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MARCH 17, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20130332

State of North Dakota,

Plaintiff-Appellee

- vs -

Allen Joseph Ratliff,

Defendant-Appellant

APPEAL FROM THE CRIMINAL JUDGMENTS
GRAND FORKS JUDICIAL DISTRICT
GRAND FORKS COUNTY CR. NO. 18-2012-CR-01099
THE HONORABLE DEBBIE KLEVEN, PRESIDING

BRIEF

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701/663-1929

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES
TABLE OF CASES

STATUTES

ABBREVIATIONS

Transcript - Tr.

Line - L.

Page - P.

STATEMENT OF THE ISSUES

[¶1] ISSUES:

I. **Did the trial court err when it denied Allen Ratliff's Rule 29 motion and post trial motion to dismiss the charges of aggravated assault of Carmen Jones and Sherman Jones?**

II. **Was Juror No. 34's statement "just from what I heard and then - - what everyone was saying about it. It sounds likely they did it; so" so prejudicial the trial judge should have either dismissed the entire panel or at least instructed the jury to disregard Juror #34's statement?**

III. **Did the trial court err when it refused to grant Allen Ratliff a new trial because inadmissable audio evidence had been allowed to go into the jury room and was heard by the jury?**

NATURE OF THE CASE

[¶2] Defendant, Allen Ratliff was changed with 6 felony crimes that were alleged to have occurred in the morning hours of April 30, 2012 in a trailer house owed by Carmen Jones which was located in Grand Forks, North Dakota.

[¶3] The 6 crimes were Robbery, Burglary, Aggravated Assault, Aggravated Assault, Theft of Property and Felonious Restraint.

[¶4] The information charging these 6 felony offenses was filed with the court on May 4, 2012.

[¶5] The preliminary hearing on these 6 felony charges was held on July 22, 2012. At the hearing probable cause was found that Allen Ratliff could have committed all 6 felony offenses.

[¶6] Motion for Joinder of the 6 felony offenses with other defendants was made on December 5, 2012 and granted on January 3, 2013.

[¶7] A Motion to Amend the information was filed on February 19, 2013 and a Motion granting the amending of the information and the amended information are dated March 5, 2013.

[¶8] A Notice of Motion to seal documents and an Order sealing was entered on March 22, 2013.

[¶9] A final dispositional conference was held on June 6, 2013.

[¶10] The trial on the 6 felony charges began on June 25, 2013 and ended on July 2, 2013.

[¶11] The opening charge to the jury was given on June 26, 2013 and the closing instructions on July 2, 2013.

[¶12] The jury found Defendant, Allen Ratliff guilty on all six felony charges on July 2, 2013.

[¶13] A Motion for Rule 29 and new trial was heard on September 5, 2013.

[¶14] The criminal judgment was filed on September 30, 2013 and an amended criminal judgment was filed on October 10, 2013.

[¶15] A notice of appeal and request for transcript was filed on October 24, 2013.

[¶16] An order denying the request for transcript was filed on October 30, 2013.

[¶17] A request for transcript was filed on October 31, 2013 and an amended notice of appeal was filed on November 1, 2013.

[¶18] A notice of filing the amended notice of appeal was filed on November 5, 2013.

[¶19] An Order denying the second request for transcript was filed on November 12, 2013.

[¶20] A third request for transcript was filed on November 13, 2013.

[¶21] An Order denying motion for new trial and an order denying a motion for judgment of acquittal was entered on November 14, 2013.

[¶22] An Order granting the third request for transcript was entered on November 20, 2013.

[¶23] The Clerk's Certificate of Appeal was entered on November 22, 2013.

[¶24] A notice of appeal from the order denying a new trial and order denying Rule 29 Motion for judgment of acquittal was filed on November 25, 2013.

[¶25] A notice of filing notice of appeal was entered on November 26, 2013.

[¶26] An Addendum Order to Transcript was entered on December 20, 2013.

