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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Alois Vetter,

Plaintiff - Appellant,

Supreme Court No. 20140028

vs.

Dist. Ct. No. 09-2013-CV-01789

State of North Dakota,

Defendant - Appellee.

APPELLEE'S BRIEF

Appeal from the January 22, 2014 Order
Denying Post-Conviction Relief
East Central Judicial District in Cass County, North Dakota
The Honorable Wickham Corwin Presiding

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[¶7] **STATEMENT OF CASE**

[¶8] Vetter appeals from the district court's denial of his application for post-conviction relief. Seeking remand for a new trial or for further findings, Vetter contends that (1) the district court did not read the entire trial transcript, (2) newly discovered evidence exists that the victim committed perjury, and (3) his trial attorney was ineffective for not seeking a continuance to locate a witness.

[¶9] The State requests that this Court affirm the district court's decision. The State asserts that the district court (1) reviewed all the relevant portions of the record – just as it was required to do, (2) properly concluded that Vetter failed to prove newly discovered evidence, namely alleged impeachment information against the victim, would have likely resulted in acquittal, and (3) reasonably found that the witness Vetter now claims the trial should have been continued for

would have been very supportive of the State's case and thus properly concluded that Vetter failed to prove ineffective assistance of counsel.

[¶10] **STATEMENT OF FACTS**

[¶11] **I. Trial**

[¶12] In late 2011, Vetter was tried by jury on charges of aggravated assault and reckless endangerment, for allegedly using his humvee to force Brian Hemphill to backpedal and, ultimately, to drive over Hemphill. Trial revealed the following:

[¶13] On the evening of February 18, 2011, Vetter was driving his "toy" – a 6,534 pound, 6.5 feet tall humvee – checking on one of the many rental properties he owned in West Fargo. (Transcript of Trial, Cass No. 09-2011-CR-00937, Oct. 18-20, 2011, "Trial" 407:6-7, 189:25-190:8, 190:23-191:2, 370:13-371:8, 402:6-403:8, 264:18-20, 167:4-14.) Vetter drove onto Second Avenue West, a street lined with multiple units he owned. (Trial 264:18-20, 167:4-14.) It was at least the third time that day that Vetter had travelled by his properties. (Trial 402:6-403:21, 410:1-4.)

[¶14] Hemphill meanwhile was visiting 611 Second Avenue West, one of Vetter's rental properties. (Trial 258:1-10.) Hemphill had recently moved out of 613 Second Avenue West, after several landlord-tenant disputes with Vetter. (Trial 262:13-16, 255:13-22; Defendant's Trial Exhibit 1.) Vetter and Hemphill did not like each other. (Trial 255:13-22, 358:16-23.) Vetter thought Hemphill "was just a real asshole." (Plaintiff's Trial Exhibit 24 at 55:36-55:41.) On this

evening, Hemphill, who had been drinking, learned that Vetter had been repeatedly driving by the residence. (Trial 154:8-14, 263:15-264:24.) Hemphill went out to confront Vetter about Vetter's driving. (Trial 263:15-264:24.)

[¶15] **A. <u>Vetter's Use of His Humvee to Run Over Hemphill</u>**

[¶16] Once outside, Hemphill saw Vetter driving toward 611 Second Avenue West. (Trial 264:18-20.) Hemphill walked out into the street. (Trial 265:16-19.) Vetter stopped his humvee right in front of Hemphill and yelled at Hemphill. (Trial 121:7-12, 265:18-19, 267:4-7.)

[¶17] Vetter then drove forward, forcing Hemphill to backpedal. (Trial 268:23-24, 298:25-299:2, 121:23-122:3.) At some point, Hemphill could not get out of Vetter's humvee's path. (Trial 269:2-18, 122:4-7.) Nor could Hemphill keep up. (Trial 269:2-18, 300:9-37, 122:4-7.) Vetter continued driving, and Hemphill fell. (Trial 300:9-37, 122:4-7.)

[¶18] Aaron Knutson and Jennifer McFarling heard Vetter accelerate his humvee and drive over Hemphill. (Trial 300:18-22, 122:19-123:7.) Vetter screamed an obscenity as he was driving over Hemphill. (Trial 312:20-23, 123:2-3.) Both a front and rear tire of Vetter's humvee trampled Hemphill. (Trial 123:5-6, 300:23-301:4.) Knutson immediately called 911; the time was approximately 7:17 p.m. (Trial 123:9-10, 135:2-5.)

