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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	**Supreme Court File Nos. 20140368 and 20140369**
City of Grand Forks,	)	
Plaintiff and Appellee,	)	**Grand Forks County Criminal Nos. 18-2013-CR-02153 and 18-2013-CR-2366**
v.	)	
Tyler James Jennewein,	)	**APPELLANT'S BRIEF**
Defendant and Appellant.	)	

APPEAL FROM THE CRIMINAL JUDGMENTS IN GRAND FORKS COUNTY DISTRICT COURT, NORTHEAST CENTRAL JUDICIAL DISTRICT GRAND FORKS, NORTH DAKOTA THE HONORABLE LAWRENCE JAHNKE, PRESIDING.

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The Final Dispositional Conference on Mr. Jennewein's case was conducted September 26, 2014 and the jury trial on two days, September 30, 2014 and October 1, 2014. The transcript of the September 26 hearing is referred to as [Tr. FDC] the transcript of the jury trial is referred to as [Tr. I], [Tr. II], and [TR. III] in this brief.

JURISDICTION

[¶ 1] The Defendant, Tyler James Jennewein, timely appealed the final criminal judgments arising out of the district court and the North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.C.C. § 29-32.1-14 which provides that, "[a] final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court." The district court had jurisdiction under N.D.C.C. § 29-32.1-01. This Court has appellate jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-06(1)(2)(4) and (5). Final criminal judgments were entered on December 3, 2014.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the court improperly admitted evidence and failed to provide relief under North Dakota Criminal Procedure Rule 16.

II. Whether the district court erred by denying the Defendant's motion to sever offenses.

III. Whether the prosecution, during closing arguments, committed reversible error by improperly commenting on Mr. Jennewein's failure to testify.

IV. Whether the district court can give day for day credit on days already completed in the 24/7 sobriety program.

STATEMENT OF CASE

[¶ 3] This is a criminal matter on direct appeal from Northeast Central Judicial District, Grand Forks County Criminal Judgments.

[¶ 4] These cases were before the district court in State v. Jennewein, 18-2013-CR-02153 and City v. Jennewein, 18-2013-CR-02366. The informations were filed with

the court on October 11, 2013 and November 17, 2013, respectively. The former charging the Defendant with one count of Possession Of Drug Paraphernalia and one count of Driving a Vehicle Under The Influence Of Liquor and the latter charging one count of Driving Under Suspension.

[¶ 5] A motion to dismiss was held on March 11, 2014. The motion was denied. A motion to sever counts was made April 10, 2014. The motion was denied and the cases proceeded without resolution to a jury trial, held from July 8th through July 9th of 2014. A mistrial was declared on July 9, 2014.

[¶ 6] The district court ordered a new trial and final dispositional conference in both cases. The final dispositional conference was held September 26, 2014. The Defendant renewed his motion to dismiss all charges and to sever count one, Possession Of Drug Paraphernalia. The court sustained its previous denial of the motions. A jury trial was held on September 30th through October 1st of 2014. A verdict of guilty was reached by the jury on count two (2), Driving a Vehicle Under The Influence Of Liquor, and count one (1), Driving Under Suspension. The cases proceeded to sentencing.

[¶ 7] In case 18-2013-CR-02153, the court imposed one (1) year of supervised probation, with one year of participation in the 24/7 sobriety program.

STATEMENT OF FACTS

[¶ 8] Tyler Jennewein and his girlfriend Kristine Cleveland were at their home, the Warehouse Apartments, in Grand Forks on Friday evening, October 4, 2013. [Tr. II p. 177]. They left their home at roughly 10:00 p.m. to go to Bonzer's Sandwich Pub in downtown Grand Forks. [Tr. II pp. 180, 181, 228]. A week prior to that evening, Ms. Cleveland's car was in an accident and was being fixed. [Tr. III p. 275]. As a result, Mr.

Jennewein's parents lent Ms. Cleveland their car. [Tr. II pp. 237; Tr. III p. 275]. Ms. Cleveland drove Mr. Jennewein and herself downtown. [Tr. II p. 182]. They went into Bonzer's and briefly spoke with Melissa Bonzer, who was bartending that evening. [Tr. II p. 251]. Ms. Cleveland and Mr. Jennewein decided to leave Bonzer's and discussed what they were going to do next. [Tr. II p. 191]. They considered going to Joe Black's Bar and Grill. Id.