[¶27] A Clerks Certificate of Appeal was entered on December 23, 2013.

[¶28] A Clerk's Certificate of Appeal was entered on January 14, 2014.

[¶29] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶30] On April 30, 2012 Carmen Jones was the owner of a trailer home that was located at lot number 136 in Valley Trailer Court, Grand Forks, North Dakota. The street address of Mrs. Jones' trailer home was 1823 North Washington, Grand Forks, North Dakota.

[¶31] Prior to April 30, 2012 there had been a break-in to Mrs. Jones trailer home. As a result of that break-in Mrs. Jones had purchased and installed two video security cameras at her trailer home about a year before, April 30, 2012. These two security video camera on April 30, 2012 recorded three masked men wearing dark clothes and gloves breaking into Mrs. Jones trailer between 5:00 and 5:30 pm.

[¶32] When the break-in occurred Mrs. Jones was in the trailer home with her husband, Sherman Jones watching TV. Two of the masked men took Mr. Jones into the hallway of the trailer home. One of the masked men then put Mr. Jones face down in the carpeting and clothes. He then duct taped Mr. Jones hands behind his back and duct taped Mr. Jones mouth. He also hit Mr. Jones about five times with a tire thumper.

[¶33] The third masked man threatened Mrs. Jones and got her to tell where the meds, money and jewelry were. He also hit Mrs. Jones with a tire thumper, duct taped her hands behind her back and duct taped her mouth.

[¶34] The three masked men then found and took with them a number of items from Mrs. Jones trailer home. These items included meds, money and jewelry, two TV's and a little bag with a Tasmanian Devil on it.

[¶35] After the masked me left Mrs. Jones freed herself from the duct tape. Once Mrs. Jones got free she helped Mr. Jones get free from the duct tape. When both Mr. and Mrs. Jones were free the Grand Forks Police were called and notified about the break-in.

[¶36] Neither prior to the trial, or during the trial were Mr. Jones, Mrs. Jones or anyone else able to identify Allen Ratliff, Nathan Ratliff or Cody Boudluc as the masked men that assaulted either Mr. or Mrs. Jones in the trailer house on the morning of April 30, 2012. Also prior to trial or during trial, neither Mr. Jones or Mrs. Jones were able to point out any action, speech, walk or any other physical characteristic of any of the three masked men that could be related to Allen Ratliff, Nathan Ratliff or Cody Boulduc.

[¶37] In spite of the fact that there was no evidence or testimony that Allen Ratliff was the masked man who assaulted either Carmen Jones or Sherman Jones the jury found him guilty of assaulting each of them.

[¶38] Verdict with respect to aggravated assault and Carmen Jones: "We the jury duly impaneled and sworn in the above entitled action do find the defendant, Allen Joseph Ratliff guilty of the crime of Aggravated Assault – Carmen Jones as charged in the information" . . .

[¶39] In the aggravated assault. Sherman Jones: "we the jury duly impaneled and sworn to try the above action do find the defendant, Allen Joseph Ratliff guilty of the crime of Aggravated Assault - Sherman Jones as charged in the Information" Tr. V, P.819, L.23-25, P.820, L.1-10.

[¶40] Allen Ratliff's defense, to the six felony charges against him in this case, was that he was never in the trailer home of Mrs. Jones on the morning of April 30, 2012. Therefore he was not guilty of any of the six felony charges. However, after the break-in he did come into possession of some of the items taken from Mrs. Jones trailer home. Therefore he was guilty of possession of stolen property. But, since the State hadn't charged him with possession of stolen property he could not be convicted of possession of stolen property.

[¶41] The State in its case against Allen Ratliff produced evidence and testimony that established that he was:

1. prior to the breaking-in of Mrs. Jones trailer on April 30, 2012 he was involved in activities and in possession of items that could connect him to the break-in;

2. after the break-in he was in possession of items similar to those worn by the three masked me who broke into Mrs. Jones trailer home;

3. after the break-in he was involved in activities and in possession of items that were taken during the break-in.