[¶19] Hemphill was rushed to a local hospital. (Trial 151:23-152:10.) Dr. Khaled Zreik discovered blood pooling in Hemphill's chest cavity (Trial 155:24-156:6) and described Hemphill's chest injury as one involving high impact,

consistent with a crushing force (Trial 158:10-13). Hemphill also suffered multiple broken ribs, a broken facial bone, a lacerated ear, and abrasions. (Trial 157:3-17.)

[¶20] West Fargo Police obtained from hospital staff the clothes that Hemphill had been wearing when Vetter drove over Hemphill. (Trial 179:13-23.) The clothes had a tire track imprinted on them. (Trial 187:4-20.)

[¶21] **B. <u>Vetter's Various Stories</u>**

[¶22] While Hemphill was being taken to the hospital, Vetter drove home. (Trial 375:2-4.) At approximately 7:32 p.m., about fifteen minutes after Knutson's 911 call, Vetter called police dispatch. (Trial 135:23-25.) During the recorded call, Vetter claimed "a bunch of guys attacked" his humvee from the "front, and the side, [and] the back" (Plaintiff's Trial Exhibit 3 at 0:40-0:58); one of the attackers went down to tamper with a tire on the humvee (Plaintiff's Trial Exhibit 3 at 1:58-2:04); and Vetter did not know whether he had struck someone with his humvee (Plaintiff's Trial Exhibit 3 at 2:10-2:18).

[¶23] Just a few minutes after Vetter's call, West Fargo Police Officer Ryan Denis arrived at Vetter's residence. (Trial 136:1-21.) Vetter told Officer Denis that a group of persons – four, Vetter believed – had attacked his humvee (Trial 138:13-139:5); the attackers "bang[ed]" on the humvee (Trial 139:10-15); at one point, Vetter lost sight of one of the attackers and suspected the attacker was trying to damage a tire on the humvee (Trial 139:21-23); and Vetter did not back up because he did not know if anyone was behind his humvee (Trial 140:4-8).

Officer Denis inspected Vetter's humvee and saw no damage. (Trial 137:6-23.)

[¶24] A few hours later, Vetter called West Fargo Police Sergeant Jason Dura. (Trial 314:15-24.) Vetter then said a man walked in front of Vetter's humvee and pointed his thumbs down (Plaintiff's Trial Exhibit 22 at 2:33-2:37); Vetter drove slowly and "pushed him back, pushed him back, [and] pushed him back" (Plaintiff's Trial Exhibit 22 at 2:45-2:51); after Vetter looked to the right to go around the man, Vetter realized Vetter had put the humvee in neutral (Plaintiff's Trial Exhibit 22 at 3:00-3:08); the humvee stopped (Plaintiff's Trial Exhibit 22 at 3:08-3:10); after shifting back into gear, Vetter could not see the man (Plaintiff's Trial Exhibit 22 at 3:10-3:14); and Vetter did not know whether the man tried to go around the humvee when it went into neutral (Plaintiff's Trial Exhibit 22 at 3:15-3:23). When Sgt. Dura said that Vetter would be considered an aggravated assault suspect, Vetter stated if that was all he would be charged with, "it's not the worst." (Plaintiff's Trial Exhibit 22 at 1:25-1:40.) Vetter added that if Vetter drove over the man, Vetter would be surprised if the man lived. (Plaintiff's Trial Exhibit 22 at 4:05-4:18.)

[¶25] Three days later, West Fargo Police Detective Derek Cruff interviewed Vetter. (Trial 327:15-22.) Vetter at that point claimed a man walked up to Vetter's humvee, slapped the humvee, and with his chest, bumped the humvee (Plaintiff's Trial Exhibit 24 at 4:25-4:37); a second man came out about three steps ahead of the man who walked up to the humvee (Plaintiff's Trial Exhibit 24 at 12:59-13:07); the second man crossed the street and, "in the