[¶ 9] As Ms. Cleveland drove, she exited Bonzer's parking lot, traveled North on Fifth Street, made a right onto First Avenue North and stopped at the intersection of First Avenue North and North Third Street. [Tr. II pp. 234-235]. A group of individuals passed in front of the car and Ms. Cleveland heard what sounded like someone hitting the car with their hand or body. [Tr. III p. 235]. Ms. Cleveland lowered the window and yelled at a group of gentlemen she believed to be responsible for striking the car. [Tr.III pp. 236]. She got out of the car and followed the men, moving North about halfway up the block. Tr. III pp. 237-238].

[¶ 10] Officer Lammers was in her patrol car on North Third Street approaching First Ave North in the City of Grand Forks. [Tr. I p. 38]. She came to a stop behind a car at this intersection. [Tr. I p. 45]. At approximately 12:10 a.m. Officer Lammers heard a car, later identified as Tyler Jennewein's parents' car, approaching at a high rate of speed and come to a stop. [Tr.I p. 40]. Officer Lammers saw a group of individuals in the crosswalk jump back onto the curb. [Tr.I p. 41]. She heard what sounded, to her, like glass hitting the ground. [Tr.I p. 41]. Officer Lammers waited for the car directly in front of her patrol vehicle to go through the intersection. [Tr.I pp. 47, 97]. She then turned left onto North Third Street, made a U-turn, and parked behind the car Mr. Jennewein was

sitting in. [Tr.I pp. 47-50, 98]. Officer Lammers stated she maintained visual contact with the car at all times after it stopped. [Tr.I p. 49]. Officer Lammers testified that while she maintained visual contact with the vehicle, she never saw Mr. Jennewein move from the driver's seat to the passenger seat. [Tr.I p. 101]. Officer Lammers only witnessed Mr. Jennewein in the passenger seat. Id. Officer Lammers never saw the car window being opened. [Tr. I p. 96]. She also stated that she never saw anything leave the car. Id. Officer Lammers approached the passenger side of the car and spoke with Mr. Jennewein. [Tr. I pp. 50, 98].

[¶ 11] At this point, roughly two (2) minutes after she had left the car, Kristine Cleveland came back to the car, got in the driver's seat, and stated she had been driving the car. [Tr. II pp. 244, 245]. Officer Lammers walked around to the driver's side of the vehicle and saw a marijuana pipe lying in the street. [Tr. I p. 49]. Neither Mr. Jennewein nor Ms. Cleveland claimed possession of the pipe. Mr. Jennewein stated multiple times that he was not the driver of the vehicle. [Tr. I p. 122]. Ms. Cleveland stated to Officer Lammers she was the driver of the vehicle. [Tr. II p. 217]. Officer Lammers did not conduct any interviews with anyone present at the scene. She did not interview Ms. Cleveland. [Tr.II p. 219, 254]. She did not inquire as to why Ms. Cleveland's purse was in the car, when Ms. Cleveland had not been. Id. Officer Lammers did not attempt to gain cell phone information between Mr. Jennewein and Ms. Cleveland. [Tr.II p. 254]. She did not conduct an interview with Bonzer's bartender until July of 2014. [Tr. III p. 286]. Officer Lammers arrested Mr. Jennewein for Driving Under the Influence, Driving Under Suspension, and Possession of Drug Paraphernalia. Ms. Cleveland walked back to Bonzer's where she spoke with Melissa Bonzer. [Tr. II pp. 251-252]. Ms. Cleveland told

Melissa Bonzer that she had been driving that evening, but that Mr. Jennewein had been arrested for Driving Under the Influence. [Tr. II p. 252].

[¶ 12] Mr. Jennewein was transported to Grand Forks County Corrections Center. While he waited to take a breath test, Officer Lammers testified that Mr. Jennewein stated he had driven his car earlier in the evening, however the pipe was not his. Officer Foley also testified that Mr. Jennewein made an admission to driving during this time. [Tr. II p. 172]. There is video but no audio of the alleged admission between the officers and Mr. Jennewein.

