was reversed and remanded. Coppage v. State, 2013 ND 10, 826 N.W.2d 320. On May 30, 2013 the

1 district court entered an Order Upon Remand denying Coppage's application
2 for postconviction relief and reinstating Coppage's conviction for attempted
3 murder along with the sentence previously imposed. App. pp. 43-47.

4
5 Coppage filed his notice of appeal on June 12, 2013. App. p. 48.

6 **STATEMENT OF THE FACTS**

7 Ernest Coppage was charged with one count of Attempted Murder, a
8 class A felony for intentionally engaging in conduct, constituting a substantial
9 step toward the offense of murder, by attempting to kill L.W. by "intentionally
10 choking her to the point of unconsciousness or repeatedly striking her with a
11 wooden rod about the head, and did so under circumstances manifesting an
12 extreme indifference to the value of human life." App. p. 8.

13
14 On July 12, 2007 Coppage filed a Motion in Limine to exclude
15 evidence of any prior acts of domestic violence. Doc ID # 34. The State did
16 not resist this and it was granted at the beginning of trial, which was held July
17 24-27, 2007. Trial Trans. p. 5, lines 16-25; p. 6, line 1-3.

18
19 L.W. testified that Coppage used a plunger and his hands to hit her and
20 choke her. State v. Coppage, 2008 ND 134, ¶ 3,751 N.W.2d 254. She also
21 testified that she pled with Coppage not to kill her during the incident, to
22 which he responded that he did not care if he killed her. Id. She described
23 how Coppage hovered over her with a serrated steak knife, followed her with
24 a pair of scissors and stabbed her leg, and when she fled the residence he
25 caught up to her, hit her in the head, told her to be quiet, and pulled her back
26 inside. Id.

1 L.W.'s treating physician testified that she was hospitalized for three
2 days with soft tissue injuries, a right orbital fracture, and she suffered from
3 brain hemorrhaging. Id. at ¶ 5. The physician also testified that her wounds
4 were consistent with being stabbed with a scissors and the forceful application
5 of a wooden rod against her throat area. Id. He identified possible defensive
6 wounds on her body and hemorrhaging in the victim's eyes consistent with the
7 infliction of force or trauma. Id.

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9
10 Coppage testified at trial, and during his direct-examination, he
11 testified that he acted in self-defense. Trial Trans. p. 472, lines 2-4. Coppage
12 also testified that he did not intend to kill L.W. Id. at p. 478, lines 21-22. He
13 testified he was intoxicated and high at the time he assaulted L.W., therefore it
14 affected his ability to think rationally. Id. at p. 484, lines 20-25; p. 485, lines
15 1-2.

16
17 During Coppage's cross-examination, the State questioned him about
18 his self-defense claim and the role of his alcohol and drug use on his mental
19 state. The specific exchange was as follows:

20 [Suhr] Mr. Coppage, why did you have to hit her more than
21 once to defend yourself?

22 [Coppage] Well, I wasn't in my right frame of mind.

23 [Suhr] Why weren't you in your right frame of mind?

24 [Coppage] Well, drinking and drugs.

25 [Suhr] So you never would have hit her if you hadn't been
26 drunk?

27 [Coppage] I've never done that to a woman ever in my life.

1 My 38 years I've never hit a woman.

2 [Suhr] You've never assaulted a woman in your life?

3 [Coppage] Not like that.

4 [Suhr] What do you mean, "not like that"? You've never been
5 physical?

6 [Coppage] I've had arguments.

7 [Suhr] You've had arguments. You've never been physical
8 with a woman?

9 [Coppage] No.

10 [Suhr] You've never hit a woman.

11 [Coppage] No.

12 Id. at p. 500, lines 19-25; p. 501, lines 1-12.

13 Following this exchange, the State called for a sidebar and argued that
14 Coppage had opened the door, for impeachment purposes, to admission of a
15 prior conviction for domestic assault. Id. at p. 501, lines 17-25. His defense
16 attorney at trial opposed the request. Id. at p. 502, lines 2-10. The trial court
17 excused the jury and held an evidentiary hearing on the matter. Id. at pp. 502-
18 504.

