20140368
20140369
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 27, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, vs. Tyler James Jennewein, Defendant/Appellant.	)	Supreme Court File No. 20140368 Dist. Ct. No. 18-2013-CR-02153

City of Grand Forks, Plaintiff/Appellee, vs. Tyler James Jennewein, Defendant/Appellant.	)	Supreme Court File Nos. 20140369 Dist. Ct. No. 18-2013-CR-02366

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

BRIEF OF APPELLEE

Carmell F. Mattison
ND Bar ID #06052
Assistant State's Attorney
124 South 4th Street
PO Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org
Attorney for Appellee State of North Dakota

Aaron Weber
Certified Law Student
Grand Forks County
P.O. Box 5607
Grand Forks, ND 58206
(701) 780-8281

Sarah W. Gereszek
ND Bar ID #07017
Assistant City Prosecutor
311 South 4th Street, Suite 103
Grand Forks, ND 58201
(701) 780-9276
E-Service Address: sgereszek@kalashpettitlaw.com
Attorney for Appellee City of Grand Forks

TABLE OF CONTENTS

TABLE OF AUTHORITIES

North Dakota State Cases

United States Court of Appeals

United States Supreme Court

Other State Cases

North Dakota Statutes and Rules

Transcript References

Jennewein's method of citing to the transcripts has been adopted by Appellee.

STATEMENT OF THE FACTS

[¶1] On the late evening of October 4, 2013 and the early morning of October 5, 2013, Corporal Lammers of the Grand Forks Police Department was on patrol near downtown Grand Forks. Tr. I, p. 38. Corporal Lammers, while stopped at an intersection with her windows down, heard a vehicle approach the intersection from her left at a high rate of speed. Tr. I, pp. 39-40. This occurred at approximately 12:10 a.m. Tr. I, p. 39. After she heard the noise, she observed a vehicle screech to a stop at the intersection. Tr. I, p. 40. After the vehicle stopped, Corporal Lammers heard the sound of glass hitting the ground. Tr. I, p. 40. Corporal Lammers noticed a group of individuals who had jumped out of the crosswalk, because the vehicle had stopped partway into the crosswalk area. Tr. I, p. 41. One of the individuals who was in the crosswalk yelled toward Corporal Lammers and stated, "He's drunk." Tr. I, p. 43. Corporal Lammers also noticed that the vehicle's headlights were not on. Tr. I, p. 41.

[¶2] Corporal Lammers planned on pulling in behind the vehicle to initiate a stop, but the vehicle did not move after it stopped at the intersection. Tr. I, pp. 46-47. Corporal Lammers proceeded to turn left and execute a u-turn to pull behind the vehicle. Tr. I, pp. 47-49. As she came along side the vehicle, before executing the u-turn, she did not see anyone in the driver's seat. Tr. I, p. 47. The driver had moved into the passenger seat. Tr. I, p. 47. While Corporal Lammers executed these maneuvers, she maintained eye contact with the vehicle. Tr. I, p. 49.

[¶3] Once stopped behind the vehicle, Corporal Lammers approached the passenger side of the vehicle. Tr. I, p. 50. Corporal Lammers spoke with the passenger, who was later identified as Tyler Jennewein. Tr. I, pp. 52-53; Tr. I, p. 59. While

speaking with Jennewein, a female individual ran up to the vehicle and entered the driver's seat. Tr. I, pp. 53-54. This female individual was later identified as Kristine Cleveland, Jennewein's girlfriend. Tr. I, pp. 53. Corporal Lammers then approached the driver's side of the vehicle to speak with Ms. Cleveland. Tr. I, p. 55. While speaking with Ms. Cleveland, Corporal Lammers observed a glass pipe lying on the ground directly below the driver's side window. Tr. I, p. 57. The pipe was dry, even though it had been raining shortly before. Tr. I, p. 57; Tr. I, pp. 39-40. Corporal Lammers asked Ms. Cleveland if the pipe was hers, and she stated, "[Y]ou better not get me in trouble for this, Tyler." Tr. I, p. 58. Corporal Lammers interpreted this statement to mean that the glass pipe was Jennewein's. Tr. I, p. 58.

[¶4] After a short conversation with Ms. Cleveland, Corporal Lammers returned to the passenger side of the vehicle to speak with Jennewein. Tr. I, pp. 59-60. Corporal Lammers observed that Jennewein was slurring his words, had a definite odor of alcohol on his breath, and he had bloodshot watery eyes. Tr. I, p. 60. Jennewein also stated that he was drunk. Tr. I, p. 60. Corporal Lammers had Jennwein come to the patrol vehicle. Tr. I, p. 61. Corporal Lammers requested dispatch to check if Jennewein had any warrants and check the status of his driver's license. Tr. I, p. 62. Dispatch informed Corporal Lammers that Mr. Jennewein's license was suspended. Tr. I, p. 62. Dispatch also stated that this Driving Under the Influence charge would be Jennewein's third Driving Under the Influence charge. Corporal Lammers then had Jennewein perform sobriety tests. Tr. I, pp. 61-75. After the tests were concluded, Corporal Lammers arrested Jennewein for Driving Under the Influence, Driving Under Suspension, and Possession of Drug Paraphernalia. Tr. I, p. 75.

[¶5] Jennewein filed a motion to sever charges before trial, and renewed the motion prior to trial, but the motion was denied each time. A jury trial was held on July 8 and July 9, 2014. The jury was declared a mistrial and a new trial was scheduled. A final dispositional conference was held on September 26, 2014. Tr. FDC, p. 3. At the final dispositional conference, Jennewein's counsel did not mention that she was not stipulating to the prior charges. Defense counsel stated, "[T]he City and State filed a joint exhibit list which stated that I was stipulating to everything which is not the case, so just so the Court's aware of that." Tr. FDC, p. 3. No mention was made of the prior charges. The district court set up a meeting for the next Tuesday morning. Tr. FDC, p. 4.