[¶ 13] A motion to dismiss was filed pursuant to N.D.R.Crim.P. 12(b)(3) and 47 on January 9, 2014. A motion hearing was held on March 11, 2014. The motion was denied. On April 10, 2014 a motion to sever offenses was filed. The motion was denied. A jury trial was held on July 8 and 9 of 2014. The jury was declared a mistrial. The case continued to a new final dispositional conference held on September 26, 2014. At this conference, the defense counsel stated specifically, that she was not stipulating to any evidence the prosecution intended to offer. [Tr. FDC pp. 3-4]. Additionally, the Defendant renewed his motion to dismiss and motion to sever counts. [Tr. FDC p. 4]. Both motions were denied by the court. Id.

[¶ 14] At some point on September 30, 2014, the first day of Mr. Jennewein's jury trial, the State procured new evidence, specifically, a certified copy of a criminal judgment from Grand Forks Municipal Court and a certified copy of a criminal judgment from Clay County Minnesota. At approximately 9:00 a.m. on October 1, 2014, the State informed the defense they were going to submit this new evidence at trial. Attorney Kraus-Parr made a discovery request pursuant to N.D.R.Crim.P. 16 on December 10,

2013. Specifically, a request for records of all prior convictions was made at this time, almost ten (10) months prior to the acquisition of this new evidence. The defense objected to the admissibility of the new evidence based upon N.D.R.Crim.P. 16. The objection was overruled, and the evidence was accepted by the court.

[¶ 15] Defense counsel attempted to offer a letter submitted by Mr. Jennewein to the court on October 13, 2013. [Tr.III pp. 259 - 261]. In the letter, written by Mr. Jennewein, he states he was not driving on October 5, that his girlfriend was driving, and that he expects the officer's patrol car video to reflect that. [Tr.III p. 260]. The court would not allow Mr. Jennewein to offer testimony for the limited purpose of laying foundation for the letter. [Tr.III p. 259]. The prosecution rested their case on October 1, 2014. [Tr.III p. 288]. The Defendant then made a motion for a directed verdict which was denied. [Tr.III pp. 288 - 291]. Mr. Jennewein exercised his right to remain silent and the defense subsequently rested. [Tr.III p. 292]. During the prosecution's closing argument Ms. Gereszek said, "Corporal Lammers testified that the defendant admitted, 'I'm drunk.' There hasn't been any testimony today to dispute that." [Tr.III p. 261]. Attorney Kraus-Parr brought the improper comment about Mr. Jenewein's failure to testify to the attention of the court, but was denied relief. [Tr.III pp. 309 - 312].

[¶ 16] Mr. Jennewein was found guilty of driving under the influence and driving under suspension. Mr. Jennewein had been placed on the 24/7 alcohol monitoring program on October 5, 2013 as a condition of his bond. Mr. Jennewein was removed from the 24/7 program on October 4, 2014. At sentencing Attorney Kraus-Parr requested that Mr. Jennewein receive day for day credit of days completed in the 24/7 program. The State resisted this request. Grand Forks State's Attorney Mr. Welte informed the

Court that the 24/7 program is a mandatory condition of supervised probation under N.D.C.C. § 39-08-01(5)(b) and thus, day for day credit could not be given by the district court. The district court did not give Mr. Jennewein any credit for completed days in the 24/7 program.

LAW AND ARGUMENT

I. Whether the Court improperly admitted evidence and failed to provide relief under North Dakota Criminal Procedure Rule 16.

Standard of Review

[¶ 17] "[T]he trial court has discretion in applying a remedy under N.D.R.Crim.P. 16(d)(2), and we will not disturb its decision absent an abuse of discretion. City of Grand Forks v. Ramstad, 2003 ND 41, ¶ 17, 658 N.W.2d 731. A district court abuses its discretion when it acts arbitrarily, unreasonably, or unconscionably, or when its decision is not the product of a rational mental process leading to a reasoned determination. State v. Paul, 2009 ND 120, ¶ 6, 769 N.W.2d 416. Mr. Jennewein must show that the district court's failure to exclude evidence under N.D.R.Crim.P. 16(d)(2) was significantly prejudicial.

[¶ 18] N.D.R.Crim.P 16, governs the requirements of disclosure in criminal matters.

