

**IN THE SUPREME COURT  
 STATE OF NORTH DAKOTA**

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**State of North Dakota,**

Plaintiff/Appellee,

vs.

**Romez Michael Coleman, Jr.,**

Defendant/Appellant.

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Supreme Court No.  
 20170315

Grand Forks County District No.  
 18-2017-CR-00458

ON APPEAL FROM VERDICT OF GUILTY AND SENTENCE  
 FROM THE DISTRICT COURT  
 FOR THE NORTHEAST JUDICIAL DISTRICT  
 GRAND FORKS COUNTY, NORTH DAKOTA  
 THE HONORABLE LOLITA G. HARTL ROMANICK, PRESIDING

**BRIEF OF APPELLANT**

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[¶1] STATEMENT OF THE ISSUES

[¶2] The evidence presented at trial was insufficient to sustain the guilty verdict.

[¶3] The trial court erred in allowing testimony about the presence of a butcher knife and ice cream scoop which violated the terms of a stipulated agreement between the State and the defense, which was reduced to an order from the trial court.

[¶4] STATEMENT OF THE CASE

[¶5] This is an appeal arising from verdict of guilty following a jury trial and sentence in Grand Forks County District Court for the offense of violation of aggravated assault-domestic violence.

[¶6] On March 1, 2017, Romez Michael Coleman, Jr., (hereinafter “Coleman”) was charged by criminal information in Grand Forks County district court with violation of aggravated assault-domestic violence, a class C felony, in violation of N.D.C.C. § 12.1-17-02. It was alleged that Coleman had committed aggravated assault upon the female victim by willfully causing serious bodily injury to the female victim.

[¶7] Coleman made his initial appearance before a magistrate on March 3, 2017. Following a waiver of preliminary hearing on April 5, 2017, Coleman pled not guilty. A demand for speedy trial was filed on April 5, 2017. Coleman’s initial appointed attorney was granted permission to withdraw pursuant to an order entered on May 30, 2017, a reassignment of attorney was made, and a Rule 16 Discovery Request was made on June 2, 2017.

[¶8] A motion in limine, notice of motion, and brief were filed by Coleman on June 26, 2017, in which the defense asserted that the admission of a knife and ice cream

scoop would be unfairly prejudicial and would inflame the jury's passions against Coleman. Register of Actions, Doc ID #62-64.

[¶9] At a hearing upon the said motion in limine on June 27, 2017, the prosecution and defense submitted a stipulation which stated as follows:

[¶1] The State of North Dakota, and Romez Michael Coleman Jr., by and through his attorney, Megan J.K. Essig, Handy Law Group, PLLC, Attorneys at Law, P.O. Box 6306, Grand Forks, ND 58206-6306, stipulate to suppress introduction of the following items into evidence at trial:

1. Ice Cream Scoop
2. Butcher Knife

[¶2] This stipulation is based upon the Defense agreeing not to bring up the absence of those items before the jury.

This stipulation was not to be read to the jury, by agreement of counsel, but was to be placed upon the record for purposes of appeal. Transcript, Motions Hearing and Pretrial Conference (June 27, 2017), 6:4-25; Register of Actions, Doc ID# 94.

[¶10] On June 28, 2017, the trial judge entered an order upon the motion in limine which stated:

The Stipulation to Suppress Trial Evidence is hereby granted. The actual Ice Cream Scoop, and the actual Butcher Knife, will not be introduced at trial. However, witnesses may provide testimony about them during the trial and counsel may discuss them in arguments.

Register of Actions, Doc ID# 70.

[¶11] At various stages leading up to trial, the State moved to amend the criminal information so that the use of dangerous weapons during the commission of the aggravated assault were changed to causing serious bodily injury, which would include language relating to the impediment of air flow or blood flow to the brain or lungs. Also at various stages leading to trial and subsequent to the dismissal of his trial counsel,

Coleman submitted various *pro se* motions. For purposes of this brief, the most substantial of these motions are referred to or alluded to herein. Coleman also interceded into the discussions of various motions, even though he was represented by counsel.

[¶12] At the pretrial conference on June 28, 2017, Coleman personally objected to the jury instruction regarding to impediment of airflow or blood flow to the brain or lungs by insisting that it should include strangulation and should specifically name the mechanical means by which strangulation was accomplished. His objection was overruled. Transcript, Pretrial Conference and Jury Trial, 7-10.

[¶13] On the second day of the jury trial, as the emergency room physician who examined the victim was being cross-examined, Coleman requested that he be allowed to represent himself because he believed the facts which he wanted to be presented at trial was not being presented. After an extended colloquy during which the trial judge examined Coleman and informed him of the standards to which he would be held, examined him as to his level of education and experience, and determined that his waiver of counsel was knowingly and voluntarily made, the trial judge appointed his trial counsel to act as stand-by counsel and allowed Coleman to represent himself during the remainder of the trial. Transcript, Pretrial Conference and Jury Trial, 125-137.