[Defendant's] mind," was behind the humvee (Plaintiff's Trial Exhibit 24 at 13:07-13:20); Vetter drove forward, forcing the first man to backpedal (Plaintiff's Trial Exhibit 24 at 21:06-21:19); Vetter used his humvee to push the first man back for a ways and the man was "kind of" on the humvee's hood[1] (Plaintiff's Trial Exhibit 24 at 37:20-37:40); Vetter thought he could drive around the first man, turned, and inadvertently shifted the humvee out of gear (Plaintiff's Trial Exhibit 24 at 29:37-29:45); Vetter had his hand on the humvee's shifter because if the man would have fallen, Vetter would have had to immediately stopped (Plaintiff's Trial Exhibit 24 at 35:33-35:44); Vetter "panicked a little bit" (Plaintiff's Trial Exhibit 24 at 5:17-5:19) but also did not panic and never panics (Plaintiff's Trial Exhibit 24 at 58:52-59:04); Vetter looked up after shifting and did not see the first man (Plaintiff's Trial Exhibit 24 at 5:27-5:31); Vetter thought that the first man was tampering with a tire on the humvee (Plaintiff's Trial Exhibit 24 at 5:32-5:38); and Vetter sped away (Plaintiff's Trial Exhibit 24 at 5:33-5:43).

[¶26] During the interview, Vetter also asserted Vetter was not afraid of Garner Gallant – the tenant at 611 Second Avenue West (Plaintiff's Trial Exhibit 24 at 1:00:00-1:00:20; Trial 358:10-15); the incident did not stem from a landlord-tenant dispute and occurred because the man tried to stop Vetter in a drug area (Plaintiff's Trial Exhibit 24 at 8:24-8:40); Vetter had no idea who the man in

[1] Det. Cruff recited what some had reported Vetter did, and Vetter confirmed, answering, "Okay, yup." (Plaintiff's Trial Exhibit 24 at 37:20-37:40.)

front of Vetter's humvee was (Plaintiff's Trial Exhibit 24 at 4:15-4:23); Vetter had been told in early February that Hemphill had left the area (Plaintiff's Trial Exhibit 24 at 7:36-7:50); and now that Vetter knew "it was [Hemphill] that [Vetter] hit," Vetter was more relieved because Hemphill was a bully (Plaintiff's Trial Exhibit 24 at 33:30-33:42).

[¶27] Months later, Vetter testified that he was afraid of the Second Avenue West neighborhood because it was a "drug area." (Trial 371:17-19, 395:6-7.) He admitted, though, that he regularly checked on his properties on Second Avenue West and that on February 18, 2011, he travelled by 611 Second Avenue West three times – including two times during the evening. (Trial 402:6-403:21, 410:1-4.) Vetter further testified that the incident began when one man came and stood "in front of the road" (Trial 370:10-19); a second man, with what appeared to be a red toolbox, came out and stood next to the first man (Trial 370:19-21); the two men faced each other and talked (Trial 371:14-15); the man with the toolbox then quickly walked back to behind the humvee, while the first man remained approximately thirty to forty feet in front of the humvee (Trial 371:6-15); Vetter kept driving, and the first man started walking toward the humvee (Trial 371:19-21); the first man dropped his hands on the hood of the humvee and laid his shoulder into the humvee (Trial 371:24-25); Vetter kept driving forward (Trial 372:1); Vetter inadvertently shifted the humvee out of gear (Trial 373:12); after shifting back into gear, Vetter looked up and no longer saw the first man (Trial 373:21-24); Vetter thought that the first man was tampering with a tire on Vetter's

humvee (Trial 374:1-13); and Vetter drove off (Trial 374:16-19). Vetter also testified he did not believe he had run over Hemphill. (Trial 411:3-7.)

[¶28] **C. Hemphill's Partial Recollection & Prior Convictions**

[¶29] Hemphill testified that he recalled going into the street to confront Vetter (Trial 264:21-19), that Hemphill told officers that Hemphill was "pissed off" (Trial 290:4-13), that Vetter drove his humvee up to Hemphill (Trial 265:16-17), that Hemphill did not move out of the way (Trial 267:232-268:5, 287:21-25), and that Vetter used his humvee to push Hemphill back, forcing Hemphill to backpedal (Trial 264-270). Beyond that, Hemphill just recalled waking up in the hospital. (Trial 270:23-24.) Hemphill testified that he did not recall drinking and admitted that he had told officers that he had not been drinking. (Trial 260:21-261:11, 289:1-8.) A medical report showed that Hemphill's blood alcohol concentration was .112 percent. (Trial 154:10-14.) Hemphill indicated he had nine prior felony convictions through 2008. (Trial 257:11-19.) When asked "what's happened since '08 in your life?" Hemphill testified, "I got sick and tired of being a loser. I didn't want to lead that lifestyle anymore. I got tired of being in trouble." (Trial 257:20-23.)

