

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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MAR -6 2015

State of North Dakota, )  
 )  
 ) *Appellee*  
 ) Plaintiff-Appellant, )  
 )  
 )  
 ) -vs- )  
 )  
 )  
 ) Dallas Pius Lang, )  
 ) *Appellant*  
 ) Defendant-Appellee, )  
 )  
 ) ..... )

STATE OF NORTH DAKOTA

) Supreme Ct. No. 20140332  
)  
) District Ct. No. 08-2014-CR-00957  
) SA File No. F404-14-04

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**BRIEF OF PLAINTIFF-APPELLEE**

APPEAL FROM JURY VERDICT AND JUDGMENT OF CONVICTION

Burleigh County District Court  
South Central Judicial District  
The Honorable Sonna M. Anderson, Presiding

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**STATEMENT OF THE ISSUES**

- [1] Whether the trial court erred by not dismissing the jury panel after statements made during voir dire.
- [2] Whether the trial court erred by not instructing the jury to not consider statements made during voir dire.

## STATEMENT OF THE CASE

[3] On April 2, 2014, officers of the Bismarck Police Department responded to the Defendant's residence to perform a welfare check on a female and infant child. Appellant Appendix at page 6-7. Eventually officers made entry into the residence with the assistance of North Dakota parole and probation. Id. Inside, officers located Delah Galusha, who indicated the Defendant held her against her will and threatened harm upon her. Id.

[4] The Defendant was subsequently charged with Felonious Restraint. Id. at page 5. The matter proceeded to trial on September 12, 2014. See, Trial Transcript. Prospective jurors were called and inquiries made. During inquiry of a specific venireperson by the State about his experience with domestic violence, the Defendant objected. Trial Transcript at page 29-30. A brief sidebar was held and the trial court sustained the objection. Id. at page 30-31. The Defendant requested a mistrial or a curative instruction in the alternative. Id. at page 50-51. The trial court denied the motion for mistrial and indicated it would determine at a later time if a curative instruction was necessary. Id. No further inquiry was made of the specific venireperson or the remaining panel as to whether they were affected by statements of the specific venireperson. Id.

[5] A jury was empaneled and the matter proceeded to trial. Id. Both parties were given a copy of the trial court's jury instructions to include closing instructions. No objections were made by either party to add, delete, or modify any of the jury instructions. After presentation of the evidence, the

jury found the Defendant guilty of felonious restraint. Appellant Appendix at page 22.

## ARGUMENT

[6] The appropriate standard of review in this case is abuse of discretion. State v. Jaster, 2004 ND 223, ¶8, 690 N.W.2d 213, 216 (N.D. 2004); City of Bismarck v. Holden, 522 N.W.2d 471, 473 (N.D. 1994).

*I. The trial court did not err by not dismissing the jury panel after statements made during voir dire.*

[7] A trial court has broad discretion in determining whether a venire panel should be dismissed, and the court's ruling will not be disturbed on appeal absent a clear abuse of discretion. State v. Evans, 802 S.W.2d 507, 514 (Mo. banc 1991). A trial court abuses its discretion only if its ruling is clearly against the logic of the circumstances then before the court, and the ruling is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Fassero, 256 S.W.3d 109, 115 (Mo. banc 2008). The trial court's denial of the motion to quash the venire is presumed correct, and it is the defendant's burden to demonstrate otherwise. State v. Stewart, 296 S.W.3d 5, 10 (Mo.App.2009). A comment made by a particular venireperson does not require dismissal of the entire venire unless the statement was so inflammatory and prejudicial as to infringe upon a defendant's right to a fair trial. State v. Thompson, 985 S.W.2d 779, 789 (Mo. banc 1999). Ware v. Norman, No. 13-3180-CV-S-BP-P, 2013 WL 6237871, at \*9 (W.D. Mo. Dec. 3, 2013).



[8] North Dakota has not established rules indicating the circumstances under which a venireperson's comments would be so prejudicial that a judge must dismiss the pool in its entirety. However, this Court has found that statements made by members of the venire may rise to the level that the entire pool is tainted. State v. Nikle, 2006 ND 25, ¶6, 708 N.W.2d 867, 869. In Mach v. Stewart, during selection of the jury for a child abuse case, a member of the venire who was a social worker made repeated statements regarding her experience with child abuse victims and her belief that such victims do not lie. 137 F.3d 630,632-33 (9th Cir.1997). The Ninth Circuit Court of Appeals determined those statements amounted to expert testimony, and it was therefore error for the district court to reject Mach's motion for a mistrial or, at a minimum, determine whether the jury had been "infected" by the statements. Id. at 633. A distinctive difference between Mach and the case before this Court is an objection was made, sustained, and no further answers were elicited from the venireperson. Trial Transcript at page 30-31, 50-51.