[¶14] A 12-person jury trial was held on June 28-29, 2017, after which Coleman was found guilty.

[¶15] While Coleman did not make a motion to dismiss at the conclusion of the State's case-in-chief, Coleman subsequently made a written motion under N.D.R.Crim.P. 29 on July 17, 2017, arguing there was insufficient evidence presented to sustain the State's burden of proof and that the trial judge's order upon the motion in limine, which

allowed witnesses to provide testimony about an ice cream scoop and a butcher knife, was “plain error”. Register of Actions, Doc ID# 88.

[¶16] Coleman also filed a written motion for transcripts on July 17, 2017. Register of Actions, Doc ID# 89. The trial court denied Coleman’s motion for transcripts on July 18, 2017. Register of Actions, Doc ID# 92.

[¶17] On July 19, 2017, the State filed State’s response to defendant’s motion for acquittal. Register of Actions, Doc ID# 96.

[¶18] On July 19, 2017, Coleman filed a motion for legal material and resources and proof of service. Register of Actions, Doc ID# 95.

[¶19] On July 21, 2017, the trial court entering an order denying Coleman’s request for legal research by the State’s Attorney. Register of Action, Doc ID# 98.

[¶20] On July 24, 2017, Coleman filed a motion to reconsider defendant’s request for court transcript. Register of Actions, Doc ID# 100.

[¶21] On July 24, 2017, the State filed State’s response to defendant’s motion to reconsider defendant’s request for court transcript. Register of Actions, Doc ID# 101.

[¶22] On July 25, 2017, the trial court entered an order on request for reconsideration of request for transcripts, which then granted Coleman’s motion. Register of Actions, Doc ID# 103. Coleman’s post-sentencing motion to request for courts transcript docket sheets was addressed in the trial court’s order in response to request for indigent appeal transcripts. Register of Actions, Doc ID# 113 and 114, respectively.

[¶23] On July 27, 2017, Coleman filed defendant’s reply to State’s response to defendant’s motion for judgment of acquittal. Register of Actions, Doc ID# 105.

[¶24] On August 14, 2017, the trial court issued an order denying motion for judgment of acquittal. Register of Actions, Doc ID# 109.

[¶25] A sentencing hearing was held August 14, 2017. Coleman was sentenced on August 14, 2017, as follows:

1. Confinement with the North Dakota Department of Corrections and Rehabilitation for a term of four (4) year.
2. Sentence reduction to be calculated by the Department of Corrections for credit for time served from March 1, 2017 to August 14, 2017.
3. All fines, fees, and costs were waived.

[¶26] Coleman filed a timely filed a notice of appeal on August 24, 2017.

Appendix, pages 79-80. Coleman argues there was not sufficient evidence to support a finding of guilt beyond a reasonable doubt and that the order the trial judge's order upon the motion in limine, which allowed witnesses to provide testimony about an ice cream scoop and a butcher knife, was "plain error".

#### [¶27] STATEMENT OF THE FACTS

[¶28] At trial, Casandra Kaldahl, the alleged victim, testified that just previous to the incident which was the subject of this criminal prosecution that she had been in a "boyfriend-girlfriend-type relationship" for a brief period of time. Pretrial Conference and Trial Transcript (hereafter "Trial Transcript"), 43:9-13. On the evening of February 28, 2017, Kaldahl and Coleman had a few friends over for some drinks. Trial Transcript, 44:21-25. At some point in the early morning hours most of the friends had left her apartment, and Kaldahl and Coleman began arguing. Trial Transcript, 45:20-25, 46:1-12. Eventually, Kaldahl was hit in the face. Trial Transcript, 47:23-25. Kaldahl testified she was hit three times in the face with Coleman's fist before she went to the floor, and one time in the head after she was on the floor. Trial Transcript, 48:8-12. One of the guests,