19 During that hearing, Coppage denied physically assaulting his live-in
20 girlfriend, however he admitted that in 2004 he pled guilty in Minnesota to
21 assaulting her, but he only pled guilty to get out of jail. Id. at p. 503, lines 8-
22 23. Coppage's 2004 conviction involved him pushing his girlfriend, causing
23 her to fall against a toilet. Id. at p. 503, lines 24-25; p. 504, lines 1-2.

24 Coppage eventually acknowledged he had technically assaulted another
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1 woman, just not as severely as he had in the case at trial. Id. at p. 504, lines 2-
2 25.
3

4 Coppage resisted the State's request to admit the prior conviction at
5 trial because it was not a felony and therefore did not meet the language of
6 N.D. R. EVID. 609, because its prejudicial value outweighed its probative
7 value under N.D. R. EVID. 403, and because of the motion in limine. Id. at p.
8 505, lines 13-25; p. 506, lines 1-17. The State concurred that the conviction
9 was not a felony, and never asserted that it was a crime of dishonesty, but
10 argued that Coppage had opened the door to its admissibility. Id. at p. 506,
11 lines 19-25; p. 507; 508, lines 1-3.
12

13 The district court found that Coppage's testimony was an assertion of
14 innocence of any prior conduct of alleged assault or assaultive behavior and
15 allowed a certified copy of the 2004 conviction into evidence for
16 impeachment purposes as Exhibit # 61. Id. at p. 508, lines 4-11; Doc ID # 44.
17 The district court also found the probative value of the conviction outweighed
18 its prejudicial effect. Id. at p. 508, lines 13-19. The State used the conviction
19 to impeach Coppage's credibility. Id. at p. 509, lines 12-25; p. 510, lines 1-
20 23. Coppage did admit that his testimony with regard to the assault had not
21 been truthful, even though he was under oath. Id. at p. 501, lines 4-9. Shortly
22 thereafter, the State continued questioning Coppage using the statement, "now
23 that we've established while under oath you lied." Id. lines 16-17. This
24 statement was objected to and sustained during trial. Id. lines 18-19.
25
26

27 During the State's closing argument, several statements were made in

1 reference to Coppage's credibility. Specifically, the State informed the jury,
2 "[w]e caught him in a lie on the stand." Id. at p. 600, lines 10-11. The State
3 continued after that statement to provide examples of inconsistencies with
4 Coppage's testimony, then stated, "[h]e can't keep his story straight long
5 enough to keep his lies straight." Id. at lines 18-19. Later, in the State's
6 rebuttal closing, the State argued to the jury that "we caught the defendant in a
7 lie . . . [h]ow many more lies are you going to let the defendant try to get away
8 with?" Id. at 635, lines 15-17.
9
10

11 Coppage's trial attorney did not request a specific curative instruction
12 and the district court did not issue one sua sponte. Jury instructions provided
13 to the jury in both written and verbal form included an instruction that a party
14 may be impeached by evidence of a prior conviction. Trial trans. p. 646, lines
15 23-25; p. 647, lines 1-8.
16

17 Coppage was ultimately convicted and a Criminal Judgment was
18 entered on October 11, 2007. App. p. 9-10. Coppage appealed and the
19 conviction was affirmed. State v. Coppage, 2008 ND 134, 751 N.W.2d 254.
20 The remainder of the facts as they pertain to the postconviction proceedings in
21 this case have been adequately summarized in the appellant's brief.
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ARGUMENT

I. The district court did not err in denying Coppage's application for postconviction relief.

Coppage's application for postconviction relief was properly denied as he did not receive ineffective assistance of counsel. This court imposes a two-prong test when analyzing whether a defendant prevails at a claim of ineffective assistance of counsel. Coppage v. State, 2013 ND 10, ¶ 12, 826 N.W.2d 320, 325.

In accord with the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant claiming ineffective assistance of counsel bears the heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance. The defendant must first overcome the "strong presumption" that trial counsel's representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect of hindsight. Heckelsmiller [v. State], 2004 ND 191, ¶ 3, 687 N.W.2d 454]; Ernst v. State, 2004 ND 152, ¶ 9, 683 N.W.2d 891.