> Under N.D.R.Crim.P. 16(a)(1)(C), the prosecution must disclose . . . (C) Documents and Tangible Objects. Upon written request of a defendant, the prosecuting attorney shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, which are within the possession, custody, or control of the prosecution, and which are material to the preparation of the defendant's defense, or are intended for use by the prosecutor as evidence in chief at the trial, or were obtained from or belong to the defendant.

Rule 16(d)(2) provides remedies for discovery violations:

> (2) Failure to Comply With Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this Rule or with an order issued pursuant to this Rule, the court may order that party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, relieve the requesting party from making a disclosure required by this Rule, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place, and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

[¶ 19] The State acquired a certified copy of the criminal judgment from Grand Forks Municipal Court and a certified copy of criminal judgment from Clay County Minnesota. These exhibits were marked twelve (12) and thirteen (13) and, shown by the date that they were certified, were obtained at some point on September 30, 2014. On October 1, 2014, the State informed the defense they had acquired this new evidence and that they were going to submit this evidence at trial. Attorney Kraus-Parr made a discovery request in this case pursuant to N.D.R.Crim.P. 16 on December 10, 2013. She made a request for records of all prior convictions at that time, almost ten (10) months prior to the acquisition of the new evidence. Because of her request for discovery and the State's intent to use this evidence in their case-in-chief at trail, she objected to the admissibility of the new evidence based upon a violation of N.D.R.Crim.P. 16. As in Ramstad, "[the defense] made a detailed request for specific documents, and the [State] had a duty under N.D.R.Crim.P. 16 to disclose those documents." Ramstad, ¶ 22. By not disclosing those documents the State violated N.D.R.Crim.P. 16.

[¶ 20] The objection to the admittance of the prior convictions was overruled, in part because the court mistakenly believed that the defense had already been sufficiently

provided with prior conviction information, specifically a driver abstract from the North Dakota Department of Transportation, and partially on the mistaken belief that proving the Defendant had counsel or properly waived counsel was not an essential element for a third offense driving under the influence conviction. [Tr.II p. 145; Tr.III p. 291]. Both of these are incorrect positions of law that show an abuse of discretion and substantially prejudiced Mr. Jennewein at trial. The jury in this case was not given any information about what constitutes a valid prior conviction and therefore could not come to an accurate conclusion about whether or not this was Mr. Jennewein's third offense within seven years. Therefore, Mr. Jennewein was substantially prejudiced by the district court's belief that the admittance of the new evidence was not dispositive; that the State did not have the burden to prove the Defendant had counsel or properly waived counsel.

[¶21] The Supreme Court held in Burgett v. Texas that a prior felony conviction is presumed void and cannot be used to enhance punishment if the record did not indicate that the Defendant either had counsel or had properly waived counsel. Burgett, 389 U.S. 109 (1967). In Orr, because the record did not indicate if Orr had been counseled, the North Dakota Supreme Court held that the State has the burden to overcome the presumption that the prior uncounseled conviction is void for enhancement purposes. State v. Orr, 375 N.W.2d 171, 179 (N.D. 1985). In Edinger, it was determined that, "because the enhancement from class B to class A does not apply unless there has been a prior conviction, proof of the prior conviction is an element of the class A misdemeanor." State v. Edinger, 331 N.W.2d 553 (N.D. 1983). By allowing this newly acquired evidence in at trial, because the district court mistakenly believed it was fundamentally the same as the information provided in a driver's abstract and because the court indicated throughout

the trial that the trial was taking longer than the court felt it should, the district court caused a substantial prejudice to the defense's strategy; attacking an essential element of the charged crime. [Tr.II p. 145].

[¶22] The evidence admitted by the court was dispositive for a Class A offense of driving under the influence. Had the district court not abused its discretion and determined the new evidence could not be admitted, the State could not have, as a matter of law, met its burden of proof. Therefore, the defense requests the Court reverse the district court's ruling allowing the new evidence to be admitted and, as a result of the lack of that evidence, find Mr. Jennewein not guilty as to the offense of a class A misdemeanor driving under the influence as a matter of law. Alternatively, the defense requests that the Court remand the case for a new trial, thus eliminating the substantial prejudice inflicted upon Mr. Jennewein by the lower court's abuse of discretion.