whom Kaldahl did not know and could not identify, interceded and told Coleman to stop. Trial Transcript, 48:15-25, 49:1-13. The argument moved from one of the bedrooms to the kitchen, where both Kaldahl and the unidentified guest attempted to calm Coleman down. However, Coleman grabbed a fork in the kitchen and attempted to stab the unidentified guest. Trial Transcript, 50:9-25. While Kaldahl testified Coleman calmed down for a brief period, he again became agitated, dropped the fork, grabbed an ice cream scooper, and hit Kaldahl in the back of the head. Trial Transcript, 51:12-14, 52:18-21. Kaldahl testified she lost count over the number of times she was hit with the ice cream scoop after four blows. Trial Transcript, 53:6-7. Kaldahl testified she kicked Coleman off her with her legs. Trial Transcript, 53:25, 54:1. The unidentified guest again tried to calm Coleman down, but he pulled out a cabinet drawer and grabbed what was described as a “kitchen knife.” Trial Transcript, 54:5-11, 55:15-22. Kaldahl described the knife as a “large kitchen knife” usually found in restaurants. Trial Transcript, 4-16. Kaldahl testified she was standing behind the unidentified guest and attempted to leave the apartment. After she found the apartment door locked, she said Coleman grabbed her by her sweatshirt, but she unzipped it and managed to get out of the sweatshirt. Trial Transcript, 58:7-23. However, when she slipped out of the sweatshirt, Kaldahl fell to the ground and Coleman got on top of her. Trial Transcript, 59:3-25, 60:1-4. It was at this point that Coleman choked her with his left hand while simultaneously brandishing the knife. Kaldahl testified she “couldn’t even make a sound, let alone barely breathe.” Trial Transcript, 60:5-20. She testified she attempted to arch her back “to try to get some air into my airway.” Trial Transcript, 61:1-3. She testified she had “[q]uite a bit” of difficulty breathing and could not speak. Trial Transcript,

61:17-24. She testified when she could speak, she asked Coleman not to kill her. Trial Transcript, 62:5-8. While being choked, Coleman continued to wave the knife around, and when Kaldahl attempted to block the knife, she was cut on her thumb and palm. Trial Transcript, 62:10-18. At some point, Kaldahl managed to twist Coleman's wrist, loosen the knife from his grasp, and throw it down the hallway. Coleman ran after the knife, and Kaldahl ran in the opposite direction to escape from the apartment. Trial Transcript, 63:9-25. Kaldahl ran from the apartment building, and Coleman ran after her, but slipped three times on the ice. Coleman went back into the apartment building, and Kaldahl ran into the next building. Trial Transcript, 64:7-13. Once outside, Kaldahl encountered a female friend who had been staying with her in a spare bedroom, who had also escaped from the apartment. Trial Transcript, 64:14-25, 65:1-7. The two of them went into the adjacent apartment building, where they barricaded themselves into the second floor laundry room. Trial Transcript, 10-19. Kaldahl then called her brother, who was actually her cousin but had been raised with Kaldahl, Brandon Schultz. Trial Transcript, 66:17-25. When Schultz arrived at the adjacent apartment building, Kaldahl, her friend, and Schultz got into his pickup and returned to Kaldahl's residence. Coleman was standing outside of the patio door, but when confronted by Schultz, Coleman went back into the apartment. Schultz took a large wooden pizza spatula from his pickup and hit the sliding glass patio door, breaking the spatula. It was at this point that two undercover law enforcement officers arrived, pulled their weapons, and stopped Schultz from acting further. Trial Transcript, 72-76. Kaldahl testified she could see Coleman had locked himself inside her apartment with the officers outside. Trial Transcript, 76-77. Eventually, Coleman opened the door. Trial Transcript, 78:19-23. Four other squad

cars then arrived on the scene, and Kaldahl spoke with Officer Prock. Trial Transcript, 79:12-17. Kaldahl described her injuries to Officer Prock. Trial Transcript, 81:12-24. Exhibits 1 through 5 were identified by Kaldahl and were entered into evidence over no objection. Trial Transcript, 82-89.

[¶29] On cross-examination, Kaldahl testified that there were slight marks around her neck, but they were not evident for very long after the incident. Trial Transcript, 94:7-12. Kaldahl also testified she had a crushed larynx from a previous domestic assault. However, the State objected to this line of questioning, and after a sidebar, gave an instruction to the jury that they are not to consider any prior injury that might be related to Coleman. Trial Transcript 94-98.

[¶30] The trial then was continued until the next day.

[¶31] Prior to resuming the trial, Coleman himself, rather than through counsel, argued that a trial error had occurred during the prosecutor's examination of the accuser:

During this examination, the prosecution allowed the State's witness to mention the use of evidence that this Court has already issued an order to exclude, specifically the knife, the butcher knife; and the ice cream scoop.

The reason for this exclusion of evidence were (sic) that:

1. Its probative value is substantially outweighed by a danger of unfair prejudice to the defendant.
2. It would create the danger of confusing the issue – the issue.
3. To avoid misleading the jury, and

Lastly because my fingerprints were not found or connected to them.

Even though my counsel failed to bring this trial error to the attention of the Court, as an officer of the Court, should have.

I hereby respectfully bring this to the Court's attention, that the fact that the prosecutor has used the suppressed evidence against me, contrary to this Court's order, and in violation of the North Dakota Rules of Evidence, Rule 403, and

especially my right to a fair trial and due process that avail (sic) under the United States Constitution.