To meet the "prejudice" prong of the Strickland test the defendant carries the heavy burden of establishing a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. The defendant must prove not only that counsel's assistance was ineffective, but must specify how and where trial counsel was incompetent and the probable different result. Unless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of the other evidence presented, create a reasonable probability of a different result, the prejudicial effect of counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial.

Wright, at ¶ 10 (quoting Laib v. State, 2005 ND 187, ¶¶ 9-10, 705 N.W.2d 845). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceedings. Tweed v. State, 2010 ND 38, ¶ 26, 779 N.W.2d 667.

1 Coppage v. State, 2013 ND 10, ¶ 12, 826 N.W.2d 320.

2
3 Specifically, this Court indicated in order for Coppage to prevail on his
4 claims of ineffective assistance of appellate counsel,

5 he must prove (1) his trial and appellate counsel's representation fell
6 below an objective standard of reasonableness, (2) there is a
7 reasonable probability that the result of the trial or appeal would have
8 been different absent his counsel's alleged errors, (3) his prior post-
9 conviction counsel's performance fell below an objective standard of
10 reasonableness by not arguing his trial and appellate counsel was
ineffective, and (4) there is a reasonable probability the result of his
prior post-conviction proceeding would have been different absent his
counsel's alleged errors.

11 Coppage v. State, 2013 ND 10, 826 N.W.2d 320. Further, this court
12 previously analyzed the district court's decision regarding ineffective
13 assistance of counsel and remanded the case to the court to:

14 assess the prejudicial effect of counsel's error within the context of the
15 remaining evidence and the overall conduct of the trial. On remand,
16 the court must consider the error in the context of the properly
17 presented evidence and overall conduct of the trial and determine
18 whether Coppage established a reasonable probability that the result of
the trial would have been different if his counsel had requested a
limiting instruction.

19 Id. at ¶ 21. The trial court did find that Coppage failed to establish a
20 reasonable probability that the outcome of trial would have been different in
21 this case, absent the error. App. p. 47.

22 As a finding has already been made that trial counsel's failure to
23 request a limiting instruction fell below a an objective standard of
24 reasonableness, the State argues that the trial court was correct in finding that
25 even if a limiting instruction had been provided, the outcome of the trial
26 would not have been different. On the direct appeal, this Court determined
27

1 there had been sufficient evidence presented to the jury in order to sustain
2
3 Coppage's Attempted Murder Conviction. State v. Coppage, 2008 ND 134, ¶
4 27, 751 N.W.2d 254. The nature and extent of the injuries to a victim are
5 evidence that can establish the intent to kill. See State v. Prtine, 784 N.W.2d
6 303, 313 (Minn. 2010)(concluding evidence of multiple stab wounds to face
7 and neck supported finding of intent to kill); State v. Bauer, 598 N.W.2d 352,
8 364 (Minn. 1999)(finding of intent to kill could be inferred where victim was
9 covered in bruises and strangled by phone cord); State v. Chambers, 507
10 N.W.2d 237, 238 (Minn. 1993) (finding of intent to kill supported by evidence
11 of multiple stab wounds including one to neck). The nature and extent of the
12 victim's injuries were all presented as part of the State's case-in-chief, before
13 Coppage's cross-examination and the admission of his prior conviction. That
14 evidence was sufficient, on its own, to support a finding that Coppage
15 intended to kill the victim and return a Guilty verdict on the Attempted
16 Murder charge.
17

18
19 On remand, the court determined that "the use of a limiting instruction
20 upon the prior conviction of the defendant would not have established by a
21 reasonable probability a different result in the trial and the resulting verdict."
22 App. pp. 45-46. The court extended this rationale with regard to ineffective
23 assistance of counsel not only to trial counsel but to counsel that represented
24 Coppage during his first postconviction proceeding. Id. In this case, while a
25 limiting instruction should have been provided to the jury, the absence of the
26 instruction does not impact the results in this case.
27