[¶30] **D. Closing Arguments & Verdict**

[¶31] During closing arguments, the State conceded that Hemphill had many prior convictions, had been drinking, and had initially claimed he had not been drinking, but asserted that his explanation was consistent with the other witnesses' recollections. (Trial 444:24-445:12.) The State even told the jury it

could completely disregard Hemphill's testimony because the other evidence established Vetter's guilt. (Trial 445:9-12.)

[¶32] The jury found Vetter guilty and that Vetter used a dangerous weapon in committing aggravated assault. State v. Vetter, 2013 ND 4, ¶ 1, 826 N.W.2d 334. Vetter appealed, and this Court affirmed. Id. at ¶ 5.

[¶33] **II. Vetter's Application for Post-Conviction Relief**

[¶34] A few months later, Vetter asserted ineffective assistance of counsel and newly discovered evidence in an application for post-conviction relief. (App. 11.) In the ineffective assistance claim, Vetter alleged that his trial attorney should have requested a continuance to locate Garner Gallant, "a convicted criminal and drug user, [who] would have corroborated [Vetter's] story and made [Vetter's] testimony more credible." (App. 12-13.) In the newly discovered evidence claim, Vetter alleged that Hemphill had committed perjury in October 2011, when Hemphill testified that since 2008, he had gotten sick and tired of being a loser, didn't want to lead that lifestyle anymore, and got tired of being in trouble. In support, Vetter pointed out that Hemphill was convicted in 2012 of a burglary committed in April 2011. (App. 15-20.)

[¶35] A hearing on Vetter's application was held in January 2014. Vetter called only one witness: himself. Regarding events at the crime scene, Vetter testified that he used his humvee to very slowly push Hemphill, who took "three big steps backwards" (Transcript of Post-Conviction Relief Hearing, Jan. 3, 2014 "PCR" 18:22-23); that thus if someone said Vetter "pushed [Hemphill] back,

pushed him back, pushed him back," that would be untruthful (PCR 35:16-36:9); and that when leaving the scene, Vetter "recall[ed] a bump 50 feet down" but thought the guy allegedly behind the humvee might have thrown the tool box under the humvee (PCR 29:10-14). Regarding his knowledge at the time of trial, Vetter testified that he knew that he had run over Hemphill (PCR 28:5-7); that he wanted Gallant to testify at trial because Gallant would help establish Vetter's self-defense claim (PCR 12:24-25:4); and that Gallant's statement to police was nearly identical to McFarland's (PCR 35:3-6).

[¶36] During the State's case, Vetter's trial attorney, Mark Meyer, testified. He reasoned that strategically he believed it could be beneficial to Vetter if Gallant did not testify (PCR 46:8-18, 53:8-19) and that, except for the lone fact that Gallant indicated Hemphill put his hands on the humvee, Gallant's statements to police did not corroborate Vetter's story (PCR 50:6-19, 56:20-57:10). Meyer explained that Gallant reported Vetter used his humvee to force Hemphill back a lengthy distance, actually pushing Hemphill up onto the humvee, and Vetter ultimately running over Hemphill. (PCR 46:19-47:3, 53:8-13, 60:8-13.) Meyer also stated that he advised Vetter that depositions of the witnesses should be taken but that Vetter rejected the advice. (PCR 45:21-46:5, 54:4-9.)

[¶37] The district court noted that although it had not read the entire transcript of the trial, it was well introduced with each of the relevant portions of the record. (PCR 74:17-24.) Reasoning that the irrelevant portions would not

impact the issues, the court explained it was ready to issue its ruling. (PCR 74:21-24.)

[¶38] Regarding Vetter's newly discovered evidence claim, the court concluded that the guilty verdicts were supported by substantial evidence in the record – including testimony from two different disinterested eyewitnesses, solid medical evidence, physical evidence, and Vetter's inconsistent descriptions of the events. (PCR 76:12-24.) The court thus rejected Vetter's claim that the jury's knowledge of an additional, and recent, felony committed by Hemphill would have likely changed the outcome of the trial. (PCR 75:18-23.)