The mention and usage of this suppressed evidence has caused:

1. Unfair prejudice to me.
2. Misled the grand jury (sic) to believe that the butcher knife and the ice cream scoop were used against her.
3. The mentioning of the suppressed [evidence] has allowed the witness to falsify her statement before the jury at the expense of my constitutional right to fair trial and due process.

The attendant need to repair the unfair prejudice inflicted and correct the undue, suggestive, and improper basis for mentioning these (sic) (*in transcript*) evidence before the jury, it is essentially in this case to protect my right to fair trial and due process. Simply stated, the mere mention of these (sic) (*in transcript*) suppressed evidence not only has created prejudice, but also confusion of issues and misled (sic) (*in transcript*) of the grand jury. (sic)

Therefore, in the interest of justice in this case, I respectfully ask this Court to address the jury, once seated, to disregard any statement made on these (sic) (*in transcript*) suppressed evidence by the witness and the State prosecutor.

In sum, I respectfully ask this Court to admonish the jury not to consider these (sic) (*in transcript*) evidence and any associated statement made upon it as relevant.

The mentioning of this suppressed evidence amounts to a trial error and an omission that is inconsistent with the fundamental notion of fairness.

And I have the order and the statement and facts of that motion that my attorney and Ms. Wamstad signed the other day.

And thank you for your consideration of this request, Your Honor.

Trial Transcript, 105-108.

[¶32] The State responded as follows:

As the Court is aware of a lot of the discussions that we discussed on the record, the agreement between the parties was that even though the State didn't agree that this evidence should be suppressed, the State agreed not to offer the items themselves, the State agreed not to offer the items themselves, the ice cream scoop and the knife, as exhibits in this case, but that the witnesses would be permitted to testify about the description of these items, how they were used in the offense, so on and so forth.

And in consideration, the defense agreed that the State's witnesses would be permitted to do so, and they would not raise the fact that these items were not submitted as exhibits against the State.

Trial Transcript, 108:12-25.

[¶33] The Court denied the motion. The trial judge pointed out that the agreement was as stated by the State, that the motion was not to suppress the witnesses' testimony about the actual butcher knife and ice cream scoop. The trial judge had requested during the pretrial conferences that counsel confirm what had been understood about the motion and the order of the Court. The trial judge pointed out that she had revised the proposed order to specifically allow testimony about these two items and in argument. Trial Transcript, 109:4-25. The trial judge found that there had been no "falsified statements presented, based on the testimony that has been presented and the agreements and order of this Court prior to trial yesterday." Trial Transcript, 110:1-4.

[¶34] The State then called Dr. Kevin Temple as a witness. Dr. Temple testified that he had treated Kaldahl in the emergency room at the Altru Emergency Department on March 1. He testified that Kaldahl presented injuries resulting from blows to her head, trouble swallowing and speaking which Kaldahl reported resulted from choking, and pain in her left arm. Trial Transcript, 113:14-17. Dr. Temple testified that the injuries to Kaldahl appeared to be fresh. Trial Transcript, 114:24-25, 115:1. He testified that Kaldahl stated to him that she had been struck in the head multiple times, choked, and kicked in the neck. Trial Transcript, 115:19-23. Dr. Temple testified that, after testing, which was negative, Kaldahl's injuries were consistent with her report to him about how they were received. Trial Transcript, 116. Dr. Temple testified that strangulation impeded the blood flow to and from the brain. Trial Transcript, 120:4-25.

He also testified that there are different types of strangulation and that there are not always immediate signs of strangulation. Trial Transcript, 121. Dr. Temple testified that Kaldahl exhibited difficulty with speaking, which could be indicative of strangulation. Trial Transcript, 122. -123.

[¶35] Although Coleman's trial counsel began cross-examining Dr. Temple, Coleman requested that he be allowed to ask questions of the witness. Out of the hearing of the jury, Coleman stated that he did not feel he was being properly represented by his trial counsel and wanted to proceed as his own attorney. After a break in the proceedings so Coleman and his attorney could consult, Coleman indicated that he wished to proceed as his own attorney for the remainder of the trial. The trial court extensively examined Coleman to determine that Coleman understood the risks of representing himself at trial and that he had sufficient capacity to waive counsel. Trial Transcript, 124-137.

[¶36] Upon the resumption of the trial, Coleman attempted to cross-examine Dr. Temple. However, due to improper questioning, which was objected to by the State and sustained by the trial court, Coleman stated he had no further questions for this witness. Trial Transcript, 137-138.