1 During Coppage's cross examination, he volunteered statements that
2 opened the door for the State to inquire of him regarding his testimony;
3 therefore he was not unfairly prejudiced by their admission. A defendant may
4 not be "unfairly prejudiced" by the admission of evidence of a prior
5 conviction where the defendant's testimony introduces an issue or "opens the
6 door" and the State uses the evidence of the prior conviction to establish the
7 defendant lied or misled the jury. Coppage v. State, 2013 ND 10, ¶ 19, 826
8 N.W.2d 320. Rule 609 of the North Dakota Rules of Evidence does not
9 exclude evidence of a prior conviction where it was used to impeach specific
10 testimony. Id. at ¶ 17. Evidence of prior convictions may be properly
11 admitted if an impression has been left by an opposing party's own testimony
12 that would be rebutted. Id. at ¶ 18. If a defendant opens the door to
13 objectionable evidence there can be no reversible error. United States v.
14 Midkiff, 613 F.3d 431, 442 (8th Cir. 2010).

15 Coppage's volunteered statements that "I've never done that to a
16 woman ever in my life. My 38 years I've never hit a woman," would have left
17 the jury with the impression that he had never engaged in violence with a
18 woman. Trial Trans. p. 500, lines 1-2. Coppage further testified upon
19 questioning in response to his volunteered statements that he had never been
20 physical with a woman. Id. at lines 8-9. Coppage, confronted with his prior
21 conviction, did admit that he had assaulted another woman and he had not
22 been truthful under oath. Id. at 4-9. Coppage's statements were misleading to
23 the jury, by his own admission, which allowed the State to use evidence of his
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1 prior conviction for assault against a female girlfriend to impeach his
2 testimony, impacting his credibility at trial.

3
4 Coppage's trial attorney and his postconviction attorney's
5 representation, even though it fell below an objective standard of performance
6 for an attorney, did not prejudice Coppage and the result of the trial or
7 postconviction hearing would not have been different.

8
9 **II. Coppage was not denied due process based upon allegations of**
10 **prosecutorial misconduct.**

11 The prosecutorial misconduct alleged in this case is not sufficient to
12 rise to the level of a due process violation, therefore it does not warrant a
13 reversal of Coppage's conviction for Attempted Murder. This Court applies
14 "a de novo standard of review to a claim of a constitutional violation." State v.
15 Aguero, 2010 ND 210, ¶ 16, 791 N.W.2d 1. "To constitute a due process
16 violation, the prosecutorial misconduct must be 'of sufficient significance to
17 result in the denial of a defendant's right to a fair trial.'" Greer v. Miller, 483
18 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (U.S. 1987) (citing United
19 States v. Bagley, 473 U.S. 667, 676 (1985)).

20
21
22 In prosecutorial misconduct analysis, we have said: "[w]e first
23 determine whether the prosecutors actions were misconduct
24 and, if they were, then we examine whether the misconduct had
25 prejudicial effect. To determine whether a prosecutor's
26 misconduct rises to a level of a due process violation, we
27 decide if the conduct, *in the context of the entire trial*, was
sufficiently prejudicial to violate a defendant's due process
rights . . . Our review is limited to determining if the
prosecutor's conduct prejudicially affected the defendant's
substantial rights, so as to deprive the defendant."

1
2 State v. Estrada, 2013 ND 79 ¶28, 830 N.W.2d 617 (N.D. 2013) (quoting
3 State v. Vondal, 2011 ND 186, ¶12, 803 N.W.2d 617 (N.D. 2011) (emphasis
4 added). It must be shown that but for the prosecutorial misconduct, the
5 outcome of the trial would have been different. Id. This means that the
6 prosecutorial misconduct must have been so influential that it altered the
7 outcome of the trial when looking at the “context of the entire trial.” Id.