[¶6] During the first day of trial, the State became aware of Jennewein's intent to not stipulate to the prior charges. The State indicated that it would prepare a new jury instruction to include the element of the prior convictions for the Driving Under the Influence charge. Tr. I, p. 139. The State procured a certified copy of a criminal judgment from Grand Forks Municipal Court and a certified copy of a written waiver in the Grand Forks Municipal case. The State offered this evidence on the second day of trial. Tr. II, pp. 145-147. Defense counsel objected and requested the evidence to be excluded. Tr. II, pp. 146-147. No other relief was requested. The Court overruled the objection. Tr. II, p. 147. The City and State continued with their case-in-chief and rested on October 1, 2014. Tr. III, p. 288. Mr. Jennwein made a motion for directed verdict, which was denied. Tr. III, pp. 288-291. A severance motion was not made at this time or at any point during the trial.

[¶7] During closing arguments, the prosecutor stated, "Corporal Lammers testified that the defendant admitted 'I'm drunk.' There hasn't been any testimony today to dispute

that. Jennewein was drunk that night." Tr. III, p. 301. Jennewein objected to this statement after the prosecution's closing argument, but was overruled. Tr. III, pp. 310-312.

LAW AND ARGUMENT

I. JENNEWEIN HAS FAILED TO SHOW HE WAS SIGNIFICANTLY PREJUDICED BY THE ADMISSION OF HIS TWO PRIOR CONVICTIONS AND THAT THE EVIDENCE SHOULD HAVE BEEN EXCLUDED UNDER RULE 16.

[¶8] In the present case, the two documents Jennewein argues were improperly admitted were certified criminal judgments of the defendant's prior convictions in Grand Forks Municipal Court and Clay County, MN. Appendix pp. 1-13. Jennewein argues that these should have been excluded pursuant to Rule 16 N.D.R.Crim.P.

[¶9] Rule 16 of the North Dakota Rules of Criminal Procedure governs criminal discovery. "The prosecutor has a duty to preserve [and disclose] evidence that is material and favorable to the defendant." State v. Steffes, 500 N.W.2d 608, 612 (N.D. 1993) (internal citations omitted). "Rule 16 is not a constitutional mandate, and a violation of the rule results in a constitutionally unfair trial only when 'the barriers and safeguards are so relaxed or forgotten the proceeding is more of a spectacle or a trial by ordeal than a disciplined contest.'" State v. Blunt, 2011 ND 127, 799 N.W.2d 363, 367 (quoting State v. Addai, 2010 ND 29, ¶ 42, 778 N.W.2d 555). A trial court is authorized to impose varies remedies, but it should only use the least severe sanction that will cure the prejudice, if any sanctions are needed. State v. McNair, 491 N.W. 2d 397, 400 (N.D. 1992). Rule 16 is derived from the federal rule and federal interpretation is persuasive authority. City of Fargo v. Levine, 2008 ND 64, ¶ 7, 747 N.W.2d 130, 133. "[A] defendant making a Rule 16 request must show the evidence is material to his defense. [E]vidence is material if there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation . . . or assisting impeachment or rebuttal." Id. (internal citations omitted). A trial court has broad discretion in

admitting evidence which was not disclosed until shortly prior to trial. State v. Roerick, 557 N.W.2d 55, 56 (N.D. 1996).

[¶10] In Marshall, the D.C. Circuit Court of Appeals analyzed the purpose of Rule 16. United States v. Marshall, 132 F.3d 63, 70 (D.C. Cir. 1998), as amended (Mar. 6, 1998). One of the primary goals behind Rule 16 is "contributing to an accurate determination of the issue of guilt or innocence." Id. (citing Fed.R.Crim.P. 16 advisory committee note to 1974 amendment). The D.C. Circuit Court of Appeals further stated, "[T]here is . . . no right to deceive a jury as to the true facts." Id. (quoting United States v. McCrory, 930 F.2d 63, 70 (D.C. Cir. 1991)).

[¶11] On October 11, 2013, an Information was filed charging the defendant with Driving Under the Influence, a Class A misdemeanor. [Appellant's App. p.11] The Information specifically stated that this was a third offense within seven years. At the first trial held on July 8, 2014, Jennewein stipulated that this was a third offense within seven years and jury instructions were given consistent with this stipulation. [Appellant's App. pp. 17-51]. This trial resulted in a hung jury and was declared a mistrial. The trial was put back on the calendar to commence on September 30, 2014.

[¶12] Prior to the first trial and the second trial, the State submitted identical proposed jury instructions. [Appellant's App. 3&4, Doc. ID. 52&97] The DUI instructions did not include the additional element of proof of prior convictions. On September 26, 2014, four days prior to the second trial, a final dispositional conference was held. Tr. FDC, p. 3. Defense counsel stated, "[T]he City and State filed a joint exhibit list which stated that I was stipulating to everything which is not the case, so just so the Court's aware of that." Tr. FDC, p. 3. No mention was made that the defendant

was no longer stipulating to the prior offenses. Furthermore, Jennewein filed proposed jury instructions on September 25, 2014, requesting pattern jury instruction K-21-20 which did not include requiring the State to prove the two prior convictions to prove the A misdemeanor level of offense. Therefore, it was reasonable for the State to believe that Jennewein was still stipulating to the prior offenses.

