20120337
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 29, 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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State of North Dakota,	*	
	*	
Plaintiff/Appellee,	*	
	*	
v.	*	**Supreme Court No. 20110337**
	*	
Miguel Humberto Medina Romero,	*	
	*	
Defendant/Appellant.	*	

****

APPEAL FROM THE CRIMINAL JUDGMENT
ENTERED IN THE NORTHEAST JUDICIAL DISTRICT
PEMBINA COUNTY FILE NO. 34-20-K-00242

THE HONORABLE LAURIE A. FONTAINE, PRESIDING

****

BRIEF OF APPELLEE

****

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the trial court err when it denied the defendant's motion to transport the jury to the crime scene?

II. Did the trial court err when it did not alter language of the pattern jury instruction "Self-Defense (Reasonableness of Accused's Belief)" nor provide a definition of the term "great bodily injury" in the closing instructions to the jury?

III. Did the trial court err when, at the close of the prosecution's case, it denied the defendant's motion for judgment of acquittal on the charge of unlawful possession of cocaine with intent to deliver?

IV. Is the defendant entitled to a new trial because the *voir dire* portion of the trial transcript has a notation of "indiscernible" where answers of potential jurors could not be understood by the transcriptionist?

ARGUMENT

I. Did the trial court err when it denied the defendant's motion to transport the jury to the crime scene?

[¶1] At trial on this matter, counsel for Mr. Romero sought to transport the impaneled jury to the scene of the murder. Defense counsel's request to bring the jury to the scene was brought in the middle of the prosecution's presentation of evidence, on the third day of trial. Defense counsel asserted that the photographs of the scene were "deceiving as to the size of the yard and exactly how it's laid out." Transcript Volume 3, p.81-85.

[¶2] The North Dakota Century Code provides direction to a trial court regarding the issue of whether a jury should be taken to the scene of a crime. N.D.C.C. § 29-21-26 states:

> ***Jury may view place.*** *When, in the opinion of the court, it is proper that the jurors should view the place in which the offense was charged to have been committed, or in which any other material fact occurred, it may order the jurors to be conducted in a body, in the custody of proper officers, to such place, which must be shown to them by a person appointed by the court for that purpose, and the officers must be sworn to suffer no person to speak to nor communicate with the jurors, nor to do so themselves, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time. The trial judge must be present and the state's attorney and counsel for the defendant may be present at the view by the jurors.*

The plain language of the statute provides that the decision of whether or not to allow the jurors to view the location of the murder rests within the discretion of the trial court. City of Fargo v. Doty, 2000 ND 176, ¶1, 622 N.W.2d 432.

[¶3] The recognized standard of review is that discretionary decisions are reversed on appeal only upon a showing of an abuse of discretion. A trial court

abuses its discretion when it acts arbitrarily, capriciously, or unreasonably, or it misinterprets or misapplies the law. State v. Chisholm, 2012 ND 147, ¶10, and cases cited therein (trial court did not abuse its discretion when it refused to admit evidence submitted by the defendant that the victim had, several years prior, brandished a firearm in family disputes, as trial courts have broad discretion in determining admissibility of evidence). *See also* State v. Kunze, 2007 ND 143, ¶14, 738 N.W.2d 472 (trial court did not abuse its discretion when it ordered the defendant to be restrained during jury trial).

[¶4] This Court has considered a similar case where a criminal defendant asked that a jury be brought to a stretch of roadway to view the scene of the crime. In State v. Schlickenmayer, 334 N.W.2d 196 (N.D. 1983), the defendant was convicted of negligent homicide arising out of the death of a woman from hypothermia. Schlickenmayer admitted that he had left the woman alongside a roadway around 3:00 a.m. The evidence established that at the time the weather conditions were well below freezing, and wind chill factors were below zero. The woman's deceased body was found several hours later by third-parties approximately 8 miles from the location where Schlickenmayer claimed he had let her out of the car. Schlickenmayer at 197.

[¶5] Schlickenmayer presented alternate theories at trial in his defense. He argued that the decedent would have been physically unable to walk or crawl the 8 mile stretch of roadway and, therefore, she must have been subsequently picked up by unknown persons and then thrown out on the road by those persons. In the alternative, Schlickenmayer argued that the decedent was

responsible for her own death because she did not seek refuge at various points of shelter which were available along the 8 mile stretch of roadway. Id. at 198.