II. Whether the district court erred by denying the Defendant's motion to sever offenses.

Standard of Review

[¶23] "In order to preserve an objection to an improper joinder, a severance motion must be renewed at the close of evidence." State v. Bingaman, 2002 ND 202, ¶ 7, 655 N.W.2d 51. The district court's decision not to sever offenses will not be overturned unless the Defendant establishes a clear abuse of discretion. State v. Stridiron, 777 N.W.2d 892, 2010 ND 19 (N.D. 2010). The Court does not review issues that are not properly raised in the district court. Bingaman, at ¶ 9. However the Court may review an issue for obvious error. Id. The Court will review an issue under N.D.R.Crim.P. 52(b) only in, "exceptional circumstances where the accused has suffered serious injustice." The Defendant must demonstrate, "(1) error, (2) that is plain, and (3) that affects

substantial rights." Id. The Court will, "examine the entire record and the probable effect of the alleged error in light of all the evidence" to determine if obvious error occurred. Id.

[¶24] N.D.R.Crim.P. 14 provides for relief from prejudicial joinder. The purpose of Rule 14 is to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of Defendants to a fair trial. State v. Lind, 322 N.W.2d 826, 831 (N.D.1982). The Defendant bears the burden of demonstrating that he will be prejudiced by joinder. He must show something more than the fact that a separate trial would afford a better chance of acquittal. It must be shown that joinder will render the trial unfair. State v. Boushee, 284 N.W.2d 423, 427-28 (N.D.1979).

[¶25] By joining the two offenses in the State's case, Mr. Jennewein must choose which of his two opposing constitutional rights to forfeit, either his right to testify in his own defense or to remain silent. It is a fundamental right of every criminal defendant to remain silent, as set forth in the Fifth Amendment to the United States Constitution. Conversely, it is a fundamental right, as found in the United States Constitution under the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment right to remain silent unless consciously choosing to speak, for a Defendant to testify on their own behalf. Rock v. Arkansas, 483 U.S. 44 (1987). Therefore, Mr. Jennewein must be allowed to testify in his own behalf. Mr. Jennewein had important testimony to offer in regard to the offense of driving under the influence and that of driving under suspension. Specifically Mr. Jennewein could have responded to the prosecution's witnesses' claims

that he made an admission of driving. In fact, at trial, Mr. Jennewein attempted to testify to lay foundation for a letter in which he stated he was not driving, that his girlfriend was driving, and that he expected the patrol car video to reflect that. However, the district court held that if Mr. Jennewein were to take the stand, even for preliminary matters, he would be completely open to all cross-examination, thereby forfeiting his right to remain silent as to Count I, possession of drug paraphernalia, of the State's information. [Tr.III pp. 259 - 261].

[¶ 26] The State may argue that both offenses were from the same transaction and therefore joinder was not improper. While the defense agrees that both offenses are close together in time and the same officers are testifying, the elements and evidence necessary to prove the driving under the influence and with a suspended license different than proving possession of drug paraphernalia. There was no evidentiary overlap with the offense of possession, as there was with the City of Grand Forks' Driving Under Suspension charge and the State's Driving Under the Influence charges. Because of the evidentiary overlap in those two cases, Mr. Jennewein would be prejudiced by not joining those two offenses into one trial. However, the reason for joinder of the offenses in the State's case was merely for convenience of the government and its witnesses. Yet the government's convenience should not and does not outweigh an individual's right to a fair trial. Therefore joinder was inappropriate in this case.

[¶ 27] Mr. Jennewein's case parallels Cross v. United States, where prior to the trial the Defendant moved to sever Count I, robbery of a church rectory, and Count II, robbery of a tourist home. The jury returned verdicts of guilty on Count I and not guilty on Count II. The Defendant in Cross argued that "each of the two counts charge distinct

felonies, not provable by the same evidence and not resulting from the same series of acts" and "that he would be embarrassed and confounded in rendering a proper defense to each of the charges in a single trial before a single jury" Cross v. United States, 335 F.2d 987, 988 (D.C. Cir. 1964). Prejudice has consistently been held to occur when it embarrasses or confounds an accused in making his defense. Drew v. United States, 331 F.2d 85, 118 U.S. App. D.C. 11 (D.C. Cir. 1964).

[¶ 28] Cross explains the prejudice inherent when the Defendant wishes to testify on one but not the other of two joined offenses.

