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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellant, vs. Taylor Weight, Defendant and Appellee,	)	Supreme Court No. 20140382 District Court No. 23-2014-CR-00037

Appeal from the Judgment of Acquittal
County of LaMoure, Southeast Judicial District
Honorable Daniel D. Narum, Presiding

APPELLEE'S BRIEF

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[¶2] Whether the Double Jeopardy Clause prohibits the State from appealing or retrying the case when the jury was empaneled and sworn and the trial court ruled the evidence was insufficient to sustain a conviction.

[¶3] Whether the trial court erred in entering Judgment of Acquittal after the court determined the evidence was insufficient to sustain a conviction under N.D.C.C. § 29-21-14.

STATEMENT OF THE CASE

[¶4] This case is premised upon the State's attempt to appeal from the trial court's Judgment of Acquittal. On March 19, 2014, the State filed a Criminal Information charging Defendant Taylor Weight with one count of Insurance Fraud and one count of Criminal Mischief. APP. 11-12.

[¶5] After the preliminary hearing on July 16, 2014, the trial court found the State failed to present sufficient evidence to find probable cause for the charge of Insurance Fraud. APP. 14. Accordingly, through an Order dated July 21, 2014 the court dismissed Count 1 of the Criminal Information. APP. 15.

[¶6] A three-day jury trial commenced in LaMoure County District Court on October 28, 2014. The State put on its entire case, consisting of 13 witnesses and

approximately 128 exhibits. However, the State's case depended primarily on the testimony of an accomplice to the alleged crimes.

[¶7] After the State rested its case on October 30, 2014, Weight submitted a Rule 29 Motion for Judgment of Acquittal. The trial court took the motion under consideration during a recess. Following the recess, the court found the State failed to meet its burden under N.D.C.C. § 29-21-14 of presenting sufficient evidence to corroborate the testimony of the accomplice. Therefore, the court granted Weight's Motion for Judgment of Acquittal and released the jury.

[¶8] Within hours of the court's decision, the State filed a Notice of Appeal. App. 16. The court entered Judgment of Acquittal on November 4, 2014. APP. 26.

STATEMENT OF THE FACTS

[¶9] Defendant Taylor Weight farms land near LaMoure, North Dakota. The Criminal Information filed by the State charges Weight with Criminal Mischief, based upon the allegation that he intentionally set fire to a John Deere 9860 Combine. APP. 12. The combine was owned by Weight's parents, Brent and Penny, and insured by North Star Mutual Insurance Company. Id.

[¶10] On the day of the fire, Anthony Bruse, a neighbor of Weight's, was farming when he thought he smelled smoke on his combine. Trial Tr. Vol. III 47:19-48:1. When he discovered the smoke was coming from Weight's field, Bruse, who was also on the Litchville Fire Department, drove over to the scene. Id. Weight told Bruse the combine had been on fire before, and the Weights clean out the

engine compartment regularly to try to prevent similar incidents in the future. Id. at 50:16-25. While firefighters were en route to the scene, Bruse and Weight proceeded to discuss the recurring problem of soybean dust causing fires with their respective John Deere combines. Id.

A. The State's Primary Witness was an Accomplice to the Alleged Crime with a History of Lying

[¶11] The primary testimony supporting the State's allegation came from C.G., a 17-year-old friend of the Weight family, who worked for Weight Farms. Trial Tr. Vol. II 68:3-20. On October 26, 2013, the day in question, C.G. stated he was operating the grain cart, while Weight was running combine. Id. at 68:24-69:15. According to C.G., Weight called him and asked him to bring gas out to the combine, and C.G. responded by filling up two Powerade bottles with gas. Id. at 70:1-10. C.G. claims he provided the gas and a lighter to Weight, who then used the items to start the fire. Id. After the fire ignited, C.G. asserted Weight proceeded to combine for about 10 minutes. Id. at 75:10-16. At that point, the combine shut down and Weight exited the machine. Id. at 76:1-17. A short time later, C.G. called 9-1-1, and the Litchville Fire Department arrived on scene about 30 minutes later. Id. at 76:22-77:7.