[¶42] When the State rested its case Allen Ratliff made a rule 29 motion on all counts. Tr. IV, P.734, L.17-19. The discussion of why and how the Rule 29 motion applied to the two aggravated assault charges is found in Tr. IV, P.735, L.1 to P.736, L.19 and P.745, L.18 to P.746, L.16.

[¶43] The trial courts denial of all of Allen Ratliff's Rule 29 motion is found at Tr. IV, P.748, L.8-11. The trial court's reason for denying Allen Ratliff's Rule 29 as to the aggravated assaults on Mr. and Mrs. Jones was:

"Also, with respect to the aggravated assault, both Carmen and Sherman Jones testified that they were assaulted with the tire thumpers. Carmen Jones, when she testified, did describe her assailant by size and, I believe, eyes and eye color; and then indicated the other two were striking Sherman Jones. So it's a question of fact for the jury to decide in this case, because there is evidence of the aggravated assault and the injuries." Tr. IV, P.749, L.7-14.

[¶44] The Defendants all rested their cases without calling any witnesses. The trial court then gave its closing instruction. The State and the Defendants gave their closing arguments and the State gave its rebuttal argument. Then the case was given to the jury.

[¶45] The second issue in this case deals with Juror No. 34's responses during voir dire to the trial judges questions. What Juror No. 34's responses were and what the trial judge asked appears in the Argument on Issue II.

[¶46] While the jury was deliberating they sent a note to the trial judge requesting a TV and DVD player with a remote source that could pause. Tr.,V, P. 868, L.1-4. Such equipment was needed by the jury in order to play State's Exhibit 8 the video of the break-in. The judge responded to the note by sending into the jury room a TV and DVD player that was capable of playing State's Exhibit 8. Tr. V, P.871, L.1-4.

[¶47] After the TV and DVD player had been sent into the jury room, Grand Forks assistant State's attorney, David Jones remembered that:

1. That State's Exhibit 8 contained both video and audio;

2. When State's Exhibit 8 had been admitted into evidence, only the video had been played to the jury;

3. That with the TV and DVD player sent in to the jury room the jury had electronic equipment capable of playing all of the video and all of the audio which was in State's Exhibit 8.

[¶48] Assistant State's Attorney Jones then informed the trial judge the Defendants and the Defendant's attorneys about the above audio problem. This caused all of these parties to get into a discussion about what should be done about that problem. During that discussion Exhibit 8 was played out of the jury's presence. Before any decision was reached about what to do about Exhibit 8 and the audio problem, the trial judge was informed the jury had reached a verdict.

[¶49] The trial judge then decided to and did bring the jury in and question each of the jurors, before their verdicts were read as to whether the audio on the DVD had any affect on his or her deliberation. Each jurors response to the district judge's question was that the audio had no effect on their deliberation.

[¶50] The court then read all the verdicts. In Allen Ratliff's cases he was convicted on all six counts. Tr. V, P.876, L.1 to P.881, L.1.

[¶51] After the trial Allen Ratliff filed two motions. One for a new trial and the other for an acquittal on the assault charges. Both motions were denied by the trial judge.

ARGUMENT

[¶52] **ISSUE I. Did the trial court err when it denied Allen Ratliff's Rule 29 motion and post trial motion to dismiss the charges of aggravated assault of Carmen Jones and Sherman Jones?**

[¶53] In this case after the State rested Defendant, Allen Ratliff timely moved for

an acquittal under NDR Crim P 29. Therefore the following language in State vs Jacob 2006 ND 246, 724 NW 2d 118 applies:

> [¶6] Because Jacob timely moved for an acquittal under N.D.R.Crim.P. 29, he preserved the issue of sufficiency of the evidence for appellate review. State v. Steen, 2000 ND 152, ¶16, 615 N.W.2d 555. The standard of review for an appeal based on the sufficiency of the evidence is deferential to the jury's verdict. State v. Laib, 2005 ND 191, ¶ 6, 705 N.W.2d 815. "This Court will reverse a conviction on the ground of insufficient evidence only if, after viewing the evidence and all reasonable inferences in the light most favorable to the verdict, no rational factfinder could have found the defendant guilty beyond a reasonable doubt." Steen, at ¶ 17.