> If the, "two charges are joined for trial…[and] he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent. It is not necessary to decide whether this invades his constitutional right to remain silent, since…it constitutes prejudice within the meaning of Rule 14."

Cross, 335 F.2d at 988.

[¶ 29] It is undeniable that the district court generally has broad discretion to join or sever offenses. But that discretion goes away, "when a defendant has made a strong showing he has both important testimony to give concerning one count and a strong need to refrain from testifying in another." State v. Neufeld, 1998 ND 103, ¶ 15, 578 N.W.2d. 536 citing United States v. Jardan, 552 F.2d 216, 220 (8th Cir. 1977). Mr. Jennewein had a strong need to testify with regard to who was driving on October 5, 2013. He had a strong need to respond to the prosecution's claims that he admitted to driving. Mr. Jennwein had a strong need to refute Officer Lammers statement that she was unaware Ms. Cleveland claimed to be driving until March of 2014. [TR. I pp. 86, 87, 89] To properly mount a defense for Count II, driving under the influence, Mr. Jennewein

needed to testify in his own defense. Officer Lammers testified that Mr. Jennewein never indicated someone else was driving that evening. [TR. I pp. 86 - 87] However, on the non-redacted, Exhibit 3, patrol car video at 12:34:30 a.m. Mr. Jennewein clearly states he was not the driver and that the "the girl drove." The prosecution only published a portion of the patrol video through their witness. If Mr. Jennewein was not forced to forfeit his right to remain silent regarding count II of the State's information, Attorney Kraus-Parr would have called him to testify to the statements he made to Officer Lammers, including telling her Ms. Cleveland, "the girl," was the driver that evening. Mr. Jennewein had a strong need to refrain from testifying with regard to Count I, possession of drug paraphernalia, an offense that did not have enough evidence for the State to secure a conviction and a strong need to testify to the offenses of driving under the influence and driving under suspension. Therefore, severing offenses was required to avoid clear error.

[¶ 30] The lower court erred by not severing the offenses, this error was clear when assessed in light of case law and N.D.R.Crim.P. 14. Furthermore, the error affects the fundamental constitutional rights of the Defendant, Mr. Jennewein. Therefore, the Court must find there was improper joinder and remand the case for a new trial.

III. Whether the prosecution, during closing arguments, committed reversible error by improperly commenting on Mr. Jennewein's failure to testify.

Standard of Review

[¶ 31] "It is a fundamental principle of constitutional law that a prosecutor may not comment on a defendant's failure to testify in a criminal case." State v. Myers, 2006 ND 242, ¶ 7, 724 N.W.2d 168; see also Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); State v. His Chase, 531 N.W.2d 271, 273 (N.D.1995);

State v. Flohr, 310 N.W.2d 735, 736 (N.D.1981). Under the Griffin rule, a "comment to the jury by a prosecutor in a State criminal trial upon the defendant's failure to testify as to matters which he can reasonably be expected to deny or explain, because of facts within his knowledge, violates the self-incrimination clause of the Fifth Amendment to the Federal Constitution." State v. Marmon, 154 N.W.2d 55, 59 (N.D.1967); see also State v. Ebach, 1999 ND 5, ¶ 15, 589 N.W.2d 566 ("A comment on the silence of a defendant is an improper comment on the right to remain silent in violation of the Fifth and Fourteenth Amendments of the Constitution"). The holding in Griffin also applies to indirect comments on the Defendant's failure to take the witness stand. State v. Scutchings, 2009 ND 8, ¶ 9 (N.D. 2009), 759 N.W.2d 729. A constitutional rights violation is reviewed de novo. Id.

[¶ 32] Defense counsel attempted to offer a letter submitted by Mr. Jennewein to the court on October 13, 2013. [Tr.III pp. 259 - 261]. In the letter, written by Mr. Jennewein, he states he was not driving on October 5, that his girlfriend was driving, and that he expects the officer's patrol car video to reflect that. [Tr.III p. 260]. The court would not allow Mr. Jennewein to offer testimony for the limited purpose of laying foundation for the letter. [Tr.III p. 259]. The prosecution rested their case on October 1, 2014. [Tr.III p. 288]. The defense called no witnesses and presented no evidence. Mr. Jennewein exercised his right to remain silent and the defense subsequently rested. [Tr.III p. 292]. During the prosecution's closing argument Ms. Gereszek said, "Corporal Lammers testified that the defendant admitted, 'I'm drunk.' There hasn't been any testimony today to dispute that." [Tr.III p. 261]. The defense insisted at the time of trial that this was an indirect comment on Mr. Jennewein's failure to testify. The prosecution