[¶12] Later that night, C.G. alleges Weight was worried whether the header was totaled. Id. at 87:13-16. Therefore, according to C.G., he and Weight returned to the combine that night to reignite the header. Id. at 87:17-19. C.G. estimated they

poured 10 gallons of diesel fuel on the header, before attempting to light it with a torch. Id. at 89:15-25. However, the header burned slowly, and C.G. and Weight then left the field without staying around very long. Id. at 90:1-2; 91:3-7.

[¶13] The veracity of C.G.'s allegations against Weight was clouded by his troubled past, which included several felonies. Id. at 92:13-20. Generally, C.G. conceded he does not always tell the truth. Id. at 103:4-6. In addition, when being untruthful, C.G. agreed he made up additional details to embellish his lies, in order to make those lies appear more believable. Id. at 103:7-10. This was true not only as a general matter, but even when C.G. was on the witness stand in previous matters and had sworn under oath to tell the truth. Id. at 103:11-19.

[¶14] For example, after C.G. was brought in to talk with the Chief of Police relating to his conduct in tearing up a local sports field with his truck, C.G. lied by denying any responsibility, and he made up a lie that someone stole his pickup truck. Id. at 103:22-104:21. C.G. conceded he made up these lies in order to avoid prosecution or responsibility for the damage. Id. C.G. was ultimately charged with criminal mischief and making a false report to a law enforcement officer. Id. at 105:7-14. At trial, he admitted he took the stand under oath and provided false testimony. Id. at 105:15-25.

[¶15] In another matter, C.G. was contacted by police regarding his involvement in a break in, burglary, and fire that was set at a local building, as well as a separate break in and theft at another business. Id. at 106:19-107:12.

Once again, C.G. lied to the police to stay out of trouble and avoid criminal charges. Id. at 107:5-24. After the police indicated C.G. was caught on surveillance video driving a vehicle at the scene of the crime, C.G. lied by reporting that his vehicle must have been stolen. Id. at 108:18-109:4.

[¶16] Eventually, C.G. was charged with nine separate felonies in juvenile court. Id. at 111:1-3. The State made a motion in that action to transfer the case to adult court, which would result in a likely prison sentence for C.G. Id. at 111:7-25. In February 2014, C.G. finally admitted to his prior lies and confessed to his crimes. Id. at 112:1-14. However, C.G. did not say anything about the combine fire at that time. Id. at 112:15-21. Upon C.G.'s plea of guilty to three felony charges, the State dismissed the other six charges and withdrew its motion to transfer the case out of juvenile court. Id. at 113:7-23. As part of his deal, C.G. agreed to cooperate with the State by testifying against Weight in this action. Id. at 114:16-22.

[¶17] C.G. then went back to the police in March 2014 and stated, for the first time, that Weight had intentionally set the combine fire. Id. at 115:4-8. However, the details between C.G.'s statement to police and his testimony at trial varied. For instance, C.G. agreed he did not tell the police anything about returning to the field later at night to reignite the header when he first spoke with law enforcement. Id. at 117:11-15. Similarly, while C.G. testified at trial that he had thrown the Powerade bottles into a slough after the combine started on fire, he stated during his deposition testimony that Weight had thrown the bottles. Id. at 119:1-19. C.G.'s trial

and deposition testimony was also inconsistent as to whether Weight had started the combine on fire with a lighter, or if Weight had first started a rag on fire and then thrown that rag onto the combine. Id. at 121:3-18. Finally, C.G. made inconsistent statements relating to the time of the fire, including the time it took between the starting of the fire and the 9-1-1 call. Id. at 129:2-130:23.

B. The State's remaining witnesses did not independently corroborate C.G.'s testimony or connect Weight with the commission of the offense

[¶18] The State presented testimony from 12 witnesses other than C.G. However, none of these witnesses were able to independently corroborate C.G.'s testimony and connect Weight with the commission of the offense.