[¶13] Subsequent to the final dispositional conference on September 26, 2014, the State first learned that Jennewein was no longer stipulating to the two prior offenses. Tr. II, pp. 144-49. The State then obtained certified judgments of the defendant's prior convictions, which is evidenced by the dates on the certified copies which were certified on September 30, 2014. Appellee's App. pp. 1-13.

[¶14] If the defendant was going to stipulate to the prior offenses, the State would have committed prejudicial error by introducing evidence of the prior convictions. State v. Saul, 434 N.W.2d 572, 575 (N.D. 1989)("[If] the defendant stipulates to prior convictions when charged under the enhancement provisions of Section 39-08-01, the submission of evidence of the defendant's prior convictions to a jury constitutes prejudicial and reversible error."). Once the State learned that the defendant was not going to stipulate to the prior charges, the State obtained the necessary documents to prove the prior convictions.

[¶15] If this Court were to find a Rule 16 violation, this Court has held that a defendant is not entitled to relief unless he can show a significant prejudice based on the violation. Blunt, 2011 ND 127, ¶ 11, 799 N.W.2d 363. The court in Blunt noted, "a defendant is in a weak position to assert prejudice from the prosecution's failure to produce requested documents or other materials under N.D.R.Crim.P. 16 when the

defendant had other available means to obtain the requested material." Blunt, 2011 ND 127, ¶ 20, 799 N.W.2d 363 (citing City of Grand Forks v. Ramstad, 2003 ND 41, ¶ 26, 658 N.W.2d 731). Further, "[W]hen a defendant is charged with the more serious offense, an offense-enhancing prior conviction need not be set out in the complaint, even though an element of the offense. A defendant knows from the more serious charge that the State intends to use any prior conviction." State v. Gahner, 413 N.W.2d 359, 362 (N.D. 1987).

[¶16] Not only were the complained of documents public records equally available to both sides, Jennewein cannot show how he was significantly prejudiced by records of judgments that he was fully aware of. Jennwein was aware of his prior criminal history and the defendant's prior criminal history was disclosed in discovery. Tr. I, pp. 139-140; Tr. II, pp. 144-145. A certified copy of his driving abstract was entered into evidence at his first trial on July 8, 2014. Appellant's App. p.3. A certified copy of Jenneweins driving abstract was received in the current trial without objections. Tr. Vol. I, p.62.

[¶17] In Roerick, this Court examined a similar discovery situation. The prosecution did not disclose a witness until a short time prior to trial. State v. Roerick, 557 N.W.2d 55, 56-57 (N.D. 1996). It was shown at trial that the defendant knew of the witness before the disclosure and what the witness would testify to. Id. The defendant did not move for a continuance, he only requested that the evidence be excluded. Id. This Court stated:

> Roerick only raised the issue of untimely disclosure immediately before trial. This was a tactical decision on Roerick's part. If Bursch's testimony was so damaging as to make the trial constitutionally unfair, Roerick should have engaged in more defensive measures. Although a continuance

> may not always be the preferred remedy for late disclosure, a court should not grant a motion for new trial when a tactical decision on the defendant's part fails to create the desired result.

Id. The tactic used by defense counsel in the case at bar, is quite similar. Defense counsel was aware of Jennewein's criminal history but chose to wait until the day of trial to object to the late disclosure of the certified criminal judgments. Tr. I, pp. 139-140; Tr. II, pp. 144-145. Jennewein states that this "caused substantial prejudice to the defense's strategy; attacking an essential element of the charged crime." Appellant's Br., ¶21. The only remedy requested by Jennewein was to have the evidence excluded, which was a similar action as was taken in Roerick.

[¶18] In State v. Ensminger, the North Dakota Supreme Court upheld a trial court's decision to permit untimely disclosed photographs to be entered into evidence, where there was evidence on the record that indicated that the existence of the photographs had been disclosed to defense counsel in a police report. State v. Ensminger, 542 N.W.2d 722 (N.D. 1996). The Court found that the defendant was unable to establish a prejudice under these circumstances. Id.

[¶19] In Thorson, a report was not disclosed to the defense prior to trial. State v. Thorson, 2003 ND 76, ¶ 11, 660 N.W.2d 581, 58. This Court assumed that the prosecution was required to disclose the report. Id. Even though this Court ruled that the report should have been disclosed, this Court stated that Thorson made "no showing the information contained in the 960 report would have been exculpatory or would have supported his theory of the case." Id. at ¶ 12. This Court concluded that the State did not commit reversible error. Id. at ¶ 12.

[¶20] Furthermore, Jennwein did not request any other remedy for the alleged discovery violation. As stated in McNair, a court should impose the least severe sanction to cure any prejudice. McNair, 491 N.W. 2d at 400. Jennewein only requested that the evidence be excluded from trial. Tr. II, pg. 146. Jennewein did not make any other request for relief, such as a continuance or a recess to examine the documents.

[¶21] Jennewein further argues that the jury 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 a third offense within seven years. Appellant's Br. at ¶21. In support of this argument, Jennewein argues the jury had to find that his prior convictions were counseled or he waived counsel. However, Jennewein did not request further instructions be given to the jury and did not object to the jury instructions. "A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests." N.D. R. Crim. P. 30. An objection is timely under Rule 30 when:

> (A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 30(b)(1), objects at the opportunity for objection required by Rule 30(b)(2); or(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 30(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.

N.D. R. Crim. P. 30. Proof of prior convictions is an element of the class A misdemeanor, whereas Sixth Amendment issues on whether the prior convictions were counseled pleas or a waiver of counsel go towards sentencing enhancements. State v. Orr, 375 N.W.2d 171, State v. Edinger, 331 N.W.2d 553 (N.D.1983).