called the only witnesses at trial. The only people in the patrol car during the statement Ms. Gereszek referred to were Officer Lammers and Mr. Jennewein. The only person the defense could call to testify contrary to Officer Lammers was Mr. Jennewein. The jury must logically conclude that Mr. Jennewein had some obligation to testify, to prove his innocence.

[¶ 33] Furthermore, there was an alleged admission by Mr. Jennewein that he was driving that evening, the only person who could dispute that testimony was Mr. Jennewein. By improperly commenting on Mr. Jennewein's failure to testify about statements made in the patrol car, the jury was left to assume that Mr. Jennewein had an obligation to testify about matters which he would reasonably be expected to deny or explain, such as an alleged admission to driving, to dispute statements made by the prosecution's witnesses. This is a violation of Mr. Jennewein's right to remain silent, as explained in Griffin.

[¶ 34] Due to the improper comment on Mr. Jennewein's failure to testify the prosecution committed reversible error. The Defendant requests the Court declare Mr. Jennewein's trial a mistrial and remand the cases for a new trial.

IV. Whether the district court can give day for day credit on days already completed in the 24/7 sobriety program.

Standard of Review

[¶ 35] Statutory construction is a question of law. State v. Rambousek, 479 N.W.2d 832 (N.D.1992). Questions of law are reviewed de novo. State v. Stavig, 2006 ND 63, ¶ 12, 711 N.W.2d 183. A question of law is fully reviewable on appeal. Id. In order to determine the intent of the legislature the Court must look at the plain, ordinary,

and commonly understood meaning of the statute's language. Van Klootwyk v. Arman, 477 N.W.2d 590 (N.D.1991); N.D.C.C. § 1-02-02. Furthermore, statutes should be read in relation to others on the same subject, giving meaning to each without causing either to be useless. Ebach v. Ralston, 469 N.W.2d 801 (N.D.1991). Finally, criminal statutes are construed against the government and in favor of the accused. Rambousek, supra. If a statute is ambiguous, the following criteria are investigated to determine the legislature's intent: 1. The object sought to be attained. 2. The circumstances under which the statute was enacted. 3. The legislative history. 4. The common law or former statutory provisions, including laws upon the same or similar subjects. 5. The consequences of a particular construction. 6. The administrative construction of the statute. 7. The preamble. N.D.C.C. § 1-02-39.

[¶ 36] N.D.C.C. § 39-08-01(5)(b), in relevant part, states, "[f]or a second offense within seven years, the sentence must include...at least twelve months' participation in the twenty-four seven sobriety program under chapter 54-12 as a mandatory condition of probation." N.D.C.C. § 12.1-32-06.1(6), states, "The court may terminate a period of probation and discharge the defendant at any time earlier than that provided in subsection 1 if warranted by the conduct of the defendant and the ends of justice." Before inquiring about the legislative intent of a statue, the plain meaning of the statute must be ambiguous. "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05.

[¶ 37] The Defendant asserts that N.D.C.C. § 12.1-32-06.1(6) is unambiguous and as such there is no need to inquire as to its legislative intent. N.D.C.C. § 12.1-32-

06.1(6) allows the court to terminate probation at any time, even directly after sentencing, based upon the conduct of the Defendant, Mr. Jennewein, and for the ends of justice.

[¶ 38] Mr. Jennewein requested that the court give him day for day credit for the time he already spent participating in the 24/7 sobriety program. The State argued that because the 24/7 program was a mandatory condition of probation the court could not give day for day credit to Mr. Jennewein. The court then sentenced Mr. Jennewein to one year of participation in the 24/7 program. The defense believes the State misinterpreted the relevant statutes and the court's discretion with regard to the 24/7 program. The defense believes this misstatement improperly influenced the court's decision with regard to sentencing.