[¶19] For instance, Paul Burkle, an insurance adjuster with the firm Heinrich and Company, testified he went out to view and take photographs of the combine shortly after the fire. Id. at 37:4-9; 39:10-25. Burkle found no reason to believe the fire was deliberately set or suspicious in any fashion. Id. at 54:1-14. Linda Raddatz, a claims rep for North Star Mutual Insurance Company who was assigned to the matter, testified North Star paid out a check to Brent and Penny Weight. Id. at 60:21-22; 61:14-19; 63:3-8.

[¶20] The most extensive testimony, other than C.G.'s, was provided by Arnie Rummel, a Supervisory Special Agent for the Bureau of Criminal Investigation. Id. at 162:19-21. After C.G. provided information to law enforcement implicating Weight in the fire, Rummel spoke with C.G., who directed Rummel to the scene about

six months after the fire. Id. at 167:5-10; 169:10-18. While Rummel was unable to locate the Powerade bottles described by C.G. at that time, he discovered them in a slough during a return trip to the field. Id. at 170:10-171:17. Rummel sent the bottles to the State Crime Lab for testing on the contents of the bottles, although he felt it would be a waste of time to test the bottles for fingerprints or DNA — despite a request Rummel ignored from Weight that this testing be conducted. Id. at 176:23-177:17; 229:14-230:15.

[¶21] Rummel also took soil samples from where he thought the header would have been located, and sent them to the State Crime Lab. Id. at 178:15-179:20. He also conducted some measurements of the slope of the ground where he believed the combine would have been located, because he believed the diesel fuel may have leaked out of the tank of the combine, but away from where the header would have been located. Id. at 226:2-24. However, Rummel was not aware of C.G.'s earlier testimony at trial that the diesel tank exploded in the fire, and he conceded he did not take soil samples from around the site in order to determine whether diesel fuel had dispersed after the explosion in various areas. Id. at 226:25-227:13.

[¶22] Rummel conceded he had no personal knowledge of what transpired between C.G. and Weight, other than what he was told by C.G. Id. at 224:16-19. Rummel also admitted he had no knowledge of certain details other than what he had been told by C.G., such as the duration of time the Powerade bottles he discovered were lying in the field. Id. at 227:14-17.

[¶23] The State also presented testimony from Chris Focke, a forensic scientist with the North Dakota State Crime Laboratory. Trial Tr. Vol. III 20:16-18. Focke indicated his testing showed that gasoline was present in the Powerade bottles, and the soil samples had a residue of heavy petroleum distillate, but he was not able to determine whether it was diesel. Id. at 28:1-30:1.

C. The trial court grants Weight's Motion for Judgment of Acquittal

[¶24] After the State rested its case, Weight submitted a Rule 29 Motion for Judgment of Acquittal, which was based primarily on the State's failure to meet its burden under N.D.C.C. § 29-21-14. N.D.C.C. 29-21-14 prohibits a conviction based solely on the testimony of an accomplice, and requires that an accomplice's testimony be independently corroborated and that it connect the defendant with the offense.

[¶25] The court granted Weight's Motion for Judgment of Acquittal after allowing the parties to argue the issue. The court stated, "[t]here is a minimum standard that the State must meet before I can allow [the jury] to determine the facts." Trial Tr. Vol. III 80:9-10. The court explained the State failed to meet that burden under N.D.C.C. § 29-21-14. Id. at 80:11-12. Specifically, the court discussed the lack of corroborative evidence in making its ruling:

> For good reason the law prohibits anyone from being convicted of any offense unless — solely on the testimony of a co-conspirator. There has been evidence before you today and yesterday that indicates that there is a fire. We've heard a lot of testimony about that. We have only the testimony of C.G. to allow you to make any conclusion that that fire was a suspicious fire. He is a co-conspirator – or an accomplice is the correct word, accomplice, based on his own

> admission. He provided gas. He provided the lighter, if that's true. If it's not true, then there was no offense. If it was true, it's the only evidence connecting Mr. Weight to the fire. There is nothing in what you heard that connects him in any other way.

Id. at 80:16-81:3.

[¶26] In reaching its decision under the statute, the court acknowledged, "I think I had no choice and I don't think it was a close call, although a difficult one." Id. at 83:12-13. The court entered a Judgment of Acquittal on November 4, 2014, which reaffirmed the basis of its ruling: "Because the State's evidence is insufficient to sustain a conviction under N.D.C.C. § 29-21-14 the motion is granted." APP. 26.

ARGUMENT

I. Whether the State may appeal the trial court's Judgment of Acquittal when the trial court acquitted the Defendant after concluding the State's evidence at trial was insufficient to sustain a guilty verdict

A. The State has no statutory right to appeal from an acquittal

[¶27] "In a criminal action, the State has only such right of appeal as is expressly conferred by statute." State v. Bernsdorf, 2010 ND 123, ¶ 5, 784 N.W.2d 126. The source of a State's right to appeal is N.D.C.C. § 29-28-07, which allows the State to appeal only from certain enumerated grounds. "[I]t is well established that the State cannot appeal from an acquittal." Id.; see also State v. Deutscher, 2009 ND 98, ¶ 7, 766 N.W.2d 442 ("There can be no appeal from a true judgment of acquittal."); State v. Bettenhausen, 460 N.W.2d 394, 395 (N.D. 1990) ("The State is not authorized to appeal from an acquittal."). However, the State may appeal from

"[a]n order quashing an information or indictment or any count thereof." Bernsdorf, 2010 ND 123, ¶ 5. "This Court has noted 'quash' is defined as 'to overthrow; to abate; to vacate; to annul; to make void.'" Deutscher, 2009 ND 98, ¶ 6.

[¶28] In Deutscher, this Court explained the difference between an order quashing an information and a judgment of acquittal. In order to discern the basis of a district court's ruling, this Court "look[s] at the substance of the judge's ruling to determine whether it actually represents a resolution of some or all of the factual elements of the offense charged." Id. at ¶ 8. If the decision was based upon a review and resolution of some or all of the factual elements, the ruling is an acquittal. Id.

[¶29] The Court in Deutscher ultimately concluded the order of dismissal was an acquittal, not an order quashing the information, because the trial court "held the evidence presented at trial was insufficient to sustain a guilty verdict." Id. at ¶ 11. In examining the trial court's written order, as well as its oral statements, the Court concluded the trial court "resolved factual elements of the offense charged" when it held there was insufficient evidence to sustain the verdict. Id. at ¶ 12.

[¶30] Similarly, in State v. Flohr, 259 N.W.2d 293, 295-96 (N.D. 1977), the Court concluded the State had no right to appeal where the trial court issued a "Judgment of Acquittal" at the close of the case, which was based upon the evidence adduced at trial. The trial court dismissed the action only after considering the evidence adduced at trial. Id.; see also Bernsdorf, 2010 ND 123, ¶ 5 (dismissing the

State's appeal where the district court granted the defendant's motion for acquittal under N.D.R.Crim.P. 29 at the close of the State's case).

B. The acquittal was based on the trial court's review of the evidence

[¶31] Like Deutscher and Flohr, the trial court in this case granted a Judgment of Acquittal after reviewing and resolving factual elements. The State put on all of its evidence, including 13 witnesses and well over 100 exhibits. The trial court explained on the record that it had heard and reviewed all of this evidence in making its decision to enter Judgment of Acquittal.

[¶32] For instance, the trial court discussed the "evidence [put on by the State] . . . that indicates that there is a fire." Trial Tr. Vol. III 80:18-19. The trial court noted, "We've heard a lot of testimony about that." Id. at 80:20. However, the trial court correctly explained that N.D.C.C. § 29-21-14 requires an accomplice's testimony to be corroborated. Id. at 80:9-18. The State failed to meet that burden, the court determined, because "[w]e have only the testimony of C.G. to allow you to make any conclusion that the fire was a suspicious fire." Id. at 80:20-22. C.G.'s testimony was "the only evidence connecting Mr. Weight to the fire," and there was "nothing . . . that connects [Weight] in any other way." Id. at 81:1-3.