[¶37] Upon redirect, the State asked Dr. Temple about matters relating to whether Kaldahl had sustained a fracture to her arm. Dr. Temple explained the symptoms relating to a fracture and indicated he had not diagnosed a fracture. Trial Transcript, 138-141:1-4.

[¶38] The State then called Brandon Schultz. Schultz testified that on March 1, he had received a series of telephone calls from Kaldahl at around 8:30 or 9:00 in the morning, which woke him up. Schultz testified that Kaldahl told him that Coleman had

beat her and asked him to come and get her. Trial Transcript, 144-145. Schultz testified when he arrived at Kaldahl's apartment and picked her up at the adjacent apartment building, she was "beaten up and bloodied on her hands." He became enraged. Trial Transcript, 146. Schultz was shown Exhibits 1 through 5 and testified that although she had been cleaned up when the pictures were taken, she had looked worse when he first saw her. Trial Transcript, 147:16-21. Schultz said he went back to confront Coleman. There were people on the scene who were later determined to be undercover law enforcement officers. Coleman went back into Kaldahl's apartment and had a knife in his hand. Transcript, 148-153:14.

[¶39] Coleman objected to the State's question regarding observing Coleman in the residence with a knife. Coleman argued that this testimony should be excluded because of the agreement regarding suppressed evidence and that there was no DNA or fingerprints on the knife. The trial judge overruled Coleman's objection. Trial Transcript, 153-154. The trial judge also stated that DNA evidence and fingerprints are not required to prove a crime. Trial Transcript, 155:1-8.

[¶40] Schultz testified by describing the knife which Coleman was holding. He testified that once he saw Coleman holding a knife, he went back to his pickup and took out a large wooden pizza spatula. After hitting the locked sliding glass door, the handle to the pizza spatula broke. It was at this point that the law enforcement officers stepped in. Transcript, 155:13-25, 156-157.

[¶41] On cross-examination, Coleman asked Schultz if he had ever seen Coleman act violently. A colloquy ensued at the bench, at which Coleman was advised that if he continued to ask questions such as this, he would open the door to his own prior

bad acts, which would include pending cases which were currently before the court. The trial judge instructed the jury not to consider any suggestion regarding his conduct prior to March 1. Trial Transcript, 162-164.

[¶42] The State called Grand Forks Police detective Darin Johnson. He testified that while he was in plain clothes but on duty, he and another undercover officer observed Schultz proceeding at a high rate of speed. Although they were on their way to another meeting, they followed Schultz' vehicle. Initially, they did not know what was transpiring, but had a brief interchange with Coleman. They were going to leave the scene at that time, but when they observed Coleman go back into the apartment and Schultz pull a large pizza spatula out of his pickup and break it on a sliding glass door, they intervened by pulling out his service weapon and disarming Schultz. He briefly talked with Schultz, then went to talk to Kaldahl. He testified he observed marks on her neck and other injuries. Johnson stated twice during his testimony that he observed marks on Kaldahl's neck. He also testified he saw scrapes and marks on Kaldahl's face and neck area. As other officers arrived on the scene, he turned the investigation over to other officers. Trial Transcript, 168-181.

[¶43] On cross-examination, Coleman asked if Johnson observed Coleman having any weapons, and Johnson testified he did not. Trial Transcript, 189:15-22.

[¶44] The State called Grand Forks Corporal April Prock. Prock testified regarding her background and training with domestic violence. Trial Transcript, 193-195. Prock testified she observed injuries to Kaldahl, which were a cut on Kaldahl's left hand and bruising on the left side of her face. Trial Transcript, 198:22-24. She also observed a large bump on Kaldahl's left upper arm and a scratch on her left side of her



neck, as well as complaining about pain to her thigh and the back of her head. Trial Transcript, 200:13-16. Prock also observed fresh blood on Kaldahl's hand and purplish bruising on her face. Trial Transcript, 201:4-8. Prock testified she had taken the photographs which had been admitted as Exhibits 1-5. Trial Transcript, 201:12-25. Prock also gathered the butcher knife and ice cream scoop as evidence. Trial Transcript, 204:3-18. Prock testified that these items were not submitted to the State Laboratory for testing because the items had been handled by a number of people. Prock testified that from her experience with domestic violence, she was familiar with strangulation. Prock testified that while Kaldahl exhibited difficulty speaking, Prock did not observe any other signs of strangulation. However, she did observe scratches to the left side of Kaldahl's neck. Trial Transcript, 207-208. Prock testified that Kaldahl told her that when Coleman was on top of her with his hand on her neck, she had difficulty breathing, had to tilt her head back to breathe, and reported difficulty swallowing and seeing stars and a "white flash." Trial Transcript, 209:6-13. Prock could not see a scratch on Kaldahl's neck from the exhibits. Trial Transcript, 209:19-21.

[¶45] On cross-examination, Prock testified that Kaldahl had previously sustained a crushed larynx from a previous incident. Trial Transcript, 210: 17-21.

[¶46] The State rested, and Coleman also rested without calling any witnesses. Trial Transcript, 212.

[¶47] In reviewing the final jury instructions, Coleman requested that the stipulated agreement be included in the jury instructions. The State argued this was a legal issue stipulation and not a stipulation of fact that would be submitted to the jury.

The trial court ruled that the stipulated agreement was a motion and was not to be admitted as a stipulation for jury instructions. Trial Transcript, 215-216.

[¶48] Coleman was found guilty of the crime of aggravated assault by the jury on June 29, 2017.

[¶49] On June 29, 2017, within fourteen days following this verdict, Coleman filed a motion to dismiss under the terms of Rule 29, N.D.R.Crim.P. In that motion, Coleman first argued that there had been “trial error” and “plain error” during the course of the trial in that the trial court permitted testimony regarding a butcher knife and an ice cream scoop which had not been admitted into evidence pursuant to an agreement between the State and the defense which excluded the introduction of the butcher knife and the ice cream scoop. Coleman next argued that there was insufficient evidence for the jury to find him guilty of aggravated assault-domestic violence beyond a reasonable doubt.

[¶50] The State filed a response to Coleman’s motion to dismiss, arguing that the testimony about the butcher knife and the ice cream scoop was properly admitted pursuant to the clear language contained in the stipulated agreement between the State and the defense, coupled with the clarification about the intent of the parties requested by the trial court prior to the commencement of the trial. The State also argued there was overwhelming evidence presented at trial from Kaldahl, Dr. Temple, Corporal Johnson, and Officer Prock that strangulation had occurred and Kaldahl’s injuries were consistent with that testimony.

[¶51] The trial court entered an order on August 11, 2017, denying Coleman’s motion to dismiss and finding that the testimony regarding the butcher knife and the ice

cream scoop were properly admitted pursuant to the terms of the stipulation entered into between the parties and as discussed on the record both the day before the trial and on the morning of the first day of the trial. The trial court also found there was “more than ample factual evidence for the jury to determine, beyond a reasonable doubt, that Coleman had committed the crime of Aggravated Assault—Domestic Violence.” Order, ¶6.

#### [¶52] JURISDICTION

[¶53] Appeals are allowed from lower district courts to the Supreme Court as provided by law. N.D. Const. art. VI, § 6. A defendant may appeal from a verdict of guilty and final judgment of conviction. N.D.C.C. § 29-28-06.

#### [¶54] STANDARD OF REVIEW

[¶55] “When the sufficiency of evidence to support a criminal conviction is challenged, [the Supreme] Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction.” State v. Schmeets, 2007 ND 197, ¶ 8, 742 N.W.2d 513. This standard also applies to a review of the district court’s denial of a motion of judgment of acquittal under N.D.R.Crim.P. 29. State v. Romero, 2013 ND 77, ¶ 24, 830 N.W.2d 586.

[¶56] The standard for review upon a motion to suppress evidence is well established:

In reviewing a district court's decision on a motion to suppress evidence, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We will affirm a district court's decision on a motion to suppress if there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. Our standard of review recognizes the importance of the district court's

opportunity to observe the witnesses and assess their credibility. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law. (Citations omitted.)

State v. Hawkins, 2017 ND 172 ¶6, 898 N.W.2d 446.

[¶57] ARGUMENT

[¶58] The evidence presented at trial was insufficient to sustain the guilty verdict.

[¶59] In this case, it was apparent that there was a significant difference of opinion between trial counsel and Coleman regarding trial strategy and trial tactics, such that midway through the trial, Coleman dismissed his counsel before the State had presented its entire case, trial counsel was then assigned to act as stand by counsel, and Coleman proceeded to act as his own attorney for the remainder of the trial. As a result, the record indicates sometimes contradictory positions taken throughout the trial between trial counsel and Coleman. For purposes of this appeal, this brief will address Coleman's positions which he asserted in argument and in his filed motions.

[¶60] The Supreme Court reviews the record at trial "to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction." Schmeets, 2007 ND 197, ¶ 8, 742 N.W.2d 513. A conviction is not supported by sufficient evidence when no rational factfinder could have found the defendant guilty beyond a reasonable doubt, even after viewing the evidence in the light most favorable to the prosecution and giving the prosecution all reasonable inferences. Id. The Supreme Court should reverse a guilty verdict if no reasonable factfinder could find the defendant guilty beyond a reasonable doubt. State v. Vantreece, 2007 ND 126, ¶ 14, 736 N.W.2d 428.