[¶22] Since Jennewein did not timely address his alleged issue with the jury instruction, this Court can review for plain error. N.D. R. Crim. P. 30(d)(2). However, Jennewein does not contend that the district court committed plain error in regard to the jury instructions. Further, Jennewein does not cite to any authority in support of his argument. Issues that have not been fully briefed and argued should not be heard on appeal. Ernst v. State, 2004 ND 152 ¶ 15, 683 N.W.2d 891 (citing State v. Backlund, 2003 ND 184, ¶38, 672 N.W.2d 431). Additionally, where a party has failed to provide supporting argument for an issue stated in his brief, he is deemed to have waived that issue. State v. Obrigewitch, 365 N.W.2d 105, 109 (N.D. 1984).

[¶23] The State requests this Court to find no discovery violation occurred. Alternatively, the State requests this Court to find that there has been no showing of significant prejudice, if a discovery violation did occur. Further, the State requests this Court to find there was no plain error regarding the jury instructions.

II. MR. JENNEWEIN FAILED TO PRESERVE THE SEVERANCE ISSUE FOR REVIEW ON APPEAL.

[¶24] In the case at bar, Jennewein was charged with Possession of Drug Paraphernalia, Driving Under the Influence, and Driving Under Suspension. All of these charges arose out of the same incident. The offenses were joined pursuant to Rule 8 of the North Dakota Rules of Criminal Procedure.

[¶25] Jennewein did not properly preserve the severance issue for appeal. This Court ruled in Dymowski that a defendant "has a duty to properly preserve a Rule 14 motion for severance by renewing the motion at the appropriate time during the trial or at the close of the evidence." State v. Dymowski, 459 N.W.2d 777, 784 (N.D. 1990). The defendant in Dymowski failed to renew the motion at any time during trial. Id. This

Court ruled the issue was not properly preserved for appeal. Id. Jennewein failed to renew the severance motion at any point during trial. Therefore, the issue was not properly preserved for appeal.

III. MR. JENNEWEIN HAS FAILED TO MEET HIS BURDEN FOR SEVERANCE.

A. Standard of Review

[¶26] Jennewein cites to N.D.R.Crim.P. 52(b), which provides for review of obvious error. This Court stated in Yineman, "We exercise our power to notice obvious error cautiously, and only in exceptional circumstances where the accused has suffered serious injustice." State v. Yineman, 2002 ND 145, ¶ 22, 651 N.W.2d 648 (citing State v. Johnson, 2001 ND 184, ¶ 12, 636 N.W.2d 391). "In determining whether there has been obvious error, we examine the entire record and the probable effect of the alleged error in light of all the evidence." Id. "To constitute plain error, there must be a clear deviation from an applicable legal rule under current law." State v. Krull, 2005 ND 63, ¶ 6, 693 N.W.2d 631, 635 (citing State v. Olander, 1998 ND 50, ¶ 14, 575 N.W.2d 658).

[¶27] Rule 8 provides for joinder of offenses if the offenses are based on the same act or transaction. N.D.R.Crim.P. 8. "The trial court's decision will not be reversed unless there is a clear abuse of discretion." State v. Neufeld, 1998 ND 103, ¶ 14, 578 N.W.2d 536, 537 (citing State v. Warmsbecker, 466 N.W.2d 105, 108 (N.D.1991)). The defendant has the burden to prove prejudice" Id.

[¶28] Under Rule 14, an aggrieved defendant may seek relief from prejudicial joinder, but has the burden of demonstrating substantial prejudice from a consolidated trial. State v. Freed, 1999 ND 185, ¶ 11, 599 N.W.2d 858, 862 (citing State v. Warmsbecker, 466 N.W.2d 105, 109). "The defendant's burden is arduous." Neufeld,

1998 ND 103, ¶ 5, 578 N.W.2d 536 (citing State v. Gann, 244 N.W.2d 746, 751). "The general rule is that public policy considerations in the administration of justice require that the severance be denied in the absence of a clear-cut showing of prejudice against which the trial court will not be able to afford protection." State v. Doll, 2012 ND 32, ¶ 10, 812 N.W.2d 381. "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 the defendants to a fair trial." Id. (citing State v. Dymowski, 459 N.W.2d 777, 779 (N.D.1990).

[¶29] Rule 8 of the North Dakota Rules of Criminal Procedure provides that an information may charge a defendant in separate counts with two or more offenses if the offenses charged are of the same or similar character or are based on the same act or transaction, or are connected with or constitute parts of a common plan or scheme. N.D.R.Crim.P. Rule 8(a). Rule 8(a) mirrors Rule 8 of the Federal Rules of Criminal Procedure in substance and governs with respect to joinder of offenses. Id. at explanatory note. Rule 8 should be read in conjunction with Rules 13 and 14 of the North Dakota Rules of Criminal Procedure as the same underlying principles apply in each. Id.

B. The District Court Did Not Commit Plain Error.

[¶30] Mr. Jennewein argues that he suffered substantial prejudice by the consolidated trial, in that he would have been forced to testify to both offenses. Appellant's Br. ¶25. In Neufeld, the defendant was charged with four separate counts of gross sexual imposition under one complaint or information. Neufeld, 1998 ND 103, ¶ 2, 578 N.W.2d 536. The counts involved two different victims. Id. Neufeld moved to

sever the first three counts from the fourth, arguing joinder of the offenses prejudiced him because he intended to testify in Counts I, II and III, but did not intend to testify in Count IV. Id. at ¶3. The trial court denied the motion for severance based on judicial economy, stating Neufeld failed to show any real prejudice. Id. Further, "No compelling prejudice when defendant expressed only a general desire to testify as to some counts and not others." Neufeld, 1998 ND 103, ¶ 14, 578 N.W.2d 536 (citing United States v. Corbin, 734 F.2d 643, 649 (11th Cir.1984)).