[¶54] According to the testimony of Sherman Jones and Carmen Jones, three masked men broke into Mrs. Jones trailer home on the morning of April 30, 2012. Once inside the trailer two of these masked men started to assault Mr. Jones and the other masked man started to assault Mrs. Jones. There was no testimony given by Mr. Jones or Mrs. Jones that either Mr. Jones or Mrs. Jones had been assaulted by all three masked men.

[¶55] Since there is no evidence or testimony that either Mr. Jones or Mrs. Jones was assaulted by three masked men a rationed fact find could only find from the evidence and testimony that two masked men only assaulted Mr. Jones and that the other masked man only assaulted Mrs. Jones. Therefore one of the two aggravated assault convictions for each of the three masked men has to be dismissed. In order to make the decision as to

which aggravated assault should be dismissed in Allen Ratliff's case two questions must be answered:

1. Which of Allen Ratliff's aggravated assault convictions is supported be credible evidence and testimony and should not be dismissed?

2. Is there enough evidence and/or testimony to support a conviction of Allen Ratliff's aggravated assault of either Mr. Jones or Mrs. Jones?

[¶56] The minimum identification of an accused to sustain any conviction is found in People vs Malone, 2012 Il App (1st) 110517.

> [¶27] "A single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. [Citations.] This is true even in the presence of contradicting alibi testimony, provided that the witness had an adequate opportunity to view the accused and that the in-court identification is positive and credible." *People v. Slim*, 127 Ill. 2d 302, 307 (1989). "In assessing identification testimony, our courts have generally been using steps set out by the Supreme Court in *Neil v. Biggers* (1972), 409 U.S. 188 ***. There the Court held that circumstances to be considered in evaluating an identification include: (1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness ' degree of attentions; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Slim*, 127 Ill. 2d at 307-08.

[¶57] The problem with any identification of Allen Ratliff as the person who assaulted either Mr. Jones or Mrs. Jones begins with the fact that Mr. Jones can't identify Allen Ratliff as one of the masked men who assaulted him and Mrs. Jones can't identify Allen Ratliff as the masked man who assaulted her. This identification problem of Allen Ratliff as one of the masked men who assaulted Mr. Jones or the masked man who assaulted Mrs. Jones only gets worse when all of the other State's witnesses testimony is considered because not a single one of these witnesses testimony identified Allen Ratliff as the one of the masked men who assaulted Mr. Jones or the masked man who assaulted Mrs. Jones.

[¶58] State vs Schweitzer 2007 ND 122, 735 NW2d 873 allowed a defendant to convicted of an aggravated assault even though the victim couldn't identify the defendant at trial only because there was sufficient other testimony to identify the defendant as the person who assaulted the victim.

[¶59] In the case now before the court there is no other sufficient testimony by any of the State's witness that identifies Allen Ratliff as one of the men who assaulted Mr. Jones or the man who assaulted Mrs. Jones. Also there is no testimony by any State's witnesses about any personal or physical characteristics of any of the three masked men that can in any way be related to Allen Ratliff.

[¶60] From the above it is clear that:

1. There is no evidence or testimony that will support the conviction of Allen Ratliff for the aggravated assault of both Mr. Jones or Mrs. Jones;

2. That there isn't enough evidence to establish that Allen Ratliff was one of the men who assaulted Mr. Jones or that he was the man who assaulted Mrs. Jones;

3. That because there is no evidence to support Allen Ratliff's aggravated assault conviction of either Mr. Jones or Mrs. Jones both convictions must be dismissed;

[¶61] **ISSUE II. Was Juror No. 34's statement "just from what I heard and then - - what everyone was saying about it. It sounds likely they did it; so" so prejudicial the trial judge should have either dismissed the entire panel or at least instructed the jury to disregard Juror #34's statement?**

[¶62] This issue involves questioning of Juror No. 34 by the trial judge and the answers give by Juror #34. The following appears in Voir Dire Tr. Vol I., P. 217, L. 13 to P. 219, L.9.