[9] Federal courts have shown great faith is placed in a juror's ability to remain fair and impartial. In United States v. Small, the Tenth Circuit Court of Appeals held a district court did not abuse its discretion in neither dismissing nor questioning a venire panel after one member of the panel made prejudicial remarks indicating his assumption of the defendants' guilt. 423 F.3d 1164, 1178-80 (2005). Similarly, in Thompson v. Borg, a venireperson stated before a sequestered panel that the defendant had at one time pled

guilty, but the Ninth Circuit Court of Appeals held this did not amount to pretrial publicity or taint the entire panel. 74 F.3d 1571, 1573-74 (1996).

[10] The trial court is vested with broad discretion in determining whether a jury panel should be dismissed because of statements made by a particular venireperson. State v. Weekley, 92 S.W.3d 327, 330 (Mo. Ct. App. 2002). The trial court is in the best position to determine the impact of a venireperson's statements on other panel members. Id. Because the trial court was in the best position to determine at the time whether the statements made had a prejudicial effect on the jury panel, it is within the trial court's discretion to determine whether the statements were so inflammatory as to prejudice the defendant and deprive him of a fair trial. Id. Given the objection by defense counsel and immediate ceasing of further information being provided by the venireperson, the trial court felt the statements made were not so inflammatory as to deprive Lang of a fair trial. Based upon that, the impact of any statements on the venire panel would have been minimal and thus not rise to the level of prejudice.

***II. The trial court did not err when it did not provide a specific jury instruction to instruct the jury to disregard statements made during voir dire.***

[11] A district court has wide discretion in formulating appropriate jury instructions. United States v. Espinoza, 684 F.3d 766 (8th Cir. 2012). A district court's denial of a proposed jury instruction is reviewed by an appellate court under abuse of discretion, reversing only if the district court's

alleged erroneous failure to give a particular instruction was prejudicial.

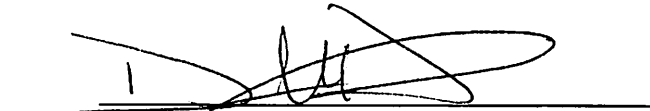
United States v. Espinoza, 684 F.3d 766 (8th Cir. 2012). Jury instructions do not need to be technically perfect or even a model of clarity, but must, taken as a whole, fairly and adequately submit the issues to the jury. United States v. Garcia-Gonon, 433 F.3d 587 (8th Cir. 2006).

[12] While the trial court didn't specifically issue an instruction to the jury informing them to disregard any statements made during voir dire, the court did provide instructions to the jury informing of them of their duty to "decide the case strictly on the evidence presented during trial," as well as to "not consider the arguments or other remarks of an attorney as evidence...." Appellant Appendix at page 12 and 19. Furthermore, the parties were provided an opportunity to object to the jury instructions, which would include the opportunity to, again, request a curative instruction. Based upon the jury instructions provided to the jury, it was clear they were to only consider testimony of witnesses in making a determination. The jury instructions provided fairly and adequately submitted the issues of the case to the jury.

**CONCLUSION**

[13] Based upon the foregoing, the State requests that the trial court's ruling to applications of the law be affirmed.

Dated this 6 day of March, 2015.

A handwritten signature in black ink, appearing to read 'Dawn M. Deitz', is written over a horizontal line.

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STATE OF NORTH DAKOTA )  
) ss  
COUNTY OF BURLEIGH )

I Stacey Baskerville, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 6<sup>th</sup> day of March, 2015, I deposited in a sealed envelope a true copy of the attached:

- 1. Brief of Plaintiff-Appellant
- 2. Affidavit of Mailing

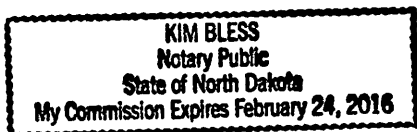
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

BENJAMIN C. PULKRABEK  
ATTORNEY AT LAW  
402 1ST ST. NW  
MANDAN, ND 58554-3118

which address is the last known address of the addressee.

Stacey Baskerville  
Stacey Baskerville

Subscribed and sworn to before me this 6<sup>th</sup> day of March, 2015.



Kim Bless  
Kim Bless, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: .