[¶31] In Boushee, the defendant was charged with two counts of Possession of Marijuana with Intent to Deliver and one count of Manufacture and Possession with Intent to Manufacture or Deliver a Controlled substance. State v. Boushee, 284 N.W.2d 423, 426 (N.D.1979). "The trial judge consolidated the actions in accordance with Rules 8 and 13 of the North Dakota Rules of Criminal Procedure. Id. at 427. "Boushee contended that consolidation confounded the presentation of his defenses because it affected his choice of whether or not to take the stand." Id. at 428. This Court affirmed the trial court's denial to sever stating "because all of the charges against Boushee stemmed from the same transaction, no prejudice resulted to Boushee by the consolidation of the three informations for trial. Id. at 428-29. This Court further stated that all "three of Boushee's arguments: (1) that the jury may confuse and cumulate the evidence; (2) that the defendant may be confounded in presenting his defenses; and (3) that proof of defendant's guilt of one offense may be used to convict him of another offense even though proof of that guilt would have been inadmissible at a separate trial, are rarely, if ever, grounds for reversal where the consolidated charges arise out of the

same transaction." Id. at 428.

[¶32] In the case at bar, the offenses stemmed from Corporal Lammers's interaction with a stopped vehicle. There is significant evidentiary overlap between the charges alleged against Mr. Jennewein. While on patrol, Corporal Lammers heard a vehicle coming towards her at a high rate of speed. Tr. I, p. 40. She then observed the vehicle come to a screeching stop. Tr. I, p. 40. She also heard the sound of glass hitting the ground. Tr. I, p. 40. After these observations, Corporal Lammers pulled her patrol vehicle behind the stopped vehicle. Tr. 1, pp. 49-50. After she stopped her patrol vehicle, she approached the passenger side of the vehicle. Tr. I, p. 50. Corporal Lammers suspected that the person in the passenger seat had been driving the vehicle, but had moved over to the passenger seat once the vehicle stopped. Tr. I, pp. 50-52. After speaking with this individual, who was later identified as Jennewein, a female approached the vehicle and got into the driver seat. Tr. I, pp. 53-54. Corporal Lammers walked around the vehicle to speak with the female, who was later identified as Kristine Cleveland. Tr. I, p. 53. While Corporal Lammers was speaking with Ms. Cleveland, Corporal Lammers noticed a glass pipe lying on the ground below the driver side window. Tr. I, pg. 57. After the glass pipe was found, Corporal Lamers continued her investigation.

[¶33] As the facts indicate, the charges filed against Jennewein occurred out of the same transaction with Corporal Lammers. Again, "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 the defendants to a fair trial." Doll, 2012 ND 32, ¶ 10, 812 N.W.2d 381 (citing State v. Dymowski, 459 N.W.2d 777,

779 (N.D.1990). The district court exercised its discretion in a similar manner to the district court in Boushee. 284 N.W.2d 423, 426 (N.D.1979). The decision by the district court in the case at bar was not plain error because it was not a clear violation of the rules regarding severance. If charges "are based on the same act or transaction, or are connected with or constitute parts of a common plan or scheme," they can be joined under Rule 8(a). N.D.R.Crim.P. Rule 8(a). Therefore, the district court exercised its discretion and did not grant the severance motion.

[¶34] In State v. Freed, the defendant was charged with conspiracy to deliver a controlled substance and delivery of a controlled substance. State v. Freed, 1999 ND 185, ¶ 1, 599 N.W.2d 858, 859. Defendant motioned to sever the offenses asserting "the elements of the charges in Count 1 and Count 2 are different . . ." Id. at ¶10. In Freed, the offenses occurred on two different days within two days of each other. Id. This Court held that the trial court did not abuse its discretion in denying Freed's motion for separate trials on the two charges because some of the conduct is common to both and "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of the common scheme or plan." Id. at ¶12 (citing N.D.R.Crim.P. Rule 8(a)). Even though the charges alleged against Jennewein have different elements, the charges arose out of the same series of events. Further, the charges in the case at bar were not separated by the length of time as the charges alleged in Freed.

[¶35] Jennewein relies on Cross as support for his argument. Appellant's Br. ¶27. However, Cross can be differentiated from the case at bar. In Cross, the defendant was charged with two separate robberies. Cross v. United States, 335 F.2d 987, 988 (D.C.

Cir. 1964). One of the alleged incidents occurred on February 23, 1962, and the other occurred on May 2, 1962. Id.

[¶36] The D.C. Circuit Court ruled that the counts should have been severed. Id. The D.C. Circuit Court stated, "Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence." Id. at 989. Again, the charges alleged against Mr. Jennewein occurred during the same series of events, unlike those in Cross. Id. The same witnesses would have been called for both charges and substantially the same evidence would have been presented. Therefore, the district court did not clearly abuse its discretion by not severing the charges.

[¶37] After Cross, the D.C. Circuit Court of Appeals in Baker discussed the standard that a defendant must meet to sever charges:

> [N]o need for a severance exists until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information— regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other— to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of 'economy and expedition in judicial administration' against the defendant's interest in having a free choice with respect to testifying.

Baker v. United States, 401 F.2d 958, 976-77 (D.C. Cir. 1968) (footnotes omitted). Jennewein has failed to meet that standard. Jennwein broadly states that he would have been subject to cross examination on the paraphernalia charge if he would have chosen to testify. Appellant's Br. ¶29. However, Jennewein fails to provide any reasoning as to how his testimony would have prejudiced him. He only asserts that he would be open to

cross examination. Id. No affidavit or any other form of proof was offered to support his claim of possible prejudice.

[¶38] Pursuant to Rule 8(a) of the North Dakota Rules of Criminal Procedure, because the Defendant was charged with offenses that arose out of the same act or transaction, the joinder of the offenses was proper. Therefore, this Court should affirm the decision of the district court to not sever the counts.

IV. THE PROSECUTION DID NOT COMMIT REVERSEABLE ERROR DURING CLOSING ARGUMENTS.

[¶39] A defendant has a constitutional right to remain silent pursuant to the Fifth and Fourteenth Amendments of the United States Constitution. "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. The United States Supreme Court established the Griffin rule which states 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, 152 N.W2d 55, 59 (N.D. 1967); see also Griffin v. California, 380 U.S. 609, 614 (1965). "The Griffin rule applies to indirect as well as direct comments on a defendant's failure to take the witness stand." State v. Scutchings, 2009 ND 8, ¶ 9, 759 N.W.2d 729.

[¶40] This Court has established a test to use in determining whether a particular comment is an impermissible encroachment upon a defendant's right against self-incrimination: "Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the

failure of the accused to testify?" State v. Nordquist, 209 N.W.2d 109, 119 (N.D. 1981) (quoting United States v. Whitehead, 618 F.2d 523, 527 (4th Cir. 1980)). This Court looks at the comments "in the context in which they were made." State v. Skjonsby, 319 N.W.2d 764, 787 (N.D. 1982). "Generally, a statement that certain evidence is uncontroverted or unrefuted or uncontradicted does not constitute a comment on the accused's failure to testify where the record indicates that persons other than the accused could have offered contradictory testimony." Scutchings, 2009 at ¶ 11 (citing Pollard v. State, 552 S.W.2d 475, 477 (Tex.Ct.Crim.App. 1977)).

[¶41] Jennewein argues that during closing arguments, the prosecutor improperly commented on Jennewein's failure to testify. Appellant's Br., ¶ 32. During closing arguments, the prosecutor stated "Corporal Lammers testified that the defendant admitted 'I'm drunk.' There hasn't been any testimony today to dispute that. Jennewein was drunk that night." Tr. III, p. 301. The prosecutor's statement did not infer Jennewein had failed to testify or should have testified. It was simply a comment on the strength of the prosecution's case based on the testimony received during trial. The prosecutor's comment, when viewed in context of the additional statement, was a comment on Jennewein being drunk, not Jennewein's statement to Corporal Lammers.

[¶42] Three witnesses testified in regard to Jennewein's level of intoxication: Corporal Lammers, Officer Foley, and Kristine Cleveland, Jennewein's girlfriend at the time of the offense. Corporal Lammers testified that Jennewein was "slurring his words, he had a definite odor of alcoholic beverage coming from his breath as he was speaking to me. He had bloodshot, watery eyes and he also, when I told him, asked him for his license again he told me he was drunk." Tr. I, p. 60. Corporal Lammers testified that she

administered the horizontal gaze nystagmus test on Jennewein and observed six total clues and vertical nystagmus was also present. Tr. I, p. 69. Corporal Lammers testified she asked Jennewein how much he had to drink that night and ". . . he said a lot. I'm drunk." Tr. I, p. 71. Corporal Lammers testified that she had Jennewein perform the reverse count test "starting with the number 67, ending at the number 49." Tr. I, p. 73. She testified that Jennewein stated "67 back to 60, but then when he got to 60 he said 50 and then he paused and then went back to 59 again through 49 and then continued, and he continued until he got to the number 29 . . . ."

[¶43] Officer Foley, the Intoxilyzer operator, testified that he administered Jennewein's chemical test and received a reported alcohol content of ".220." Tr. II, p. 171. Cleveland, Jennewein's girlfriend at the time, also testified. The prosecution asked "do you recall whether or not the Defendant was drinking alcohol that day?" Tr. II, p. 178. Cleveland responded "he was." Tr. II, p. 178. Cleveland testified that she and Jennewein started drinking "roughly around five o'clock" that evening. Tr. II, p. 179. The prosecution asked Cleveland "would you say that Mr. Jennewein was intoxicated that night?" Tr. II, p. 189. Cleveland responded "yes." Tr. II, p. 190. When asked to clarify how she knew Jennewein was intoxicated, she testified "I just know him well enough to know when he's been drinking." Tr. II, p. 190.

[¶44] Three separate witnesses testified about the level of Jennewein's intoxication on the night of the offense. There were other witnesses besides Jennewein who could have offered contradictory testimony as required by Scutchings. Due to potential evidence from witnesses other than Jennewein, the prosecutor's comment during closing argument did not directly or indirectly address Jennewein's failure to testify. Nor

did it lead the jury to believe that Jennewein had to take the stand to testify to refute that he was intoxicated.

[¶45] "The scope and substance of counsels' opening statements and closing arguments lie within the trial court's discretion." Nesseth v. Omlid, 1998 ND 51, ¶ 8, 574 N.W.2d 848. The jury was advised that statements or remarks made by an attorney were not evidence. Opening statements were not put on the record. Tr. I, p. 20. However, during Corporal Lammers' testimony, Jennewein's attorney made an objection to hearsay. Tr. I, p. 42. During that objection, the following was stated:

> **MS. GERESZEK:** Your Honor, the defense has already stipulated that the Defendant was drunk during opening statements.
>
> **MS. KRAUS-PARR:** Yes, Your Honor, . . .

Tr. I, p. 42. While this Court cannot review the comments Jennewein's attorney made during opening statements, and any comments made by an attorney are not evidence, it is relevant that Jennewein's attorney did not dispute that Jennewein was drunk. Furthermore, Jennewein's attorney referred to Jennewein's "intoxicated state" during her closing argument. Tr. III, p. 328.

[¶46] The prosecutor's recitation of Corporal Lammers' testimony during closing argument only addressed the strength of the prosecution's case to establish Jennewein was intoxicated. Jennewein argues that only he and Corporal Lammers were in the patrol car when that statement was allegedly made and the only person who could dispute Corporal Lammers was Jennewein. Jennewein cites to State v. Scutchings. In Scutchings, the only witnesses to the actual crime were the defendant and one witness. 2009 ND ¶¶ 2, 13. The Court held the prosecutor's statement, "'what do you have to

refute C.M's [the witness'] testimony? Nothing.' would naturally and necessarily lead the jury to consider it a comment on defendant's failure to testify." Id. at ¶ 10. Three witnesses testified in reference to Jennewein's intoxication. There were multiple witnesses in this case that could have offered contradictory testimony. The prosecutor's comment that, "Corporal Lammers testified that the defendant admitted 'I'm drunk.' There hasn't been any testimony today to dispute that. Jennewein was drunk that night" did not directly or indirectly comment on Jennewein's failure to testify. Furthermore, it did not indicate Jennewein had to testify to refute the statement of Corporal Lammers that he was drunk. There was sufficient evidence provided by three separate witnesses to allow the jury to reach the conclusion that Jennewein was drunk. Therefore, the prosecutor did not commit reversible error during closing arguments. Furthermore, after closing arguments, the district court judge went through closing instructions with the jury and addressed Jennewein's right not to testify and that argument or remarks of an attorney must not be considered by the jury as evidence. Tr. III, pp. 344, 349.

[¶47] Jennewein also argues that there was testimony that he admitted to driving which also left the jury to assume that Jennewein had to testify to refute that statement. Appellant's Br., ¶ 33. Corporal Lammers and Officer Foley both testified that Jennewein voluntarily admitted to driving the vehicle on the night of the offense. Tr. I, p. 83; Tr. II, p. 172. An attorney is not permitted to step "beyond the bounds of any fair and reasonable criticism of the evidence, or any fair and reasonable argument based upon any theory of the case that has support in the evidence." State v. Evans, 1999 ND 70, ¶ 11, 593 N.W.2d 336. Statements during closing argument reiterating the testimony from two witnesses is a fair and reasonable recitation of the evidence presented during trial and was

not improper or prejudicial. Again, there were multiple witnesses that could have offered contradictory testimony pursuant to Scutchings. The prosecutor's recitation of the evidence during closing arguments did not directly or indirectly touch on Jennewein's failure to testify or that he needed to testify to refute the evidence.

[¶48] If this Court determines that the statement made during closing arguments regarding Corporal Lammers' testimony is a comment on Jennewein's failure to testify, that comment was a harmless error. "When a prosecutor improperly comments on a defendant's right to remain silent, we apply the harmless error analysis." Scutchings, 2009 ND at ¶ 14. A harmless error is "any error, defect, irregularity or variance that does not affect substantial rights and must be disregarded." State v. Rivet, 2008 ND 145, ¶ 10, 752 N.W.2d 611. "Reviewing courts must ignore harmless errors, including most constitutional violations." Id. "To determine the effect of the error on a defendant's constitutional rights we must consider the entire record and the probable effect of the actions alleged to be error in light of all the evidence." Id. "The beneficiary of a constitutional error has the heavy burden of proving beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. If the Court determines the prosecutor's statement during closing argument regarding Corporal Lammers' testimony is a comment on Jennewein's failure to testify, based on all of the evidence received during the trial, this alleged error was harmless. The prosecutor's statement, "Corporal Lammers testified that the defendant admitted, "I'm drunk." There hasn't been any testimony today to dispute that. When taken in context of the following statement, "Mr. Jennewein was drunk that night", would not lead the jury to believe that Jennewein had to testify. It was simply a comment on the strength of the evidence

establishing Jennewein was intoxicated the night of the offense. There was sufficient evidence for the jury to find Jennewein was intoxicated and driving the night of the offense. Therefore, even if this Court determines the statement was a violation of the Griffin rule, absent that statement, it is clear beyond a reasonable doubt that the jury would have still returned a guilty verdict and the error should be considered harmless.

V. MR. JENNEWEIN'S SENTENCE WAS WITHIN THE SENTENCING LIMITS PRESCRIBED BY THE STATUTE.

[¶49] "[A] district court is allowed the widest range of discretion in sentencing, and appellate review of the sentence itself focuses only on whether the district court "acted within the limits prescribed by statute, or substantially relied on an impermissible factor." State v. Wardner, 2006 ND 256, ¶ 27, 725 N.W.2d 215, 225 (citing State v. Ennis, 464 N.W.2d 378, 382 (N.D.1990)).

[¶50] Jennewein argues that the State asserted that the twenty-four seven program is a mandatory condition of probation and the district court should not give day for day credit for Mr. Jennewein's prior twenty-four seven testing. Appellant's. Br. ¶ 39. Jennewein argues that this statement improperly influenced the court. Id. Jennewein does not argue that the district court sentenced Jennwein outside the limits of the statute or that the district court relied on an impermissible factor in sentencing. As stated by this Court, a review of a sentence imposed by a district court is limited to whether the court "acted within the limits prescribed by statute, or substantially relied on an impermissible factor." Wardner, 2006 ND 256, ¶ 27, 725 N.W.2d 215 (citing State v. Ennis, 464 N.W.2d 378, 382 (N.D.1990)).

[¶51] The district court exercised its wide-ranging discretion in imposing twenty-four seven testing. N.D.C.C. § 39-08-01(5)(c) provides:

> For a third offense within seven years, the sentence **must** include at least one hundred twenty days' imprisonment; a fine of at least two thousand dollars . . . at least one year's supervised probation; and participation in the twenty-four seven sobriety program under chapter 54-12 as a **mandatory** condition of probation. (emphasis added).

The language of the statute provides the sentencing requirements for a violation of N.D.C.C. § 39-08-01. A sentence including one year of supervised probation with twenty-four seven testing is within the sentencing limits of the statute. Id.

[¶52] Jennewein does not cite to any transcript of the sentencing proceeding or any document issued by the district court that indicates the court relied on the prosecutor's statement. There is nothing on the record that indicates whether the district court relied on the State's assertion. Overturning a district court's ruling, based only on the assumption that comments from one party influenced the decision, is an argument that escapes any meaningful standard of review. The district court also terminated Jennewein's 24/7 testing, which was a condition of bond, on October 4, 2014. Appellant's Br. ¶ 16. The court was under no obligation to do so. Jennewein was subsequently sentenced to one year of 24/7 testing, as a term of supervised probation, on December 3, 2014. Appellant's Appendix pg. 55-56. While the State recognizes the length of time that Jennewein has been required to complete 24/7 testing, the conditions of pre-trial release and conditions imposed at sentencing are distinct. The district court was within its discretion to order one year of participation in the twenty-four seven program as a term of supervised probation. N.D.C.C. § 39-08-01(5)(c). Therefore, the State requests Jennewein's sentence be upheld.

VI. 24/7 TESTING IS A MANDATORY CONDITION OF PROBATION.

[¶53] N.D.C.C. § 39-08-01(3) states, "The **minimum** penalty for violating this section is as provided in subsection 5." (emphasis added). N.D.C.C. § 39-08-01(5)(c)

provides:

> For a third offense within seven years, the sentence **must** include at least one hundred twenty days' imprisonment; a fine of at least two thousand dollars; an order for addiction evaluation by an appropriate licensed addiction treatment program; at least one year's supervised probation; and participation in the twenty-four seven sobriety program under chapter 54-12 as a **mandatory** condition of probation. (emphasis added).

[¶54] Jennewein cites to N.D.C.C. § 12.1-32-06.1(6), which 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." Statutory interpretation is a question of law and is fully reviewable on appeal. Teigen v. State, 2008 ND 88, ¶ 19, 749 N.W.2d 505, 513 (citing In re P.F., 2008 ND 37, ¶ 11, 744 N.W.2d 724) "The primary purpose of statutory interpretation is to determine legislative intent." Id. (quoting Estate of Elken, 2007 ND 107, ¶ 7, 735 N.W.2d 842. Words used "are to be understood in their ordinary sense." N.D.C.C. § 1-02-02. "Statutes are construed as a whole and are harmonized to give meaning to related provisions." N.D.C.C. § 1-02-07. "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.

[¶55] N.D.C.C. § 39-08-01(5)(c) is clear in that it requires "at least one year's supervised probation; and participation in the twenty-four seven sobriety program under chapter 54-12 as a mandatory condition of probation." While most probationary sentences can be terminated under N.D.C.C. § 12.1-32-06.1(6), the mandatory language of N.D.C.C. § 39-08-01(5)(c) indicates that supervised probation and 24/7 testing are mandatory minimum terms of the sentence. Therefore, the district court did not have any discretion in sentencing Jennewein to anything less than one year of supervised

probation, with 24/7 testing being a term of his supervised probation.

CONCLUSION

[¶56] The State respectfully requests this Court to affirm the decision of the district court. There was no violation of the discovery rules in the trial below. If a violation did occur, Jennewein was not substantially prejudiced by the violation. Jennewein did not properly preserve the severance issue for appeal. If this Court considers that argument, the district court properly exercised its discretion to not grant severance. The prosecution did not make an impermissible comment on Jennewein's failure to testify because the statement was a reference to the strength of the prosecution's case. Lastly, the district court exercised its discretion in sentencing Jennewein. For these reasons, the State respectfully requests this Court to affirm the decision of the lower court.

Dated this 27th day of February, 2015.

Carmell F. Mattison
ND Bar ID #06052
Assistant State's Attorney
124 South 4th Street
PO Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org
Attorney for Appellee State of North Dakota

Aaron Weber
Certified Law Student, Grand Forks County
P.O. Box 5607
Grand Forks, ND 58201
(701) 780-8281

Sarah W. Gereszek
ND Bar ID #07017
Assistant City Prosecutor
311 South 4th Street, Suite 103
Grand Forks, ND 58201
(701) 780-9276
E-Service Address: sgereszek@kalashpettitlaw.com
Attorney for Appellee City of Grand Forks

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, vs. Tyler James Jennewein, Defendant/Appellant.	)	Supreme Court File No. 20140368 Dist. Ct. No. 18-2013-CR-02153

City of Grand Forks, Plaintiff/Appellee, vs. Tyler James Jennewein, Defendant/Appellant.	)	Supreme Court File Nos. 20140369 Dist. Ct. No. 18-2013-CR-02366

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

AFFIDAVIT OF SERVICE BY E-MAIL

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the___ day of February, 2015, she served via e-mail true copies of the following documents:

BRIEF OF APPELLE
APPENDIX OF APPELLEE
NOTICE OF CERTIFIED STUDENT REPRESENTATION

and that said email was served on the address of:

Kiara Kraus-Parr and said e-mail address is: kiara@krausparrlaw.com

At the office of the Grand Forks County States Attorney's Office.

Sheri Holter
States Attorney's Office

Subscribed and sworn to before me this 27th day of February, 2015.

Darlene Jensen
Notary Public

DARLENE JENSEN
Notary Public
State of North Dakota
My Commission Expires Dec. 19, 2018

sh
SA#128019