I am aware that this - - these allegations were reported in the news media, I believe both in the Grand Forks Herald and TV and radio stations. So what I want to know at this time is whether anyone has seen, heard, or read anything about this case or heard anyone express any opinion about it.

So I'll just start with the back row there and ask the jurors. Anybody in the back row, have any of you heard or read anything about this or recall hearing anything?

(Shaking heads.)

THE COURT: I don't see any hands. How about in the middle row? Okay. And Juror No. 34. And we'll ask that you use the microphone.

And, then, one other thing, if anyone needs to just stand up at all because you're having back issues or too long sitting, feel free to stand up.

No. 34, can you tell me whether you've heard it or read it or - -

JUROR NO. 34: Yes, Your Honor, I actually - - I read about the story online. And I don't know these men, but I have seen them before. I've seen them before - - I used to work at the Discontent Skate Shop, and that's where I've seen them.

THE COURT: Okay. So other than - - do you recall any specific facts about what you read online?

JUROR NO. 34: I just remember reading the story.

THE COURT: Have you formed any decision about the case?

JUROR NO. 34: I don't know. I guess so. I don't really know what to - - what to think of it.

THE COURT: Okay. I'm not quite following you on that. Have you formed an opinion?

JUROR NO. 34: Yeah. Yeah, I guess so.

THE COURT: And what did you base that on?

JUROR NO. 34: Just from what I heard and, then, what everybody - - I guess what I've - - what everybody was saying about it. It sounds like they did do it; so . . .

THE COURT: So is this something that you can set aside and just form an opinion if you're selected as a juror, based on the evidence produced in court and not what you've read or heard about?

JUROR NO. 34: No, I guess. I don't know.

THE COURT: You've had some - - you know these people from - -

JUROR NO. 34: I've had past experiences with them.

[¶63] In the North Dakota case of State vs Nikle, 2006 ND 25, 708 N.W.2d 867 [4] Nikel argues the venire persons statement was so prejudicial it was obvious error for the district court to fail to dismiss the entire jury panel . . .

> [¶5] Nikle Supra to establish obvious error, a Defendant must show error occurred that 1) was plain, meaning it deviated from a legal rule under current law, and 2) affected substantial rights, meaning the outcome of the proceeding was affected. State v. Krull, 2005 ND 63, ¶6 693 N.W.2d 631; N.D.R.Crim. P.52(b).

[¶64] Nikle Supra [7] statements made by members of the venire may rise to the level the entire pool is tainted. Mach vs Stewart, 137 F3d 630 (9th Cir 1997). Therefore what occurred in the case now before the court must be examined to see if what occurred could taint the entire jury panel.

[¶65] In Nikel Supra what was said didn't taint the entire panel because the venire persons statement:

1. didn't pertain to the Defendant's past criminal activity;
2. didn't pertain to the Defendant's current charge;
3. didn't involve a crime because it isn't a crime to purchase sudafed;
4. and at a later time in the trial some or all of the jury members were asked if they could be fair and impartial;

[¶66] In the case now before the court the court asked and Juror #34 answered in Voir Dire Tr. Vol 1, P.218, l. 6-10 " THE COURT: You've had some - - you know these people from - -

JUROR NO. 34: I've had past experiences with them." Looking at the rest of Juror #34's voir dire answers it is clear these past experiences weren't good and were part of his reasons for concluding that Allen Ratliff committed the crimes charge. Therefore it is reasonable to conclude that Juror #34's past experiences could include criminal activity.