[¶6] At the trial of the case, the trial court admitted into evidence a video tape made by law enforcement which showed the 8 mile stretch of roadway that was at issue. The video tape was made while the officers drove down the stretch of road where Schlickenmayer admitted he had left the decedent. The officers stopped every one-half mile and video taped a full circle view of the area from outside of the officers' vehicle. The video tape ended at the point where the decedent's body was located. Id. at 199.

[¶7] After this video tape was admitted at the trial, Schlickenmayer asked that the jury be taken to the 8 mile stretch of roadway as allowed by N.D.C.C. § 29-21-26. Schlickenmayer argued that the video tape was inaccurate and highly prejudicial, and that the jury needed to see the area in person. The trial court denied Schlickenmayer's request, noting that the Court did "*not believe that a view . . . of the general area will add anything that the video tape doesn't already show, with the exception of maybe the one house [Schlickenmayer was] concerned about.*" Id. at 200.

[¶8] In affirming the trial court's denial of Schlickenmayer's request to view the scene, the North Dakota Supreme Court confirmed that: "*. . . the decision of whether or not to grant or deny a request for a jury view rests in the sound discretion of the trial judge, and, as such, the trial court may properly deny such a request when the view would serve no useful purpose in illustrating testimony.*" Id. at 200. In reaching its decision in support of the trial court, the North Dakota

Supreme Court rejected Schlickenmayer's assertions that the video tape was inaccurate and/or unduly prejudicial, and noted that Schlickenmayer had introduced numerous photographs of farms and houses visible from the roadway in support of its defense. Consequently, the North Dakota Supreme Court concluded "*. . . that a jury view of the area would have had limited value, if any. Accordingly, the trial court did not abuse its discretion in denying Schlickenmayer's request for a jury view of the area.*" Id. at 200.

[¶9] Mr. Romero's situation is very similar to that of the Schlickenmayer case. Numerous exhibits were admitted into evidence at Romero's jury trial, including photographs of the area. State's Exhibits 5 through 24 were photographs of the area that were taken at the scene on the night of the murder by Special Agent Michael Ness of the North Dakota Bureau of Criminal Investigation. Transcript Volume 2, p. 91, pp. 95-96 and pp. 98-103. State's Exhibit 25 was a photograph of the defendant's residence admitted through the testimony of Special Agent Steve Gilpin of the North Dakota Bureau of Criminal Investigation. Transcript Volume 2, p. 73 and pp. 88-89.

[¶10] Most significantly, through direct testimony elicited by the State, Trooper Matthew Denault of the North Dakota Highway Patrol provided detailed testimony of his role in the crime scene investigation, which was to measure various distances and produce a "scale representation" of the crime scene. This scale drawing was admitted as State's Exhibit 163. This scale drawing provided numerous measurements, including the distance between the decedent's body and the cell phone located at the dike, the distance between the decedent's body

and the baseball bat, the distance between the decedent's body and the knife, and the distance between the decedent's body and the house. Transcript Volume 3, pp.32-38.

[¶11] The defendant did not admit any photographs of the crime scene at the trial. Nevertheless, he was given opportunity to cross-examine all of the witnesses through which the photographs and the scale drawing were admitted. Transcript Volume 2, pp. 88-89 (Special Agent Gilpin); Transcript Volume 3, p. 12-28 (Special Agent Ness); *and* Transcript Volume 3, pp.39-42 (Trooper Denault).

[¶12] The trial court did not immediately rule on the defendant's request to bring the jury to the crime scene, but instead engaged in thoughtful consideration of the request. After the request was made on the third day of trial, the trial court revisited the issue on the fourth day of trial. Transcript Volume 4, pp.97-99 and pp.110-126. After considering the arguments of the State and defense counsel, and after researching the matter, Judge Fontaine denied the request to bring the jurors to the scene at the beginning of the final day of trial. She provided a detailed explanation of her decision, located in Transcript Volume 5, beginning at p. 1, line 13 and continuing through p. 3, line 2:

> *One of the legal issues - - or a motion was brought before me to allow the jury to view the premises pursuant to a North Dakota Century provision, I looked at that issue from a legal standpoint, and in fact, spent a good part of the evening reading case law.*
>
> *North Dakota doesn't have a lot of case law on it, but I read the State v. Schumaier [sic] case, I read several ALR sections, and there is a case from Texas, and those cases from other jurisdictions discuss that in determining whether a view of the premises would be allowed, also consider and look at timing of the request, and the Court should look at the totality of all the circumstances, including the - - well this is a Texas*

case that talks about difficulty in expense of arranging it, importance of the information to be gained by it, the extent to which the information has been or could be secured for more convenient sources, the extent to which the place or object to be viewed may have changed in appearance since the controversy began.