[¶39] Mr. Jennewein was placed in the 24/7 sobriety program as a condition of his pretrial release. Participation in this program is not a mandatory condition of pretrial release, as stated in N.D.C.C. § 54-12-31. Mr. Jennewein complied fully with the requirements of the 24/7 program, and never failed or missed his alcohol testing for an entire year. Based upon Mr. Jennewein's conduct the court should be allowed to terminate his 24/7 probation. Furthermore, the court should be allowed to grant day for day credit of completed 24/7 participation to obtain a just result. Mr. Jennewein was sentenced to a year of supervised probation with the mandatory condition of participating in the 24/7 program for one year. Mr. Jennewein, as a condition of his pretrial release, was already ordered to participate in the 24/7 program, and successfully did so for one year. If Mr. Jennewein were to then be required to complete another year of the 24/7 program he would have collectively paid for and completed two years in the 24/7

program. The result of this would be to double the court's sentence, which would be unjust.

[¶40] Therefore, Mr. Jennewein requests this Court declare whether day for day credit in the 24/7 program is an available option at sentencing and remand that issue to the district court for further consideration.

CONCLUSION

[¶ 41] The district court improperly admitted dispositive evidence that caused substantial prejudice to the Defendant and failed to provide relief under North Dakota Criminal Procedure Rule 16. If the district court properly denied the evidence from being admitted the State would not be able to prove Count II in the information as a matter of law. Therefore, the Defendant respectfully requests the Court reverse the district court's ruling to admit exhibits 12 and 13 and find Mr. Jennewein not guilty as a matter of law to the offense of a Class A misdemeanor driving under the influence. Alternatively, the Defendant requests that the Court remand the case for a new trial, thus eliminating the substantial prejudice inflicted upon Mr. Jennewein by the lower court's abuse of discretion.

[¶ 42] The court also committed clear error by not severing offenses in the State's case, which resulted in unfair prejudice against Mr. Jennewein. The prosecution, during closing arguments, committed reversible error by improperly commenting on Mr. Jennewein's failure to testify. Because of this unfair prejudice and reversible error Mr. Jennewein respectfully requests the Court to set aside the jury verdict and order a new trial in these cases.

[¶ 43] Finally, the Defendant respectfully request the Court determine if the district court can give day for day credit on days already completed in the 24/7 sobriety program. If the Court determines that day for day credit is within the discretion of the trial court, the Defendant respectfully requests the Court remand that issue to the district court for further consideration.

Dated this 2nd day of February, 2015

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IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Tyler James Jennewein, Defendant and Appellant.	))))))))))	**Supreme Court File Nos. 20140368 and 20140369** **Grand Forks County Criminal Nos. 18-2013-CR-02153 and 18-2013-CR-2366** **APPELLANT'S BRIEF**

The undersigned, being of legal age, being first duly sworn deposes and says that on the 30th day of January, 2015, she served true copies of the following document:

Appellant Brief

And that said copies were served upon:

Carmell Mattison
Assistant State's Attorney
Grand Forks County;

Sarah Gereszek
Assistant City Prosecutor
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Grand Forks, ND 58201

by efile

Dated this 30th day of January, 2015.

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FILED
IN THE OFFICE OF THE
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FEBRUARY 2, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	**Supreme Court File Nos. 20140368 and 20140369**
City of Grand Forks,	)	
Plaintiff and Appellee,	)	**Grand Forks County Criminal Nos. 18-2013-CR-02153 and 18-2013-CR-2366**
v.	)	
Tyler James Jennewein,	)	**ATTORNEY CERTIFICATE OF SERVICE**
Defendant and Appellant.	)	

The undersigned, being of legal age, being first duly sworn deposes and says that on the 2nd day of February, 2015, she served true copies of the following document:

Appellant Brief
Appellant Appendix

And that said copies were served upon:

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IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	**Supreme Court File Nos. 20140368 and 20140369**
City of Grand Forks,	)	
Plaintiff and Appellee,	)	**Grand Forks County Criminal Nos. 18-2013-CR-02153 and 18-2013-CR-2366**
v.	)	
Tyler James Jennewein,	)	**ATTORNEY CERTIFICATE OF SERVICE**
Defendant and Appellant.	)	

The undersigned, being of legal age, being first duly sworn deposes and says that on the 3rd day of February, 2015, she served true copies of the following document:

Appellant Appendix, p. A-14

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