8
9 When the State asked Coppage if he would not have hit the victim but
10 for his being intoxicated, that question was aimed at challenging his earlier
11 testimony in which he blamed his behavior on substance use. Trial Trans. pp.
12 500-501. The question was not directed into his past, nor was it intended to
13 inquire regarding Coppage’s criminal history. Coppage could have very
14 simply answered the question “no” which would have been responsive, and
15 would not have brought his past up in any way. Instead of answering the
16 question, Coppage chose to bolster his propensity for nonviolent behavior by
17 making the statement that he had never hit a woman in his life. Trial Trans. p.
18 501, lines 1-2. This was a statement which was not only unresponsive to the
19 question posed, and unnecessary to answer it, but one which opened the door
20 to further inquiry. During that follow-up inquiry Coppage even went so far as
21 to claim he had never even been physical with a woman. Trial Trans. p. 500,
22 lines 8-9.

23
24
25 Coppage asserts that his testimony at trial was “literally true” because
26 his prior assault conviction involved “pushing” instead of “hitting.” However,
27

1 the trial court stated, "I do find, first of all, the witness has asserted his
2 innocence of any prior conduct of alleged assault or assaultive behavior."

3
4 Trial trans. p. 508, lines 4-6. Allowing Coppage's statements to remain,
5 without an impeachment would have misled the jurors.

6 The State did not misrepresent the facts or law to the court during trial,
7 therefore this allegation as to prosecutorial misconduct must fail. The State
8 pointed out the existence of the prior assault conviction to the court, and asked
9 for permission to use it to impeach Coppage's specific testimony. The State
10 did make any reference to the prior conviction until permission from the trial
11 court was given to do so.

12
13 Coppage asserts that the State also engaged in prosecutorial
14 misconduct because it did not disclose the prior conviction to the defense.
15 North Dakota Rule of Criminal Procedure 16(a)(1)(C) provides

16
17 upon a defendant's written request, the prosecution must
18 furnish the defendant with a copy of that defendant's prior
19 criminal record, if any, that is within the prosecution's
20 possession, custody or control if the prosecuting attorney
21 knows—or through due diligence could know—that the record
22 exists.

23 The similarity of the state and federal versions of a procedural rule
24 allows for the latter to be of guidance in interpretation of the former. Fisher v.
25 Fisher, 546 N.W.2d 354, 355 (N.D. 1996). The comments to the rule states
26 that the prosecution is required to disclose a defendant's criminal record by
27 obtaining a copy of the defendant's prior criminal plus a record of prior felony
convictions. Fed. R. Crim. P. 16, cmt. 1975 Enactment n. A. In this case

1 there was never an allegation that the State had not disclosed Coppage's
2 criminal record or "rap sheet" or that trial counsel did not know of the
3 conviction. In fact, Coppage's assault conviction was the subject of a pre-trial
4 Motion in Limine, therefore, the State did not fail to disclose Coppage's prior
5 conviction.
6

7
8 The case of State v. Mayhorn, 720 N.W.2d 776 (Minn. 2006) is
9 distinguishable from the case at hand. In Mayhorn, the Minnesota Supreme
10 Court reversed and remanded the defendant's convictions due to multiple
11 incidents and types of prosecutorial misconduct and evidentiary errors. Id. at
12 792. First, in Mayhorn, while cross-examining the defendant, the prosecutor
13 asked "you wouldn't know the truth if it hit you in the face, would you . . ."?
14 Id. at 786. This was construed as an improper proffering of the prosecutor's
15 own opinion about the defendant's credibility. Id. Second, the prosecutor
16 improperly inflamed the passions of the jury by making a total of fifteen
17 different references to a previous shoot out in which the defendant was
18 involved. Id. Third, the prosecutor improperly commented on the defendant's
19 failure to call a witness at trial. Id. at 787. Fourth, the prosecutor intentionally
20 mis-stated evidence and asked the defendant an improper question about
21 whether another witness was lying. Id. at 787-88. Fifth, the Court concluded
22 that the prosecutor improperly offered evidence of alleged witness threats for
23 which there was no good faith basis to consider admissible. Id. at 788-89.
24 Sixth, the prosecutor improperly highlighted cultural differences between that
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1 of the defendant versus that of the jury. Id. at 789. Seventh, the Court found
2 that the prosecutor improperly remarked about the defendant tailoring his
3 testimony to that of other evidence presented during trial when there was no
4 evidence to support the remarks. Id. at 790-91. Eighth, the Court found that
5 the prosecutor improperly gave her opinion about the credibility of a second
6 witness named “Lyra” in closing argument. Id. at 791. It was this combination
7 of errors which resulted in the ultimate conclusion that the defendant was
8 entitled to a new trial. Id. at 792.
9
10

11 There are a number of significant differences between the facts of this
12 case and the facts in Mayhorn. Here, again, Coppage admitted he was not
13 truthful in his testimony. There is no such admission in Mayhorn. Further,
14 there are multiple instances of misconduct in the Mayhorn case, itemized
15 above, which are neither alleged nor even remotely applicable to the facts
16 present in this matter. The Court in Mayhorn made it very clear that it was the
17 cumulative effect of all the multiple incidents and types of misconduct that led
18 it to the conclusion it did, not any one or lesser combination of the same. The
19 circumstances of Mayhorn are simply not the same as the circumstances here,
20 be it as a matter of fact or degree.
21
22

23 This case can also be distinguished from State v. Doppler. 2013 ND
24 54, 828 N.W.2d 502. First, unlike Doppler, there is an extensive record here
25 which outlines the trial court’s reasoning to allow the conviction to be
26 admitted for impeachment purposes. Id. Second, in Doppler, there was no
27

1 question that the prior convictions were being used as a general attack on the
2 defendant's character under Rule 609. Id. In this case, this Court has already
3 concluded that Coppage's prior conviction was not offered to impeach his
4 general character for truthfulness. Coppage v. State, 2013 ND 10, ¶ 20, 826
5 N.W.2d 320. Rather, the prior conviction was introduced to impeach specific
6 testimony Coppage offered during cross-examination. Id. Doppler is a Rule
7 609 case and the North Dakota Supreme Court has found that the issue here is
8 not governed by Rule 609, therefore, Doppler is not applicable. Id.

11 The statements alleged by Coppage to be improper during the State's
12 closing were not objected to at trial; therefore, the statements must be
13 reviewed for plain error. United States v. Abrams, 108 F.3d 953, 955 (8th Cir.
14 1997). Assuming the statements made by a prosecutor are improper, the
15 Court must consider the possible effect the comment would have on the jury's
16 ability to fairly judge the evidence. State v. Kruckenberg, 2008 ND 212, ¶ 20,
17 758 N.W.2d 427. Statements by the prosecutor are not improper if the
18 statement or argument is not beyond the bounds of any fair and reasonable
19 comment about the evidence presented. State v. Clark, 2004 ND 85, ¶ 18, 678
20 N.W.2d 2004.

22 A prosecutor is not allowed to "inject their personal beliefs into
23 closing argument." Id. at ¶ 11. The concern surrounds a possible inducement
24 of the jurors to trust the government's view over its own judgment when they
25 are deliberating. State v. Rivet, 2008 ND 145, ¶¶ 4-5, 752 N.W.2d 611.

27 Attorneys during trial cannot call witnesses liars or opine that a witness lied

1 during their testimony. State v. Chacano, 2013 ND 8, ¶ 23, 836 N.W.2d 294.
2
3 In this case, the State did comment during its closing argument that Coppage
4 lied and provided examples to the jury of Coppage's inconsistencies during
5 trial. However, even if a prosecutor makes statements that would be
6 considered prejudicial, such as in this case, those statements can be minimized
7 by instructing the jury that an attorney's closing arguments are not evidence.
8 Id. at ¶ 25. In this case, as the trial court's Order Upon Remand indicates,
9 "the jury was expressly instructed, and there is no evidence that it did not
10 follow the court's instructions." App. p. 47.
11

12 In the context of the entire trial, the State's comments regarding
13 Coppage's truthfulness was not so influential that it altered the outcome of the
14 trial. Coppage himself, while he was on the witness stand, acknowledged that
15 he had not been truthful in his responses to questions during trial. Trial Trans.
16 p. 510, lines 6-7. The evidence against Coppage was overwhelming and even
17 though the State argued using words that injected his personal beliefs, these
18 comments did not impact the jury's verdict nor Coppage's ability to have a
19 fair trial.
20
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22 **III. Coppage's right to a fair trial was not violated by the absence of a**
23 **limiting jury instruction regarding a prior assault conviction.**
24