I have also reviewed exhibits 163 - - 163 is a drawing by the highway patrolman setting out specifically distances. I have reviewed exhibit - - State's exhibit 26, which is a photograph - - a aerial photograph of the house in question. I have considered State's exhibit 6, which is a photograph of the house on the evening - - although it's dark, the photograph, because of the time, and then the large photograph . . .

Alright exhibit 25, I have also reviewed that exhibit. Based on my review and consideration of all of those factors, I am going to deny the motion to view the premises. The State's exhibit 163 shows the distance between the house and the victim of twenty-two and half feet, I think between these photographs - - and other distances are measured out, between these photographs and these exact measured distances, it can be explained to the jury the distances involved that are relevant to this case without a viewing of the premises.

So at this time I'm going to deny viewing of the premises . . .

[¶13] Based on the rationale provided by the trial court and recited on the record, it is clear that that the trial judge did not make an arbitrary, capricious or unreasonable decision. The trial court was not operating under a misinterpretation or misapplication of the law. The trial court considered the request, researched the law, carefully reviewed the evidence that was before the jury in the form of photographs and the detailed drawing containing the relevant measurements, and then made a decision consistent with North Dakota law.

[¶14] On appeal, the defendant is unable to show that the trial court abused its discretion when it denied his request to take the jury to the crime scene, and as such his request to be given a new trial, with the opportunity to bring the jury to the crime scene, should in all respects be denied.

II. Did the trial court err when it did not alter language of the pattern jury instruction "Self-Defense (Reasonableness of Accused's Belief)" nor provide a definition of the term "great bodily injury" in the closing instructions to the jury?

[¶15] At trial the defendant requested a change in the pattern jury instruction entitled "Self-Defense (Reasonableness of Accused's Belief)." That jury instruction reads:

> *The Defendant's conduct is to be judged by what the Defendant in good faith honestly believed and had reasonable grounds to believe was necessary to avoid apprehended death or* ***great bodily injury****.*

Register of Actions Document ID #61, p. 20 [*emphasis supplied*].

Defense counsel wanted to strike the word "*great*" as it modified bodily injury, and instead insert the word "*serious*" to modify bodily injury. In the event the Court would not insert the word "*serious*" to modify bodily injury, the defendant sought a separate definition of the term "*great bodily injury*." Transcript Volume 5, p. 5.

[¶16] North Dakota law regarding appellate review of jury instructions is unambiguous:

> *On appeal, jury instructions are fully reviewable. State v. Wilson, 2004 ND 51, ¶11, 676 N.W.2d 98. Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. State v. Jahner, 2003 ND 36, ¶13, 657 N.W.2d 266. We review jury instructions as a whole to determine whether they adequately and correctly inform the jury of the applicable law, even though part of the instruction standing alone may be insufficient or erroneous. State v. Barth, 2001 ND 201, ¶ 12, 637 N.W.2d 369. It is well settled that if the instructions to the jury, when considered in their entirety, correctly advise the jury about the applicable law, there is no error even though the district court refused to submit a requested instruction which itself was a correct statement of the law. State v. Hammeren, 2003 ND 6, ¶13, 655 N.W.2d 707. We will reverse only if the instructions, as a whole, are erroneous, relate to a central subject in the case, and affect a substantial right of the accused. Wilson, at ¶11.*

State v. Jaster, 2004 ND 223, ¶17, 690 N.W.2d 213. *See also* State v. Pavlicek, 2012 ND 154, ¶14; *and* State v. Clark, 2012 ND 135, ¶8.