[¶67] As to Allen Ratliff's current charges the following comment Juror #34 indicates that from what he heard and from what others have said, it sounded as if Allen Ratliff did it Voir Dire Tr. Vol. 1, P. 218, L. 23-25.

JUROR NO. 34: Just from what I heard and, then, what everybody - - I guess what I've - - what everybody was saying about it. It sounds like they did do it; so . . .

[¶68] The trial judge after excusing Juror #34 did ask questions if jurors in he middle row and first row could decide the case based on the evidence produced in court and got yes answers from the jury. However, because the same trial judge that tried Nikle also tried the case now before the court. she knew or should have known becaues of Nikel, that the remaining jurors after Juror #34 was excused at least needed to be instructed to disregard Juror #34's answers to her questions.

[¶69] In the case now before the court Allen Ratliff believes he has satisfied the first prong of NDR Crim P 52(b) obvious error because Juror #34 answers to the trial judge questions:

1. related to Allen Ratliff's current criminal charges what others were saying about him and what the juror heard being said and ended with a conclusion the Allen Ratliff did do it;
2. That Allen Ratliff's past activity wasn't good because of Juror #34's past experiences with Allen Ratliff;

3. That it is reasonable for a juror to believe that the past experiences Juror #34 had with Allen Ratliff could include prior crimes;

4. That the trial judge in Nikle and the one in this case were the same.

Therefore this trial judge knew or should have known that because of Juror #34 answers to her questions, she should have granted a mistrial or at the very least instructed the jury to disregard Juror #34's answers indicating Allen Ratliff was guilty of the crimes charged.

[¶70] According to Nikle Supra [6] North Dakota has not established rules indicating the circumstances under which a venirepersons comments would be so prejudicial that it is obvious error for the district court to fail to dismiss the entire panel.

[¶71] In the case now before the court, Allen Ratliff believes that Juror #34 answers to the trial judge questions were so prejudicial that the trial judge should have either dismissed the panel or instructed the jury to disregard Jury 34's statements.

[¶72] **ISSUE III: Did the trial court err when it refused to grant Allen Ratliff a new trial because inadmissable evidence had been allowed to go into the jury room and was heard by the jury?**

[¶73] Rather than presenting to the jury security camera film that only showed a video of the break in of Mrs. Jones trailer home, the State decided to create Exhibit 8 from the security camera film. This sounds innocent enough, but in creating Exhibit 8 the State added audio to the video. This audio could be heard whenever Exhibit 8 and the video were played.

[¶74] After creating Exhibit 8 it is reasonable to assume that the State would play that exhibit prior to trial to be sure all of the security video had been transferred onto it.

During such playing the State would have heard the audio and could have and should have erased it.

[¶75] When the State offered exhibit 8 it knew that exhibit 8 contained both video and audio. Only the State knows why it played only the video.

[¶76] After the trial it appears the rule about not disclosing all evidence on a disk is that the side that offers the evidence is all right even if the jury hears the evidence not disclosed as long as the jury says they didn't consider the unadmitted evidence in reaching their verdict.

[¶77] The following according to Nickle Supra applies to the standard of review in this case: "To establish obvious error, a Defendant must show error occurred that 1) was plain, meaning it deviated from a legal rule under current law, and 2) affected substantial rights, meaning the outcome of the proceeding was affected. State v. Krull, 2005 ND 63, ¶6 693 N.W.2d 631; N.D.R.Crim. P.52(b)."

[¶78] There is no question in the case now before the court that audio evidence on Exhibit 8 was not known about by the jury when the jury was sent into the jury room. Such a fact would end up deviating from a legal rule under current law and such a deviation would meet the proof required in prong one of Nikle, becaues the following occurred before the jury verdict was entered. Tr. V. P. 876, L.24 to P.878, L.24.

I have been advised the jury has reached verdicts in this case. But before I ask for that information, is it Juror No. 14 that is the jury leader?