[¶39] Regarding Vetter's ineffective assistance of counsel claim, the court found that Meyer was very credible (PCR 77:5-12), Vetter was "all over the place in his description of the events" (PCR 76:20-24), and "Gallant maybe could have supported some things that the defense wanted to establish, but he absolutely would have provided testimony that would have corroborated what the other eyewitnesses said and would have been very supportive of the State's case" (PCR 78:16-20). Importantly, Gallant would have been the "third witness who would have said that Mr. Hemphill was pushed a considerable distance by the front of the Hummer, and then when Mr. Hemphill fell down, Mr. Vetter proceeded to drive over him." (PCR 78:21-24.) Determining that Gallant would not have helped the defense and his testimony would not have likely changed the outcome, the court rejected Vetter's ineffective assistance claim. (PCR 78:24-79:2.)

[¶40] The court issued its order denying post-conviction relief. (App. 27.) Vetter appealed. (App. 35.)

[¶41] LAW AND ARGUMENT

[¶42] Vetter contends that the case should be remanded because the district court did not read the entire transcript. Vetter also contends that the district court's decision should be reversed because newly discovered evidence exists that Hemphill committed perjury and because Vetter's trial attorney was ineffective for not seeking a continuance to locate Gallant. None of Vetter's contentions is supportable.

[¶43] I. The district court properly reviewed all the relevant portions of the record.

[¶44] Vetter suggests that N.D.R.Civ.P. 63 provides helpful guidance on the issue of whether the district court was required to read the entire record. The State agrees.

[¶45] Under Rule 63, a successor judge certifying familiarity with the record "must read and consider all relevant portions of the record." Weigel v. Weigel, 1999 ND 55, ¶ 9, 591 N.W.2d 123 (citation omitted) (emphasis added); Clark v. Clark, 2005 ND 176, ¶ 19, 704 N.W.2d 847; see generally C & M, Inc., v. Northern Founders Ins. Co., 112 N.W.2d 827, 828 (N.D. 1962) (explaining that "[i]f counsel wishes to raise the question of the sufficiency of the evidence upon a motion for a new trial before a successor judge, he must present that evidence to the judge and the successor judge must adequately review that evidence")

(emphasis added). The successor judge, as Vetter points out, "must have sufficient confidence in the existing record to be able to resolve the case on a fair and intelligent basis." (Appellant's Brief at 11 (citing 12 James Wm. Moore, Moore's Federal Practice § 63.05(6)(a) (1988).)

[¶46] Using Rule 63 as a guide shows that the district court acted appropriately. The district court was not required to read every portion of the record. Instead, the district court did precisely what Rule 63 prescribes: review of all the relevant portions of the record. See Weigel v. Weigel, 1999 ND 55, ¶ 9, 591 N.W.2d 123; Clark v. Clark, 2005 ND 176, ¶ 19, 704 N.W.2d 847.

[¶47] Vetter focuses – not on specific findings or reasoning of the district court – but on its use of the word "sense." In particular, the district court noted that "it is my sense that both sides have had ample opportunity to point out to me what they deem to be the relevant portions of that trial." (PCR 74:17-20.) Vetter selects a definition of "sense" that fits his argument: "an intuitive or acquired perception or ability to estimate." (Appellant's Brief at 9.) Yet many other definitions of "sense" exist – including "a mental discernment, realization, or recognition" and "an opinion or judgment formed or held." Webster's Encyclopedic Unabridged Dictionary 1744 (1996). And other definitions fit the context better than the one Vetter selected. Indeed, in the same discussion that the court used the word "sense," it emphasized rational factors - the in-court testimony and the arguments set out in Vetter's own petition and his attorney's petition - and explained it was familiar with all the relevant portions of the record. (PCR 74:11-

24.) But even if the district court misused the word "sense," it would be absurd to ignore the district court's rationale and conclude, as Vetter suggests, that the court simply made an "educated guess." (Appellant's Brief at 10.)

[¶48] Vetter offers no specific factual support for his claim that the district court did not resolve the case in a fair and intelligent manner. On the contrary, Vetter's untruthfulness alone, which was one of the factors the court pointed out, showed the court acted fairly and intelligently. Besides Vetter's previous inconsistent stories, his testimony at the hearing revealed at least two more examples of his untruthfulness. First, he testified at trial that he did not believe he had run over Hemphill (Trial 411:3-7); then at the post-conviction relief hearing, he testified that he knew before trial that he had run over Hemphill (PCR 28:5-7). Second, before trial he told Sgt. Dura that he drove slowly and "pushed [Hemphill] back, pushed him back, [and] pushed him back" (Plaintiff's Trial Exhibit 22 at 2:45-2:51) and indicated to Det. Cruff that he drove forward, forcing Hemphill to backpedal (Plaintiff's Trial Exhibit 24 at 21:06-21:19) - even to the point where Hemphill was "kind of" on the humvee's hood (Plaintiff's Trial Exhibit 24 at 37:20-37:40); then at the post-conviction relief hearing, he testified that he had used his humvee to very slowly push back Hemphill, who took "three big steps backwards" (PCR 18:22-23) and that if someone said Vetter "pushed [Hemphill] back, pushed him back, pushed him back," that would be untruthful (PCR 35:16-36:9). The district court thus reasonably found that Vetter was "all over the place in his description of events" and fairly and intelligently considered