[¶17] In this case, the defendant proceeded to verdict with an "all or nothing" trial tactic: setting the jury up to decide that his actions in shooting the victim were either done in self defense resulting in an acquittal, or else his actions were intentional resulting in a conviction for murder. He proceeded in this fashion as a matter of trial strategy, and with full knowledge on his part as evidenced by his waiver of jury instructions on all lesser included offenses of murder. Transcript Volume 4, p. 87. Doing so obviously elevated the significance of the self-defense jury instructions for the defendant. That trial tactic did not, however, change the Court's obligation to provide fair and accurate instructions on all facets of the law in its jury instructions.

[¶18] The State contends that the instructions as a whole were a fair and adequate advisement to the jury of the law. The record establishes that the trial court was keenly aware of this onerous responsibility. When denying the defendant's request to change the pattern jury instruction, the Court stated: "*My basis is that the instructions as a whole I believe correctly advise the jury of the law - - the instructions as a whole - - and that's what I need to look at.*" Transcript Volume 5, p.5.

[¶19] The Court presented the appropriate instructions related to the charge of murder. Register of Actions Document ID #61, p. 15. The Court also presented numerous specific instructions as related to the defendant's self-defense claim. Register of Actions Document ID #61, p. 20-21. Viewing these

instructions, it is clear that the jury was given legally accurate and complete instructions to guide deliberations. The jury was advised that when the defendant claimed self-defense, it was the State that had the burden of proving beyond a reasonable doubt that the defendant was not acting in self-defense. The jury was advised about the propriety of using force upon another if the defendant intentionally provoked the danger defended against. The jury was advised that when judging the defendant's actions related to self-defense, they were to apply the "subjective" standard of judging the defendant's actions. The jury was advised that there were some limits placed upon the use of deadly force. All of these instructions worked together to adequately inform the jury of its fact-finding obligations when considering self-defense. Consequently, the instructions, as a whole, were not erroneous.

[¶20] The State acknowledges that the Leidholm opinion, a key decision on the issue of self-defense, interchange the words "*great bodily injury*" and "*serious bodily injury*" and "*imminent and unlawful harm*" when referring to the defendant's belief of the level of danger he may be facing from an attacker. *See* State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983) (saying use of force is necessary to protect from "imminent harm" and then saying use of force necessary to protect from "apprehended death or great bodily injury" and then saying use of force necessary to protect from "imminent and unlawful harm). Nevertheless, the intermingling of those words within the context of that decision does not negate the main focus of the body of law that has arisen from the Leidholm decision:

that self-defense must be viewed from a "subjective" rather than an "objective" perspective.

[¶21] The defendant has failed to show how he was prejudiced by the Court's decision to refrain from modifying the pattern jury instruction as it related to the reasonableness of his belief. More specifically, the defendant has failed to show how striking the single word "*great*" and inserting "*serious*" in its place negatively affected any substantial right of his. The overall purpose of the "reasonableness of accused's belief" jury instruction is to be certain that the jury focuses on the subjective belief of the defendant in view of the situation that the defendant was faced with at the time.

Under the circumstances presented in this case, there is little if any difference between "*great bodily injury*" and "*serious bodily injury*." The purpose of the jury instruction was accomplished: to advise the jury that if they concluded that the defendant subjectively believed he was facing death or imminent bodily injury from the victim, the defendant was allowed to act in self-defense.

[¶22] Even if this Court were to determine that the trial court should have granted the defendant's request and either stricken the word "*great*" and inserted in its place the word "*serious*" or, in the alternative, should have provided an additional instruction defining the term "*great bodily injury*," such a slight change in the jury instructions would not have resulted in a different verdict on the charge of murder. Prior North Dakota cases have concluded that jury instructions can adequately and correctly inform the jury of the law when viewed as a whole, even

if part of an instruction standing alone may be insufficient or erroneous. Barth at ¶12. Such is the case at hand.

[¶23] This Court has recognized: "[A] *defendant is entitled to a fair trial but not necessarily to a perfect trial.*" State v. Ellvanger, 453 N.W.2d 810, 815 (N.D. 1990), *quoting* State v. Allen, 237 N.W.2d 154, 162 (N.D. 1975). Because the overall jury scope of the jury instructions provided a fair and correct compilation of the relevant law, there are no grounds to reverse the jury's verdict. In this case, the defendant received a fair trial. The defendant's request for a reversal of the jury verdict and remand for a new trial because of this issue should be denied.

III. Did the trial court err when, at the close of the prosecution's case, it denied the defendant's motion for judgment of acquittal on the charge of unlawful possession of cocaine with intent to deliver?

[¶24] At the conclusion of the State's presentation of testimony, the defendant's counsel moved, pursuant to Rule 29 of the North Dakota Rules of Criminal Procedure, for a judgment of acquittal on Count 3 of the Information. Count 3 charged the defendant with the offense of Unlawful Possession Of A Controlled Substance (Cocaine) With Intent To Deliver.

[¶25] N.D.R.Crim.P. 29, at section (a), states:

> *After the prosecution closes its evidence oe after the close of all of the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the prosecution's evidence, the defendant may offer evidence without having reserved the right to do so.*

When making such a motion at the close of the State's case, a defendant preserves the issue of sufficiency of the evidence for appeal. State v. Igou, 2005 ND 16, ¶4, 691 N.W.2d 213.

[¶26] The standard of review for appeals claiming that a Rule 29 motion for acquittal should have been granted is well-established in North Dakota law.

> *When reviewing challenges to the sufficiency of the evidence, this Court reviews the evidence most favorable to the verdict and all reasonable inferences drawn from such evidence. State v. Wilson, 2004 ND 51, ¶6, 676 N.W.2d 98. The defendant must show the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt. Id. This court will not weigh conflicting evidence or judge the credibility of the witnesses; rather we will only reverse a conviction if no rational fact-finder could have found the defendant guilty beyond a reasonable doubt. Id.*

State v. McAvoy, 2009 ND 130, ¶ 8, 767 N.W.2d 874. *See also* State v. O'Toole, 2009 ND 174, ¶8, 773 N.W.2d 201; *and* State v. Bruce, 2012 ND 140, ¶16.

[¶27] In the instant case, the burden is upon the defendant to show that when the evidence is viewed most favorably to the verdict of guilty reached by the jury, there is no reasonable inference of guilt. While the defense made an admirable effort to select testimony in the record indicating that the cocaine in evidence could not be connected to the defendant but instead ostensibly belonged to somebody else, there were numerous salient facts which the defendant conveniently ignored:

A. The testimony of Special Agent Michael Ness

[¶28] Special Agent Michael Ness testified at the trial regarding certain photographs which were recovered from the telephone that was in the custody of the defendant. Through Special Agent Ness, State's Exhibits 102 and 103 were

admitted into evidence. Transcript Volume 2, pp. 125-127. The photos show a white powdery substance in a bag, a scale, a significant sum of cash, a wallet and a Glock handgun. The testimony also established that these photographs were taken at the Country Inn Suites on October 15, 2010, where the defendant had rented a room. Transcript Volume 2, p. 134.

B. *The testimony of Special Agent Steve Gilpin*

[¶29] Special Agent Gilpin testified that he recovered seventeen (17) individual baggies of cocaine, weighing approximately twenty (20) grams which were linked to the defendant. The actual baggies of cocaine were admitted into evidence, marked at State's Exhibit 173. Transcript Volume 3, pp. 153-155.

[¶30] Special Agent Gilpin also testified that the cocaine had been submitted to the North Dakota State Crime lab for analysis. The analytical report was received into evidence as State's Exhibit 169. Transcript Volume 3, pp. 163-164.

C. *The testimony of Christopher Erdman*

[¶31] Another of the State's witnesses, Christopher Erdman, provided testimony that the defendant regularly sold marijuana and drugs. Transcript Volume 3, p. 181. Mr. Erdman also testified that he saw money and a bag of white powder on the table at the Country Inn Suites in the room of the defendant on October 15, 2010. The white powder was identified by the defendant as cocaine. Transcript Volume 3, pp. 185-187.

[¶32] Mr. Erdman also testified that after the murder on October 16, 2010, he came into possession of a black bag that was known to belong to the

defendant. This black bag contained numerous items which he could identify as belonging to the defendant. Significantly, the black bag also contained the 17 bags of cocaine which were subsequently recovered by Special Agent Gilpin. Transcript Volume 3, pp. 198-202.

D. The testimony of Beau Brown

[¶33] Another of the State's witnesses, Beau Brown, also testified about the defendant's connection to cocaine. Mr. Brown testified that on October 16, 2010, the day of the murder, he was in the defendant's residence and saw little baggies of cocaine. Mr. Brown further testified that the defendant identified the baggies as containing cocaine. Transcript Volume 4, pp. 9-10.

E. The testimony of Jace Brown

[¶34] Beau Browns brother, Jace Brown, also testified at the trial. He testified that on October 16, 2010, he was at the defendant's residence at the same time that his brother was present. Jace Brown testified that although he didn't see any cocaine at the apartment, "they" told him that they had cocaine, and he saw some empty baggies. Transcript Volume 4, pp. 32-34.

F. The text messages exchanged between the murder victim, B.J. Kalis, and the defendant on October 15, 2010

[¶35] The most compelling evidence of the defendant's endeavor into the trafficking of cocaine was presented to the jury via State's Exhibit 164. This exhibit was an exchange of text messages between the murder victim and the defendant, occurring on October 15, 2010. The messages were exchanged when the defendant was in Grand Forks at the Country Inn Suites, and the

murder victim was on his way to meet up with the defendant. Transcript Volume 3, pp. 124-129.

[¶36] Text messages exchanged between the murder victim and the defendant unequivocally show the defendant engaging in the trafficking of cocaine. The text messages show that an outgoing message requesting a "*gram of blow*" was sent by the murder victim ("*Beej*" or B.J. Kalis) to "Miguel" (the defendant). The defendant "Miguel" then replies "*Yes*". In the next message, "*Beej*" replies: "*Sexy im on my way be there in an hour.*" State's Exhibit 164. The testimony from Special Agent Gilpin confirmed that "blow" is a slang term for cocaine. Transcript Volume 3, p. 125.

[¶37] In light of this extensive evidence connecting the defendant to significant amounts of cocaine, the State asserts that the trial court properly denied the defendant's Rule 29 motion for judgment of acquittal. The defendant's own text message in which he agrees to deliver cocaine to the murder victim is, on its face, compelling evidence of the defendant's guilt. Moreover, the State was able to convincingly show that the 17 baggies of cocaine retrieved by Special Agent Gilpin could be directly tied to the defendant.

[¶38] The trial court also indicated, on the record, her belief that there was sufficient evidence through the testimony of Mr. Erdman that the cocaine was in the Country Inn Suites motel room in Grand Forks on October 15, 2010, only a day prior to the murder. Moreover, the trial court recognized that the cocaine was eventually found by police at the place identified by Mr. Erdman, and that Mr. Erdman identified the cocaine as the same cocaine that was in Grand Forks.

The Court also noted that the cocaine was in an amount that was not for personal use. Transcript Volume 4, p. 74.

[¶39] Viewing the foregoing evidence connecting the defendant to cocaine trafficking in a light most favorable to the guilty verdict rendered by the jury, it is clear that the trial court did not err in denying the defendant's Rule 29 motion. The defendant is charged with the burden of showing that no rational fact-finder could have found the defendant guilty of this charge. Unfortunately, the evidence of his guilt was persuasive and sizeable, and he cannot make the necessary showing to overcome the jury's verdict. His request for this Court to enter a dismissal of Count 3 must be denied.

IV. *Is the defendant entitled to a new trial because the voir dire portion of the trial transcript has a notation of "indiscernible" where answers of potential jurors could not be understood by the transcriptionist?*

[¶40] The defendant suggests that because the notation "indiscernible" appears at twenty-two (22) places in the *voir dire* portion of the trial transcript, he has been denied a "trial transcript that truly discloses what occurred in the District Court." Appellant/Romero Brief at ¶80. He further requests this Court to correct the omissions in the transcript. Appellant/Romero Brief at ¶82. Finally, the defendant requests that "unless and until the jury trial Voir Dire Transcript" is corrected, he should be given a new trial. Appellant/Romero Brief at ¶86.

[¶41] Rule 10 of the North Dakota Rules of Appellate Procedure provides the method by which correction or modification of a trial court record can be accomplished. Specifically, Rule 10 section (h), subsection (2) states:

If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:
• on stipulation of the parties; or
• by the district court before or after the record has been forwarded.
The supreme court, on proper suggestion or of its own initiative, may direct an omission or misstatement be corrected, and, if necessary, that a supplemental record be certified and transmitted. All other questions as to the form and content of the record must be presented to the supreme court.

The State respectfully asserts that omissions or misstatements need to be "material" in order to justify action to correct a record.

[¶42] In this instance, the defendant has already availed himself of the relief afforded in Rule 10 of the North Dakota Rules of Appellate Procedure to have the district court review the trial transcript and make corrections. Following a hearing on June 1, 2012, the trial court judge ordered that a corrected transcript be prepared. Register of Actions Document ID #136. Thereafter a corrected *voir dire* transcript was prepared and filed with the Supreme Court and the parties. Register of Actions Document ID #137.

[¶43] Although the State acknowledges that there remain a few places in the *voir dire* transcript where "indiscernible" appears, those instances do not equate to the conclusion that the defendant has been denied a trial transcript that "truly discloses" what occurred at the trial. In fact, a careful review of those limited instances where "indiscernible" appears during the *voir dire* process shows clearly that at trial, defense counsel was able to hear and understand the responses provided by the prospective jurors. During the *voir dire* process, no objections were raised to suggest that the defendant was unable to hear or understand the answers provided by the prospective jurors. Notably, in many

instances appropriate follow-up questions were asked by counsel which evidence that there was clear communication occurring between the prospective juror being examined and the court and all parties in the courtroom.

[¶44] The North Dakota Supreme Court has previously dealt with a case where there was no transcript of *voir dire* because it was not recorded at the trial. In State v. Entzi, 2000 ND 148, 615 N.W.2d 145, defendant Entzi was found guilty of two (2) counts of gross sexual imposition. On appeal, he raised several issues regarding the jury selection process, including that *voir dire* was not conducted on the record so that a transcript of that portion of the trial was unavailable.

[¶45] While a critical fact in the Entzi decision was that defense counsel had not requested that *voir dire* be conducted on the record, the Court's rational is instructive to the issue raised by the defendant in this case. This Court recognized that "a transcript is important to, but not always essential for, a meaningful appeal." Entzi at ¶7, *citing* Hoagland v. State, 518 N.W.2d 531, 535 (Minn. 1994). It went on to acknowledge that, " . . . *As to other untranscribed portions of the record, where there were no contemporaneous objections, the errors were not preserved for appeal*." Entzi at ¶7, *citing* State v. Harrison, 627 So.2d 231, 233 (La.App. 4th Cir. 1993).

[¶46] That observation is seminal for the case *sub judice*. There is no place in the record where the defendant raised any type of objection to the *voir dire* examination or the jury selection process. Rather, on three (3) separate occasions, following *voir dire* of prospective jurors, defense counsel indicated

that it passed on the jury panel for cause. *Voir Dire* Transcript, p. 94, lines 23-24; p. 112, lines 17-18; and p. 118, lines 6-7. Most significantly, at the conclusion of the *voir dire* process and prior to the seating and swearing in of the selected jurors, the following exchange occurred between the trial court and defense counsel:

> *THE COURT: And defense counsel, are you satisfied with the jury selection process?*
> *MR. R. FLEMING: Yes, Judge.*

Transcript Volume 1, p. 17, lines 12-14.

[¶47] Under these circumstances, there is no basis upon which the defendant could raise any type of appellate issue arising from jury selection. As recognized by this Court on numerous occasions: "One of the touchstones for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court so it could intelligently rule on it." State v. Osier, 1999 ND 28, ¶14, 590 N.W.2d 205, *and cases cited thereafter*. Because there were no objections registered by the defendant regarding jury selection, the few instances where the word "indiscernible" appears in the *voir dire* transcript are meaningless. Consequently, the defendant has failed to show that there are "material" omissions or misstatements on the record.

[¶48] The defendant has wholly failed to disclose any reason to continue efforts to correct the *voir dire* transcript. He most certainly has not shown any prejudice to justify a new trial on the matter. The State asserts that the defendant's request for relief in this regard should be denied in its entirety.

CONCLUSION

[¶49] For the reasons set forth herein, the State of North Dakota respectfully requests that the North Dakota Supreme Court AFFIRM, in all respects, the criminal judgment entered in this matter, and take no further action with regard to correcting the *voir dire* portion of the trial transcript.

Dated this 29th day of August, 2012.

Respectfully submitted,

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