JURY FOREPERSON: Yes.

THE COURT: Juror No. 14, it came to my attention that the video that was sent in and was offered into evidence had some audio. The audio was not played during the trial and was not offered. Did the jury listen to the audio portion in the jury room?

JURY FOREPERSON: We heard bits and pieces , but we did slow motion pause; so after we did that, we weren't able to hear anything.

THE COURT: So was anything that was on that audio discussed in your deliberations?

JURY FOREPERSON: No, Ma'am.

THE COURT: And as it turns out, it's my understanding - - I believe Detective Simon said the way he made that was to just transfer it to a DVD format by kind of re-copying it; so any audio wasn't even from the scene. So I just want to know if that was discussed at all, the audio.

JURY FOREPERSON: No. We just heard, like, moving around. It wasn't really, like, words.

THE COURT: Okay. It was not considered - -

JURY FOREPERSON: Yeah.

THE COURT: - - is that correct?

[¶] From the above it is apparent that:

1. the jury heard bits and pieces of the audio;

2. Juror 13 didn't really understand anything being said;

3. that the following jurors response to the trial judge's question "did you consider any of the audio portion in your deliberations? was: Juror 12 "no" Juror 13, no I did not,

Juror 9 "no your honor" Juror 8 "no Ma'am", Juror 7, "no your honor", Juror 5 "no" Juror 4 "no" Juror 3 "no" and Juror 2 "no Ma'am"

[¶79] The answers of the above jurors only shows that they didn't consider the audio, on Exhibit 8, but it doesn't establish that they didn't hear the audio.

[¶80] When a bell is rung you can't unring it. When a juror hears inadmissible evidence you can't erase what that juror has heard.

[¶81] Neither side in a lawsuit under any circumstance should be allowed to get unadmitted evidence into a jury room and then not be accountable if the jurors hear such evidence.

[¶82] In todays computer age the ability of a Defendant to discover what are on disks that the State creates and discloses under Brady v. Maryland, 373 U.S. (1963) is limited to the capabilities of the Defendants attorneys computer. In the case now before the jury would have never known there was audio on Exhibit 8 if the jury hadn't asked for a DVD player and a TV so they could play Exhibit 8. Once the jury played Exhibit 8 they heard the unadmitted evidence. After the jury heard the unadmitted evidence they had to decide whether to consider it or not. Jury's shouldn't have to decide whther or not to consider unadmitted evidence.

[¶83] Putting a jury in a situation where they have to hear unadmitted evidence and then decide whether or not to consider it effects the rights of Allan Ratliff. Such an effect on Allan Ratliffs rights meets the second prong of the test in Nikle.

[¶84] The error that occurred in this case will continue in the future cases unless there is a rule that requires the State when offering any computer disk to disclose in its offer in writing all things contained on the disk.

CONCLUSION

[¶85] As to Issue I, both charges of aggravated assault should be remanded to he district court with an Order to Dismiss.

[¶86] As to Issue II, the case should be remanded to the district court with an Order granting Allen Ratliff a new trial.

[¶87] As to Issue III, the case should be remanded to the district court with an Order granting Allen Ratliff a new trial.

[¶88]Allan Ratliff joins the other Defendant, Appellants' in any issue that either of the other Defendant, Appellant's have raised in their briefs that has not been raised in this brief.

DATED this 17th day of March, 2014.

/s/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek, ID #02908

CERTIFICATE OF SERVICE BY MAIL

[¶89] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on March 17th, 2014, she served, by e-mail and mailed a copy of the following:

APPELLANT'S APPENDIX and BRIEF

to: Carmell Mattison
State's Attorney's Office
carmell.mattison@gfcounty.org

David Jones
State's Attorney's Office
David.jones@gfcounty.org

Mailed to: Allen Ratliff
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on March, 17th, 2014, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S APPENDIX and BRIEF.

_/s/ Sharon Renfrow_____
Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek