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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, v. Nathan Lawrence Ratliff, Defendant/Appellant,	)))))))))	Supreme Court No. 20130346 Grand Forks Co. No. 18-2012-CR-01100

APPEAL FROM THE CRIMINAL JUDGMENTS ENTERED BY THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT ON SEPTEMBER 30, 2013, THE HONORABLE DEBBIE KLEVEN PRESIDING

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

[¶1] The trial court erred when it denied Nathan Ratliff's Rule 29 motion and post-trial motion to dismiss the charges of aggravated assault.

STATEMENT OF THE CASE

[¶2] This is an appeal from the Grand Forks County Criminal Judgment and Commitment entered by the Honorable Debbie Kleven on September 30, 2013. (Appendix ("A") 5,

[¶3] On May 4, 2012, an Information was filed charging Nathan Lawrence Ratliff ("Nathan") with the crimes of Count I: Robbery, a Class A Felony, in violation of N.D.C.C. §12.1-22-01(1) & (2), Count II: Burglary, a Class B Felony, in violation of N.D.C.C. §12.1-22-02(1) & (2), (A. 1, D. 1, A. 11), Count III: Aggravated Assault, a Class C Felony, in violation of N.D.C.C. §12.1-17-02(1), Count IV: Aggravated Assault, a Class C Felony, in violation of N.D.C.C. §12.1-17-02(1), Count V: Theft of Property, a Class C Felony, in violation of N.D.C.C. §12.1-22-02(2) & 05(2)(a) & (k), and Count VI: Felonious Restraint, a Class C Felony, in violation of N.D.C.C. §12.1-18-02(2). (A. 1, D. 1, A. 11). On July 11, 2012, Nathan waived his preliminary hearing and on July 20, 2012 he entered his plea of Not Guilty to all counts (A. 3, D. 22).

[¶4] A Motion for Joinder with co-defendants, Allen J. Ratliff and Cody L. Boulduc, was filed on December 5, 2012 (A.4, D. 51, A. 14) and an Order granting that Motion was filed January 3, 2013 (A. 4, D. 57, A. 16). An Amended Information was filed February 19, 2013. (A. 4, D. 68, A. 17). On March 22, 2013, a Motion to Seal and Order granting that Motion were filed. (A. 4, D. 77 and A. 4, D. 78 respectively).

[¶5] A jury trial began on June 24, 2013. (Trial Transcript, ("T")). At the close of the State's case, Ratliff made a Rule 29 Motion for directed verdict of acquittal arguing that

the state had failed to prove the essential elements of the crimes charged and the State objected to the Motion. (T. p. 738, l. 15 – p. 740, l. 3) The Trial Judge denied the motion. (T. p748, l. 8 – p. 750, l. 10). At the close of trial, the jury returned verdicts of guilty on all counts. On July 11, 2013, a Motion for Judgment of Acquittal (A. 9, D. 286, A. 21) and a Motion for a New Trial (A. 9, D. 288, D. 24) were filed. The State's Brief in Opposition to Defendant's Motion for New Trial (A. 10, D. 293, A. 26) and State's Brief in Opposition to Defendant's Rule 29 Motion (A. 10, D. 294, A. 30) were filed. A hearing on the motions was held September 5, 2013.

[¶6] A criminal judgment was filed September 30, 2013. (A. 10, D. 306, A. 33). Nathan filed his Notice of Appeal on October 25, 2013. (A. 10, D. 312, A. 37). An Order Denying Motion for New Trial was filed November 14, 2013 (A. 10, D. 318, A. 38) as well as an Order Denying Rule 29 Motion for Judgment of Acquittal (A. 10, D. 319, A. 44). An Appeal of those Orders was filed December 12, 2013. (A. 10, D. 327, A. 53).

FACTS OF CASE

[¶7] In the early morning hours of April 30, 2012, Carmen Jones ("Carmen") and her husband, Sherman Jones ("Sherman"), were sitting in her trailer house in Grand Forks, North Dakota watching television. (T. p. 64, l. 19 – p. 65, l. 1). Carmen and Sherman were separated but had a good relationship. (T. p. 65, l. 5-6). (T. p. 66, l. 1-9). At approximately 5:30 a.m., they heard a noise in the entryway and the door window was kicked and fell to the floor. (TS. P. 66, l. 19 – p. 67, l. 1). Carmen's trailer had previously been robbed so she had a security video-system in place and running at the time. (T. p. 664, l. 17-21).

[¶8] Three individuals came into the trailer demanding Carmen and Sherman tell them were the pills, jewelry and money was. (T. p. 79, l. 10-11). Sherman testified the three individuals were wearing dark clothes and dark masks and all three had a night stick or billy club. (T. p. 67, l. 8-14). Sherman also testified that he did not know who they were (T. p. 67, l. 8-14) and they were about 6 feet 2 inches tall. (T. p. 67, l. 19-23). Sherman did not recognize their voices. (T. p. 68, l. 2-3).

[¶9] Carmen's testimony was that's the three were wearing dark masks like a ski mask with just the eyes and mouths open. (T. p. 553, l. 24 – p. 664, l. 5). Carmen testified that she believed the individuals were younger than 40 years old but she did not recognize any voices or any characteristic of any of them. (T. p. 669, l. 3-12). Carmen also testified that they were all white, just a little darker than some white people. (Id. l. 18-20). Carmen's testimony was that one was about 5 feet 10 inches and the other two were taller. (T. p. 663, l. 6-15).

[¶10] Sherman testified that he was overpowered by the individuals and one took me into the hallway. (T. p. 68, l. 20-22). On cross examination, Sherman testified that one individual stayed in the living room and two of them went back with [Sherman] into the hallway. (T. p. 84, l. 24). Sherman then knelt down or fell down and he put [Sherman's] head into the spare room in some clothes. (T. p. 68, l. 23-25). Sherman testified that his hands were duct taped behind his back. (T. p. 71, l. 12-25). Sherman does not recall what happened then because [his] head was down in the clothes. (T. p. 69, l. 1-3). Sherman testified that he was struck by the one holding me down with the object he was carrying. (T. p. 69, l. 4-23). Sherman believes he may have lost consciousness and came to after the three left. (T. p. 70, l. 1-2). Sherman testified that he did not know the

[Ratliffs or Boulduc] (T. p. 80, l. 18-23) and that he cannot identify them as the ones that were in the house. (T. p. 81, l. 3-5). Sherman testified that he could not see or hear anything that related to Carmen when he was in the hall and she was in the living room. (T. p. 73, l. 11-17). Sherman did not have reason to believe he knew or recognized any of them or that they knew him. (TS. P. 76, l. 23 – p. 77, l. 5).

[¶11] Sherman testified that he could not identify which one of the three took him into the hallway. (T. p. 79, l. 2-4). Sherman later testified that he was struck by one individual and held by the other. (T. p. 85, l. 25- p. 86, l. 1). Sherman testified he did not know who duct taped him. (T. p. 85, l. 8-9) and he is certain only one person hit him. (T. p. 85, l. 10-11)

After the three left, Carmen woke Sherman up and they called 911. (T. p. 74, l. 4-7).

[¶12] Carmen testified that she was hit and threatened until she told one individual where the medications, money and jewelry were. Carmen testified that she was struck by one person (T. p. 700, l. 5-7) and that she saw Sherman get struck by one blow but doesn't know which individual struck [Sherman]. (T. p. 70, l. 22-24). Carmen's testimony was that the three unidentified individuals took two televisions, jewelry, medications, money and, she believes, a bag with a Tasmanian Devil on it (T. p. 689, l. 13-19).

[¶13] Chad Nelson ("Nelson") was delivering newspapers in the area when the robbery occurred and noticed a red Tiburon automobile with three males standing around it. (T. p. 644, l. 23 – p. 646, l. 20). Nelson passed by the three with the closest approximately five to six feet away (T. p. 653, l. 3) and the other two less than 20 feet away (T. p. 655, l. 20-21). Nelson testified that two of the individuals had darker-colored hair and the one closest to [Nelson] had lighter-colored hair and that all were white-colored individuals.

(T. p. 648, l. 11-19). Nelson testified he told the police the youngest was blond, short and thin. (T. p. 653, l. 16-18). The other two appeared taller with dark hair. (T. p. 649, l. 13-17). Nelson testified he was shown a lineup and was not able to identify the individuals. (T. p. 651, l. 19 – p. 652, l. 7).

[¶14] Grand Forks police sergeant Duane Simon ("Simon") testified that he showed three different lineups, one for each of the Ratliffs and one for Boulduc. (T. p. 171, l. 13-18). Simon had interviewed Nelson, and it was Simon's recollection that Nelson said he could identify the individuals that he saw. (T. p. 180, l. 3-9). Simon testified that Nelson did not identify any of the individuals (in the lineup), including Nathan. (T. p. 168, l. 24 – p. 169, l. 6 and T. p. 181, l. 17 – p. 182, l. 2).

[¶15] Simon also testified that the red Tiburon had been reported stolen and that an individual by the name of Borseth was identified as the person who stole the vehicle. (T. p. 105, l. 1-3). Simon also testified that when he interviewed Carmen, she was unable to identify a suspect (T. p. 127, l. 12-15) and that voices were not recognized (T. p.128, l. 12-14). Simon testified that there was zero to no chance of finding any fingerprints or any biological in the residence (T. p. 134, l. 12-16) and that they did not find any biological evidence (T. p. 144, l. 22-24).

[¶16] It was Simon's opinion that the intruders were probably familiar with the Jones' and the residence or at least the Jones' and the description of the residence. (T. p. 126, l. 15-17). Further testimony provided by the State showed that some of the stolen property was located at the homes or garages of some of the defendant's friends or acquaintances, some of the property had been located in the red Tiburon and some in a black (or blue) Cadallac which was owned by an acquaintance of some of the defendants, some of the

property had been pawned by persons other than Nathan. There was no evidence that any of the property was found on the person of Nathan or at his primary residence.

[¶17] Nathan pled not guilty to all of the charges filed by the state against him. All of the charges relate to acts or actions involved inside the Jones' residence. The State provided evidence of locating stolen items and articles of clothing which were similar to those worn by the intruders and related the finding of those items to the defendants or individuals they knew. The state did not provide evidence. All these crimes charged occurred in the residence. Nathan was not charged with the crime of possession of stolen property.

[¶18] After the state closed it's case, Nathan made his Rule 29 motion for judgment of acquittal. (T. p. 738, l. 15 – p. 740, l. 3). The state objected and the Court denied the motion. (T. p. 748, l. 8 – p. 750, l. 10). All of the defense rested without presenting evidence. While deliberating, the jury sent a request to have a TV and DVD player so they could watch the security camera video that was presented at trial, offered and admitted as State's Exhibit 8. (A. 20). During the trial only the video was shown to the jury. After the television and DVD player were sent into the jury room, and after the jury had viewed the video, the State's Attorney, David Jones, remembered that State's Exhibit 8 contained both video and audio. State's Attorney Jones then notified the trial judge and defense attorneys about the audio portion on the DVD. Prior to making any decision as to what to do, the jury notified the court it had reached it's verdict. The jury was brought into the courtroom and each of the jurors was questioned whether the audio portion of the DVD had any effect on their deliberation. The jurors informed the judge that the audio portion had no effect on their deliberation. The verdicts were then read.

[¶19] The jury returned verdicts of guilty on all counts. (T. p. 879). Nathan filed a Rule 29 Motion for Judgment of Acquittal and a Motion for New Trial. Both motions were denied. Nathan timely filed his appeal.

LAW AND ARGUMENT

[¶20] Jurisdiction. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

> "An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:
>
> 1. A verdict of guilty;
> 2. A final judgment of conviction;
> 3. An order refusing a motion in arrest of judgment;
> 4. An order denying a motion for new trial; or
> 5. An order made after judgment affecting any substantial right of the party."

N.D.C.C. § 29-28-06.

[¶21] ISSUE: The trial court erred when it denied Nathan Ratliff's Rule 29 motion and post-trial motion to dismiss the charges of aggravated assault of Carmen and Sherman Jones.

[¶22] At the conclusion of the State's case, Nathan timely moved for an acquittal pursuant to NDR Crim P 29. In State v. Jacob, 2006 ND 246, 724 NW2nd 118, this Court held that "[B]ecause 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.2nd 555. The standard of review for an appeal based on sufficiency of the evidence is deferential to the jury's verdict. State v. Laib, 2005 ND 191, ¶6, 705 N.W.2nd 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.

[¶23] In the case at hand, Carmen testified that she was struck by only one individual and she was not able to identify that individual. Carmen then testified that the other two struck Sherman but also testified that she only saw one blow to Sherman. Sherman testified that he was struck by only one individual and he was unable to identify who it was that struck him. By the victims own testimony, only two of the individuals struck them and not all three. Although the state may charge all three with the crime, the state has to provide sufficient evidence that the defendant committed the act charged. Because the testimony clearly indicates one of the intruders did not strike either Carmen or Sherman, and the two that did strike them is not clear, the evidence is not sufficient for a conviction of any of the defendants, let alone Nathan. Additionally, the testimony of Carmen and Sherman does not establish that Nathan was in their residence. The convictions for aggravated assault must be dismissed.

[¶24] ISSUE: The evidence was insufficient for the jury to convict Nathan for the crimes charged.

[¶25] The appellate standard of review regarding a claim of insufficiency of evidence is well-established. In State v. Schmeets, 2007 ND 197, ¶8, 742 N.W.2d 513, the court stated: "When the sufficiency of evidence to support a criminal conviction is challenged, this 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. Igou, 2005 ND 16, ¶5, 691 N.W.2d 213. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in

the light most favorable to the verdict. Id. "A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor." State v. Knowels, 2003 ND 180, ¶6, 671 N.W.2d 816.

[¶26] Nathan was charged with the offenses of Robbery, Burglary, Aggravated Assault (two counts), Theft of Property, and Felonious Restraint. In order to obtain convictions the jury must find that the state has proven beyond a reasonable each element of the crime charged.

[¶27] N.D.C.C.12.1-02-02. Requirements of culpability.

> "1. For the purposes of this title, a person engages in conduct:
> a. "Intentionally" if, when he engages in the conduct, it is his purpose to do so.
> b. "Knowingly" if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.

N.D.C.C.12.1-02-02.

[¶28] The sections of N.D.C.C. § 12.1-22-01 Robbery which Nathan was charged with provide:

1. "A person is guilty of robbery if, in the course of committing a theft, he inflicts or attempts to inflict bodily injury upon another or threatens or menaces another with imminent bodily injury.

2. Robbery is a class A felony if the actor fires a firearm or explodes or hurls a destructive device or directs the force of any other dangerous weapon against another. Robbery is a class B felony if the robber possesses or pretends to possess a firearm, destructive device, or other dangerous weapon, or menaces another with serious bodily injury, or inflicts bodily injury upon another, or is aided by an accomplice actually present. Otherwise robbery is a class C felony."

§ 12.1-22-01

[¶29] The evidence at trial was that three individuals entered the Jones' residence and

demanded that they be told where the medications, jewelry and money were. The testimony of Carmen and Sherman, the only victims in the residence, is unclear as to what, if anything, each of the intruders said. There is insufficient evidence to prove beyond a reasonable doubt that Nathan had threatened either of the victims, that Nathan had struck either of the victims, or that Nathan was even present in the trailer house. Carmen and Sherman testified that they could not identify the intruders. Carmen testified that she was struck by one intruder. Sherman testified that he was struck by one intruder. The paperboy testified that he saw the three individuals outside the residence from a distance of 5 to less than 20 feet and he was unable to identify any of the defendants.

[¶30] The portions of N.D.C.C. § 12.1-22-02 Burglary which Nathan was charged provide:

1. "A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein.

2. Burglary is a class B felony if:

    a. The offense is committed at night and is knowingly perpetrated in the dwelling of another; or

    b. In effecting entry or while in the premises or in immediate flight therefrom, the actor inflicts or attempts to inflict bodily injury or physical restraint on another, or menaces another with imminent serious bodily injury, or is armed with a firearm, destructive device, or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury.

Otherwise burglary is a class C felony."

N.D.C.C. § 12.1-22-02

[¶31] The jury was not presented sufficient evidence to find Nathan guilty of Burglary. The

testimony at trial was that Carmen and Sherman could not identify the intruders. They did not recognize the voices, manner of walk, or any other characteristics of the intruders. The paperboy could not identify Nathan as one of the three individuals outside the trailer at the time of the burglary. The police officers testified that they did not find any DNA evidence, shoe print evidence, or fingerprint evidence which would place Nathan inside the Jones residence. There is no evidence that Nathan struck or inflicted bodily injury on either Carmen or Sherman. There is no evidence that Nathan bound either Carmen or Sherman. There is no evidence that Nathan threatened either Carmen or Sherman with imminent serious bodily injury or that Nathan was in possession of a dangerous weapon on April 30, 2012. The Carmen and Sherman Jones, the paperboy and the police officers could not identify, beyond a reasonable doubt, that Nathan had entered the Jones' residence on April 30, 2012 and the charge of Burglary must be dismissed.

[¶32] The portion of N.D.C.C. § 12.1-17-02(2) Aggravated assault which Nathan was charged

provides:

"A person is guilty of a class C felony, except if the victim is under the age of twelve years or the victim suffers permanent loss or impairment of the function of a bodily member or organ in which case the offense is a class B felony, if that person:

2. Knowingly causes bodily injury or substantial bodily injury to another human being with a dangerous weapon or other weapon, the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury."

N.D.C.C. § 12.1-17-02(2)

[¶33] In the case at hand, even if there was sufficient evidence for the judge to deny Nathan's Rule 29 motion, the evidence was still not sufficient to prove beyond a reasonable doubt that Nathan had committed the crime of aggravated assault on either Carmen or Sherman Jones.

[¶34] At trial, the State argued that State v. Schweitzer, 2007 ND 122, 735 N.W.2d 873, allowed a defendant to be convicted of an aggravated assault even though the victim couldn't identify the defendant at trial. In Schweitzer, there was sufficient other testimony to identify the defendant as the person that had committed the assault. In the case at hand, there is not sufficient evidence to identify Nathan as one of the two intruders that struck either Carmen or Sherman.

[¶35] Carmen and Sherman both testified they each had been struck by one person. Carmen testified that the intruder that stayed with her is the one that struck her. The testimony of Sherman is that only one of the other two intruders struck him. That testimony indicates that the third intruder did not strike either Carmen or Sherman. The evidence does not prove beyond a reasonable doubt that all three individuals had committed aggravated assault and it does not prove beyond a reasonable doubt which intruder struck which victim. Additionally, if they had testified that all three individuals had assault them, the state did not provide sufficient evidence that the third intruder caused any bodily injury. If two individuals had struck Sherman, which the evidence does not support, which bodily injuries were caused by which intruder and did that defendant knowingly cause that injury. The testimony of Carmen, Sherman and the paperboy do not identify Nathan as one of the intruders, let alone one that committed

aggravated assault. The evidence does not support the guilty verdicts for aggravated assault and both must be dismissed.

[¶36] The portion of N.D.C.C. § 12.1-23-02(2) Theft of property which Nathan is charged provides:

"A person is guilty of theft if he:

2. Knowingly obtains the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally deprives another of his property by deception or by threat"

N.D.C.C. § 12.1-23-02(2)

[¶37] The evidence presented at trial is insufficient to support a conviction of theft of property. The testimony at trial is not sufficient enough to prove beyond a reasonable doubt that Nathan was in the Jones residence or that he obtained their property through deception or threat, or that he intentionally deprived the Jones' of their property by deception or threat. Neither Carmen, Sherman or the paperboy could identify Nathan as one of the intruders. The testimony at trial may support the argument that Nathan was in possession of stolen property, however, he was not charged with that crime. The verdict of guilty on the charge of theft of property must be reversed.

[¶38] That portion of N.D.C.C. § 12.1-18-02(2) Felonious Restraint that Nathan was charged provides:

"A person is guilty of a class C felony, if he:

2. Knowingly restrains another under terrorizing circumstances or under circumstances exposing him to risk of serious bodily injury."

N.D.C.C. § 12.1-18-02(2)

[¶39] The evidence presented at trial does not support a verdict of guilty beyond a reasonable doubt. Carmen testified that one intruder bound her hands and struck her, which leaves two other intruders. Sherman testimony was somewhat conflicting. Sherman testified that one intruder took him into the hallway and only one struck him. There was also testimony that two of the intruders went back with Sherman. There is no testimony as to how many of the intruders held Sherman and bound him with duct tape. There is no testimony which would indicate which of the intruders held or bound either Carmen or Sherman and which intruder did not. There is insufficient evidence to identify Nathan as one of the intruders on April 30, 2012. The evidence provided to the jury was insufficient to support a guilty verdict and the verdict must be reversed.

[¶40] ISSUE: The Trial Court erred by failing to instruct the jury or dismiss the entire jury panel when potential juror number 34 responded to a question during voir dire that [I]t sounds like they did it; so".

[¶41] During voir dire of the jury panel, juror number 34 was questioned and responded that had had read about this case online, that he knew the defendants from his place of employment, that he had past experiences with the defendants, that he had formed an decision on the case. When asked what that opinion, or decision was, Juror 34 responded "[J]ust 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 --." (Voir Dire Transcript, Vol I, p. 217, l. 13 – p. 219, l. 9).

[¶42] The trial court did not dismiss the entire panel and did not instruct the remaining jurors to disregard what juror 34 had said. In State v. Nickle, 2006 ND 25, 708 N.W.2d 867 [¶4], Nikel argued the venire persons statement was so prejudicial it was obvious error for the district court to fail to dismiss the entire jury panel… "

[¶43] "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." Nickle at ¶5. "Statements made by members of the venire may rise to the level the entire pool is tainted." Id. at ¶7.

[¶44] In the case at hand, Juror 34 stated that he knew the defendants and had past experience with them. The court did not question further about what those past experiences were but from the answers juror 34 was providing to the questions asked it is apparent these were not good past experiences and were part of his decision that Nathan had committed the crimes charged. Juror 34 referred to the current charges when he answered that he had talked to others and "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 it". The judge excused Juror #34, however the trial judge did not instruct the balance of the juror pool to disregard those answers.

[¶45] The verdicts must be reversed due to obvious error during the jury selection process. Juror #34 had disclosed his decision that Nathan, and the others, had committed the crimes currently charged based upon what he had read, what others had said and what Juror #34 had heard and Juror #34 had past experiences with Nathan and the other defendants. Because of those responses, the trial judge should have either given an instruction to the potential jurors or dismissed the entire panel.

[¶46] ISSUE: The trial court committed err when it refused to grant Nathan Ratliff a new trial because inadmissible evidence had been allowed to go into the jury room and was heard by the jury.

[¶47] State's Exhibit 8 was a video of the break-in at Carmen's residence. This video

was not the actual security camera film from the residence but one created by the State taken from the security camera film. When creating State's Exhibit 8, audio was added to the video. When the State offered Exhibit 8 at trial, it was aware that the exhibit contained audio. Only the video, which was shown at trial was offered and admitted by the Court, without objection. During jury deliberations, the jury requested a television and DVD player so they could review exhibit 8. When it came to the Court's and Defendants attention that the exhibit also contained audio. The judge, state's attorney and defense attorneys began discussing what should be done when the jury sent notice that it had reached a verdict. The jury was brought into the courtroom and, prior to asking about the verdicts, the trial judge questioned them on whether they heard the audio and whether the audio was discussed during deliberations. The trial judge also asked the jurors whether the audio portion was considered when they made their decision. The trial judge was informed the audio they heard was not so much words as it was moving around and that the jurors weren't able to hear anything. (T. p. 876 l. 24 – p. 878, l. 24).

[¶48] The jurors answered that they did not consider the audio during deliberations or when making their decision. However, the Court was informed by the jurors that they did hear the audio. The audio was not presented to the jury during trial, the audio was not offered or admitted into evidence. The defendants were not afforded the opportunity to cross-examine witnesses during trial about the audio portion on the security recording. The jury heard the audio and had to determine whether it was relevant or not. The jury had to make that decision regarding something that had not been received and admitted by the judge. The jury had to make that decision without the defense being given an opportunity to question that "evidence" and without the opportunity to argue to the jury

what the audio meant in relation to their client. The jury reached a verdict on all counts after hearing the audio.

[¶49] It was obvious error to accept the verdicts of guilty after discovering inadmissible evidence was presented to the jury during deliberations. "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." Nickle, State v. Krull, 2005 ND 63, ¶6, 693 N.W.2d 631, N.D.R.Crim.P. 52(b).

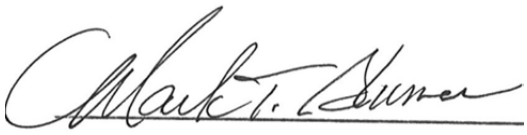
[¶50] To provide evidence that was not offered or admitted to the jury during deliberations is obvious, or plain, error. In this case, substantial rights were affected. Nathan, was not given the right to confront and cross-examine all witnesses against him and to review all evidence against him prior to submitting it to the jury for deliberation. The jury received that evidence, by deviating from the rules, and reached a verdict without affording Nathan the right to review, cross-examine and argue that evidence.

CONCLUSION

[¶51] The trial court erred when it denied the Rule 29 motion on the charges of aggravated assault and both should be remanded to the district court with an Order to Dismiss. The evidence was insufficient to support the verdicts on all counts and the verdicts should be reversed. The trial court erred by denying Nathan Ratliff's motion for new trial and the matter should be remanded to the district court with an Order granting Nathan Ratliff a new trial. It was obvious error to permit the audio portion to the jury for deliberation and the case should be remanded to the district court with an Order granting Nathan Ratliff a new trial.

[¶52] Nathan Ratliff joins the other Defendants/Appellants in any issue that either have raised in their briefs that has not been raised in this brief.

Respectfully submitted this 21st day of March, 2014.



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MARCH 21, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, v. Nathan Lawrence Ratliff, Defendant/Appellant,	)	Supreme Court No. 20130332 Grand Forks Co. No. 18-2012-CR-01100 CERTIFICATE OF SERVICE

I, Mark T. Blumer, do hereby certify that on 21st day of March, 2014, I served the following documents:

1. Appellant Brief
2. Appellant Appendix
3. Certificate of Service

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to the electronic mail addresses shown above and to Nathan Ratliff by First Class U.S. Mail, postage prepaid to Nathan Ratliff, PO Box 5521, Bismarck, ND 58506.

Dated this 21st day of March, 2014.

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OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, v. Nathan Lawrence Ratliff, Defendant/Appellant,	)	Supreme Court No. 20130346 Grand Forks Co. No. 18-2012-CR-01100 CERTIFICATE OF SERVICE

I, Mark T. Blumer, do hereby certify that on 27th day of March, 2014, I served the following documents:

1. Appellant Brief (with corrections)
2. Appellant Appendix cover sheet and pages 1-10

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to the electronic mail addresses shown above. A copy of these documents was mailed to Nathan Ratliff by 1st Class U.S. Mail, postage prepaid, at Fargo, ND to his address at PO Box 5521, Bismarck, ND 58506.

Dated this 27th day of March, 2014.

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State of North Dakota, Plaintiff/Appellee, v. Nathan Lawrence Ratliff, Defendant/Appellant,	)	Supreme Court No. 20130346 Grand Forks Co. No. 18-2012-CR-01100 CERTIFICATE OF SERVICE

I, Mark T. Blumer, do hereby certify that on 27th day of March, 2014, I served the following documents:

1. Appellant Brief
2. Appellant Appendix

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to the electronic mail addresses shown above.

Previous attempts were rejected.

Dated this 27th day of March, 2014.

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