25 The absence of a limiting instruction to the jury at trial does not cause
26 a serious injustice which requires this Court to correct an obvious error. Only
27 in exceptional circumstances where there has been a serious injustice will this

1 Court exercise its authority to notice obvious error. State v. Clark, 2004 ND
2 85, ¶ 6, 678 N.W.2d 765. There are three components for analysis of a claim
3 for obvious error including a determination of (1) error, (2) that is plain, and
4 (3) does it affect substantial rights. Id. “If the defendant ‘establishes a
5 forfeited plain error affects substantial rights, we have discretion to correct the
6 error and should correct it if it seriously affects the fairness, integrity or public
7 reputation of judicial proceedings.’ ” Id. citing State v. Olander, 1998 ND 50,
8 ¶ 14, 575 N.W.2d 658). In making a determination whether the error affected
9 substantial rights, the question of prejudice must be determined or did it affect
10 the outcome of the trial. Id. at ¶ 15.
11

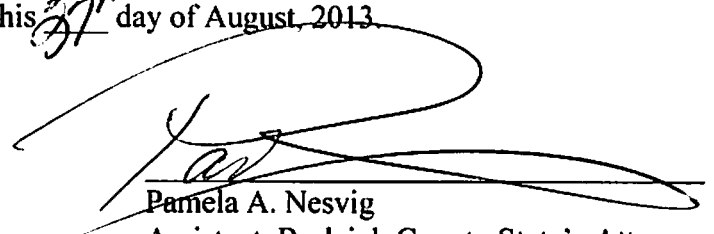
12
13 In this case, the absence of the limiting instruction does not amount to
14 obvious error as it would not affect Coppage’s substantial rights. Where a
15 jury is presented with instructions that, as a whole, adequately and correctly
16 inform them of the law they were required to follow when making a decision,
17 they are deemed sufficient. State v. Olander, 1998 ND 50, ¶ 22, 575 N.W.2d
18 658. The jury was informed of all the essential elements for Attempted
19 Murder and an explanation of impeachment that included a party could be
20 impeached by evidence of a prior conviction. The failure by the court to
21 instruct the jury would not have affected the outcome of the trial in this case
22 due to the overwhelming evidence of Coppage’s guilt and the jury was
23 adequately informed with the instructions provided to find him guilty of
24 Attempted Murder, therefore it was not obvious error.
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CONCLUSION

Based upon the foregoing, the State requests that the district court's
Order on Remand be affirmed.

Dated this 31st day of August, 2013.



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Attorney for Respondent-Appellee

1
2 IN THE SUPREME COURT
3 STATE OF NORTH DAKOTA

4 Ernest Coppage,)
5)
6 Petitioner-Appellant,)
7)
8 -vs-)
9)
10 State of North Dakota,) Supreme Ct. No. 20130180
11)
12 Respondent-Appellee,) District Ct. No. 08-06-K-2085
13) SA File No. F 747-06-10
14
15 STATE OF NORTH DAKOTA)
16) ss
17 COUNTY OF BURLEIGH)
18)

19 Kim Bless, being first duly sworn, depose and say that I am a United
20 States citizen over 21 years old, and on the 27th day of August, 2013, I
21 deposited in a sealed envelope a true copy of the attached:

- 22 1. Brief of Respondent-Appellee
23 2. Affidavit of Mailing

24 in the United States mail at Bismarck, North Dakota, postage prepaid,
25 addressed to:

26 MONTY G. MERTZ
27 ATTORNEY AT LAW
912 3RD AVE. S.
FARGO, ND 58103-1707

which address is the last known address of the addressee.

28 Kim Bless
29 Kim Bless

30 Subscribed and sworn to before me this 27th day of August, 2013.

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34
35
36
37

KATIE A WANGLER
Notary Public
State of North Dakota
My Commission Expires October 8, 2014

Katie A. Wangler
Katie A. Wangler, Notary Public
Burleigh County, North Dakota
My Commission Expires: 10-8-14.