that as a factor in deciding the case. (PCR 76:20-24.)

[¶49] In short, Vetter cannot support his argument that the district court clearly erred by not reading every portion of the record. Applying the very authority Vetter cites - Weigel v. Weigel, 1999 ND 55, ¶ 9, 591 N.W.2d 123 and 12 James Wm. Moore, Moore's Federal Practice § 63.05(6)(a) (1988) – shows that.

[¶50] **II. The district court properly concluded that Vetter failed to prove the alleged newly discovered impeachment evidence would have likely resulted in acquittal.**

[¶51] Vetter's newly discovered evidence claim required Vetter to prove "(1) the evidence was discovered after trial, (2) the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal." Moore v. State, 2007 ND 96, ¶ 9, 734 N.W.2d 336 (citation omitted). The abuse of discretion standard is applied to the district court's decision on whether the claimant proved newly discovered evidence. State v. Steinbach, 1998 ND 18, ¶ 22, 575 N.W.2d 193.

[¶52] The district court acted within its discretion in concluding Vetter failed to prove his claim. Although the first two elements of the newly discovered evidence claim were met, the latter two were not. When reviewing the latter two, the precise allegations of perjury should be considered: (1) "[since 2008], I got sick and tired of being a loser. I didn't want to lead that lifestyle anymore. I got

tired of being in trouble[,]" and (2) "I'm familiar enough with my past and I wanted to – I did not want to have a situation where I was going to get in trouble. You know, I didn't want to – basically I live my life anymore not to go to jail, not to make stupid decisions." (Appellant's Brief at 12-13.) Whether Hemphill's commission of a burglary six months before those two excerpts of testimony shows that the testimony was perjury is uncertain; proving the untruthfulness of one's own opinion about himself is difficult.

[¶53] But more importantly, whether Hemphill falsely testified that he desired and strived to lead a crime-free lifestyle as asserted in the two excerpts, was not material to any trial issue. Indeed, "merely impeaching evidence that [a person] is not a truthful witness" is generally insufficient grounds for granting a new trial. See State v. Steinbach, 1998 ND 18, ¶ 23, 575 N.W.2d 193; State v. VanNatta, 506 N.W.2d 63, 69-70 (N.D. 1993); State v. McLain, 312 N.W.2d 343, 346-47 (N.D. 1981). For instance, in VanNatta, a prosecution witness had testified that he and a second witness had seen the defendant a week before the murder make sexual advances toward the victim and say, "one way or another I'm going to get her," and the rejected newly discovered impeachment evidence would have shown that the second witness had been in jail and thus could not have been at the scene of the purported sexual advances and threatening remark. VanNatta, at 69-70. And in Steinbach, a prosecution witness had testified that the victim barricaded herself in a room to get away from the defendant during a heated dispute a few hours before the murder, and the rejected newly discovered

impeachment evidence would have shown that the witness had falsely testified that he had not stolen property from the defendant. Steinbach, at ¶ 23. As in VanNatta and Steinbach, Hemphill's testimony about his desire to lead a crime-free lifestyle did not directly relate to the crime itself; it was merely potentially impeaching information and was not material. Thus the alleged evidence to impeach that testimony does not create grounds for a new trial.

[¶54] Further, the alleged evidence to impeach Hemphill's testimony that he did not desire to lead a crime-free lifestyle is not of such a nature that it would probably produce an acquittal on retrial. Hemphill was already impeachable: he had nine prior felony convictions, had a .112 alcohol concentration at the time of the incident, was untruthful to police about his drinking, admitted to being "pissed off," and did not recall getting run over. On the other hand, the evidence besides Hemphill's testimony was overwhelming: the testimony of two eyewitnesses, Aaron Knutson and Jennifer McFarling, who heard Vetter rev his humvee's engine and yell as he drove his humvee over Hemphill with both a front and back wheel (Trial 300:18-301:4, 312:20-23, 122:19-123:7); the testimony of Dr. Zreik, who explained that Hemphill suffered multiple broken ribs, a broken facial bone, a lacerated ear, abrasions (Trial 157:3-17) and a chest injury consistent with a crushing force (Trial 158:10-13); and the many conflicting statements of Vetter himself, see supra Statement of Facts at I(B).

[¶55] Still further, it would make no difference if the "Larrison Rule" was applied. Under the Rule, a new trial may be granted where: (1) the court is

reasonably well satisfied that the testimony given by a material witness is false, (2) that without the testimony, the jury might have reached a different conclusion, and (3) that the party moving for a new trial was taken by surprise by the false testimony or did not know of its falsity during trial. State v. Hegland, 355 N.W.2d 803, 806 (N.D. 1984) (discussing but not adopting the Rule) (citations omitted). Given the immateriality of the alleged impeachment evidence and the overwhelming other evidence, Vetter could not show the jury might have reached a different conclusion. The district court thus appropriately concluded it was not grounds for new trial.

[¶56] **III. The district court reasonably found that Gallant would have been very supportive of the State's case and thus properly concluded that Vetter failed to prove ineffective assistance of counsel based on the failure to seek a continuance to locate Gallant.**

[¶57] To succeed on his ineffective assistance of counsel claim, Vetter faced the "heavy burden" to prove that (1) his trial attorney's performance in failing to seek a continuance to locate Gallant fell below an objective standard of reasonableness and (2) but for that failure, Vetter was prejudiced, i.e., a reasonable probability existed that the trial's outcome would have been different. See Murchison v. State, 2011 ND 126, ¶ 8, 799 N.W.2d 360 (citation omitted). Review of the district court's ruling that Vetter failed to prove his claim involves a mixed question: factual findings are subject to the clearly erroneous standard, and legal conclusions are subject to de novo review. See Wong v. State, 2011 ND 201, ¶ 15, 804 N.W.2d 382 (citation omitted).

[¶58] The district court reasonably found that Gallant would have been very supportive of the State's case. Meyer explained that Gallant would have supported the State's case – reporting that Vetter used his humvee to push Hemphill back a lengthy distance and ultimately to run him over. (PCR 46:19-47:3; 53:8-13; 60:8-13.) Although Vetter emphasizes that Gallant had reported that Vetter put his hands on the humvee, that was insignificant for two major reasons. First, corroborating Vetter's trial testimony about Hemphill placing his hands on the humvee would not have corroborated the remainder of Vetter's testimony. Indeed, Vetter testified that he did not believe he had even run over Hemphill (Trial 411:3-7), and Vetter had given many different versions of events to police before trial, see supra Statement of Facts at I(B). And interestingly, the difference that Meyer noted between Gallant's and the other eyewitnesses' reports was that Gallant indicated that Vetter pushed Hemphill back such that Hemphill was up on the humvee's hood – a damaging fact that Vetter himself admitted, at least in his interview with Det. Cruff. (PCR 46:19-47:3; Plaintiff's Trial Exhibit 24 at 37:20-37:40.) Second, regardless of whether Hemphill placed his hands on the humvee, it would not have justified Vetter's reaction – using a 3.25-ton humvee to force Hemphill back and back until Hemphill fell over and then to trample Hemphill.

[¶59] Under the circumstances, deciding not to locate Gallant appeared to be a wise trial tactic, which should not be second-guessed or presumed ineffective because Vetter was convicted. See Noorlun v. State, 2007 ND 118, ¶ 12, 736

N.W.2d 477. Thus the decision neither fell below an objective level of reasonableness nor was prejudicial. The district court appropriately concluded that Vetter failed to prove ineffective assistance of counsel.

[¶60] **CONCLUSION**

[¶61] The district court appropriately reviewed all the relevant portions of the record and properly concluded that Vetter failed to prove his claims of newly discovered evidence and ineffective assistance of counsel. Its judgment should be affirmed.

Dated at Fargo, North Dakota this 19th day of May, 2014.

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[¶62] **CERTIFICATE OF SERVICE**

[¶59] A true and correct copy of the foregoing document was sent by e-mail on the 19th day of May, 2014, to: Richard Edinger at edingerlaw@cableone.net.

Reid A. Brady, NDID# 5696