[¶61] It is the defendant's burden on appeal to show the evidence does not support the verdict even when all reasonable inferences are given to the prosecution. State v. Zottnick, 2011 ND 84, ¶ 14, 796 N.W.2d 666. The Supreme Court will not reweigh conflicting evidence or judge the credibility of witnesses. Id. A jury may find a defendant guilty even if evidence exists could lead to a verdict of not guilty. Id.

[¶62] A defendant may move the court to enter a judgment of acquittal prior to jury deliberations if the prosecution has failed to establish its case with sufficient evidence to sustain a conviction. N.D.R.Crim.P. 29(a). A motion under Rule 29 preserves the issue of sufficiency of the evidence for appellate review. Romero, 2013 ND 77, ¶ 24, 830 N.W.2d 586. Coleman filed a written motion for acquittal under N.D.R.Crim.P. 29 after the guilty verdict, but within fourteen (14) days, as permitted by Rule 29. He argued there was insufficient evidence presented to sustain the State's burden of proof. The trial court denied the Rule 29 motion in an Order denying motion for acquittal on August 11, 2017.

[¶63] Coleman was charged with violation of N.D.C.C. § 12.1-17-02(1) for aggravated assault with a proviso that the same constituted domestic violence. This subsection states that a person is guilty if he or she "[w]illfully causes serious bodily injury to another human being. "

[¶64] "Serious bodily injury" is defined as follows:

"Serious bodily injury" means bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs.

N.D.C.C. § 12.1-01-04(27).

[¶65] Coleman argues that while there was testimony from witnesses that an assault had taken place, this testimony did not present evidence beyond a reasonable doubt that strangulation had occurred. Kaldahl testified that any marks were not apparent. Dr. Temple's testimony did not indicate clear evidence of strangulation, but only some symptoms which could possibly be related to strangulation; Schultz, who testified as to observing signs of assault, did not directly testify to, nor was questioned about, any signs of strangulation, although he did observe marks on Kaldahl's neck; and Corporal Prock did not see direct signs of strangulation, although she also observed marks on Kaldahl's neck. Coleman's argument is not that the testimony and evidence did not prove that an assault did not occur, but rather that the evidence did not demonstrate an impairment of blood flow or air flow to the brain beyond a reasonable doubt, as required by N.D.C.C. § 12.1-01-04(27). Because the State did not prove this element of aggravated assault, Coleman argues that the State did not prove its case at trial. The State must establish proof beyond a reasonable doubt all elements of a charged offense. In this case the evidence was insufficient to prove beyond a reasonable doubt that Coleman committed the specific crime of aggravated assault against Kaldahl. Even when giving all reasonable inferences to the prosecution, the evidence presented at trial is not sufficient to support the guilty verdict.

[¶66] The trial court erred and abused its discretion in allowing testimony about the presence of a butcher knife and ice cream scoop which violated the terms of a stipulated agreement between the State and the defense, which was reduced to an order from the trial court.

[¶67] As indicated in Coleman’s dismissal of his trial counsel in ¶31, above, there was a significant difference of opinion between Coleman and his trial counsel regarding trial strategy and trial tactics, such that Coleman dismissed his counsel before the State had rested and continued to represent himself for the remainder of the trial and in post-trial motions.

[¶68] Here, Coleman contends that stipulated agreement between the State and the defense which made prior to trial and was presented to the trial judge in a pretrial conference the day before the jury trial would not just bar introduction of the butcher knife and the ice cream scoop into evidence at trial, but would also bar testimony regarding these two items from witnesses.

[¶69] The motion in limine which was filed by Coleman’s counsel asserted that the admission of a knife and ice cream scoop would be unfairly prejudicial and would inflame the jury’s passions against Coleman. Although this was designated a motion in limine, the motion did not refer to testimony regarding the knife or the ice cream scoop; rather, it was characterized as a suppression motion. This motion was not argued to the trial court; rather, a stipulation was entered into between the State and the defense. The stipulation with the State which was presented to the trial court did not refer to any testimony regarding the butcher knife or the ice cream scoop, only that the Defense agreed not to bring up the absence of those items before the jury.

[¶70] Coleman contends that the trial court erred in placing the additional language into its order which states: “However, witnesses may provide testimony about them during the trial and counsel may discuss them in arguments.” The trial court twice requested clarification of the State and of Coleman’s trial attorney which indicated that it

was not their intent in this stipulation to limit testimony about the butcher knife or the ice cream scoop, only that it was their intent not to have these items placed into evidence or to allow the defense to question or point out that the items had not been placed into evidence.

[¶71] However, Coleman argued at ¶31 that this was not his intent with the motion in limine or with the stipulation, that his trial counsel failed to object to the testimony which had been made regarding the butcher knife and the ice cream scoop, and that the trial court should issue an order that the jury should disregard this testimony. The trial court denied this motion.

[¶72] While it is not clear from Coleman's Rule 29 motion and response, or from his *pro se* motion at ¶31, it appears he is arguing that since the butcher knife and the ice cream scoop were excluded, albeit by stipulation and not as the result of a hearing, that any testimony regarding these items constitutes a violation of the "fruit of the poisonous tree" doctrine.

[¶73] The fruit of the poisonous tree is a legal metaphor in the United States used to describe evidence that is obtained illegally. The logic of the terminology is that if the source (the "tree") of the evidence or evidence itself is tainted, then anything gained (the "fruit") from it is tainted as well. The fruit of the poisonous tree doctrine was first described in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The term's first use was by Justice Felix Frankfurter in Nardone v. United States, 308 U.S. 338 (1939). Such evidence is not generally admissible in court, but if the connection between the evidence and the illegal method by which it was obtained is sufficiently remote or attenuated, the trial court could allow testimony about the evidence. However, it should



be noted that the testimony of a witness who is discovered through illegal means would not necessarily be excluded, however, due to the “attenuation doctrine”, which allows certain evidence or testimony to be admitted in court if the link between the illegal police conduct and the resulting evidence or testimony is sufficiently attenuated. It is believed that a witness who freely and voluntarily testifies is enough of an independent intervening factor to sufficiently “attenuate” the connection between the government’s illegal discovery of the witness and the witness’s voluntary testimony itself. United States v. Ceccolini, 435 U.S. 268 (1978).

[¶74] Here, Coleman asserts that the motion in limine and subsequent stipulation about the butcher knife and ice cream scoop with the State would operate to require the trial court to exclude any and all testimony regarding the butcher knife and ice cream scoop, as an adjunct to the fruit of the poisonous tree doctrine. In his *pro se* motion in ¶31, Coleman argued that the testimony regarding the butcher knife and ice cream scoop which had been admitted was so prejudicial to him that it would unfairly prejudice the jury against him. Coleman, with whom he apparently disagreed with regarding trial strategy and trial tactics, also asserts that his trial counsel, whom he dismissed after the first day of testimony, did not properly object to the testimony about the butcher knife and ice cream scoop and did not seek to limit the testimony regarding these items in an appropriate manner.

#### [¶75] CONCLUSION

[¶76] The guilty verdict was not supported by sufficient evidence. The trial court erred and abused its discretion in allowing testimony regarding the butcher knife and the ice cream scoop to be admitted over Coleman’s objection and in issuing its order

permitting such testimony. Coleman requests the Supreme Court to reverse the criminal judgment and remand for an entry of judgment of acquittal.

[¶77] The Appellant respectfully prays that the Court grant the relief requested.

Dated this 19<sup>th</sup> day of December, 2017.

Respectfully submitted,

/s/ Russell J. Myhre

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**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

<b>State of North Dakota,</b>	)	
	)	
Plaintiff/Appellee,	)	CERTIFICATE OF SERVICE
	)	
vs.	)	Supreme Court Case No. 20170315
	)	
<b>Romez Michael Coleman Jr.,</b>	)	Grand Forks County File No.
	)	18-2017-CR-00458
Defendant/Appellant.	)	

I, Russell J. Myhre, do hereby certify that on December 19, 2017, I served the following documents:

1. Brief of Appellant
2. Appendix of Appellant

On:

Supreme Clerk of Court  
ND Supreme Court  
State Capitol  
Judicial Wing, 1st Floor  
600 East Blvd Ave., Dept. 180  
Bismarck, ND 58505-0530  
supclerkofcourt@ndcourts.gov

Haley Lorelle Wamstad  
Grand Forks County Assistant State's Attorney  
P.O. Box 5607  
Grand Forks, ND 58206-5607  
E-Service: sasupportstaff@gfcounty.org

by Electronic Filing, pursuant to N.D. Sup. Ct. Admin. Order 16.

I, Russell J. Myhre, hereby certify that pursuant to Rules 5(b) and 5(f), NDRCivP, that on the 19th day of December, 2017, I deposited, with postage prepaid by first class mail, in the United States post office at Valley City, North Dakota, a true and correct copy of the following document(s):

1. Brief of Appellant
2. Appendix of Appellant

To the defendant, listed at the following address:

Romez Jr. Coleman  
NDSP #50778  
PO BOX 5521  
Bismarck, ND 58506

To the best of my knowledge, information, and belief, such address was the last known post office address of the party intended to be so served. These above-referenced documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, Rule 5.

Dated this 19<sup>th</sup> day of December, 2017.

/s/ Russell J. Myhre

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