[¶33] There can be no question the trial court's ruling was based upon its review of the evidence adduced at trial. The trial court explicitly referred, on multiple occasions, to the evidence presented at trial, including the testimony about the fire and the allegations of C.G. Id. at 80:11-81:3. Indeed, the trial court was required to

review the evidence in order to determine whether the State had presented the corroboration evidence required by N.D.C.C. § 29-21-14. Therefore, the trial court necessarily resolved factual issues by reviewing the State's evidence, and concluding there was not evidence of corroboration, as required under N.D.C.C. § 29-21-14. See State v. Meyer, 494 N.W.2d 364, 366 (N.D. 1992) ("Because the court's order for dismissal was based upon factual elements, we conclude it is an acquittal which may not be appealed under N.D.C.C. § 29-28-07.").

C. The trial court's Judgment of Acquittal concluded the State failed to present sufficient evidence under N.D.C.C. § 29-21-14

[¶34] The trial court further entered a "Judgment of Acquittal," which declares, in no uncertain terms, "the State's evidence is insufficient to sustain a conviction under N.D.C.C. § 29-21-14." APP. 26. This determination is **identical** to the trial court's determination in Deutscher, which this Court held was an acquittal. See Deutscher, 2009 ND 98, ¶ 11 (dismissing the appeal where the trial court "held the evidence presented at trial was insufficient to sustain a guilty verdict."). The State fails to even cite Deutscher or Flohr, much less explain how the determinations in those cases, which were held to be acquittals, do not bar this appeal.

[¶35] Once again, by definition, the trial court's ruling the evidence was "insufficient to sustain a conviction" was a resolution of some or all of the factual elements of the crime charged. The only way in which the trial court could conclude the evidence was insufficient to sustain a conviction was by reviewing the evidence

and making a determination based on the facts. See State v. Yineman, 2002 ND 145, ¶ 8, 651 N.W.2d 648 ("When a court, be it an appellate court or a trial court on motion for entry of a judgment of acquittal, concludes that evidence is legally insufficient to support a guilty verdict, it concludes that the prosecution has failed to produce sufficient evidence to prove its case."); State v. Hogie, 424 N.W.2d 630, 632 (N.D. 1988) (stating a judgment of acquittal entered pursuant to Rule 29 is barred "'when it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.'") (quoting United States v. Scott, 437 U.S. 82, 97 (1978)).

[¶36] Finally, the State argues the trial court made an erroneous legal conclusion under N.D.C.C. § 29-21-14. Even if that were true, however, it does not change the fact the acquittal cannot be appealed. For instance, in Sanabria v. United States, 437 U.S. 54, 68-69 (1978), the United States Supreme Court recognized a trial court's erroneous evidentiary ruling, which led to an acquittal for insufficient evidence, "bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." "Because the trial court found the defendant not guilty because of a failure of proof on a factual element of the offense charged, even though induced by erroneous legal rulings, there was an acquittal which barred further prosecution and the government could not appeal." Hogie, 424 N.W.2d at 632 (citing Sanabria, 437 U.S. at 68-69). Accordingly, even assuming the trial

court erred in its determination under N.D.C.C. § 29-21-14, it is of no consequence to the issue of whether the State may appeal from the acquittal.

[¶37] In sum, the State is attempting to appeal the trial court's Judgment of Acquittal, which it plainly cannot do under well-established North Dakota precedent. Under these circumstances, this Court must dismiss the State's appeal.

II. Whether the Double Jeopardy Clause prohibits the State from appealing or retrying the case when the jury was empaneled and sworn and the trial court ruled the evidence was insufficient to sustain a conviction

[¶38] "The double jeopardy provisions of the federal and state constitutions, and state law, prohibit successive prosecutions and punishments for the same criminal offense." State v. Voigt, 2007 ND 100, ¶ 11, 734 N.W.2d 787. "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." United States v. Scott, 437 U.S. 82, 87 (1978).

[¶39] "It is well settled that, in a jury trial, jeopardy attaches when the jury is empaneled and sworn." Id. The jury was empaneled and sworn in this matter on October 28, 2014. The State proceeded to put on two days' worth of evidence at trial before resting. Accordingly, there is no question jeopardy attached when the jury was

empaneled and sworn. See id. ("Jeopardy attached in this case when the jury was empaneled and sworn.").

[¶40] "A ruling, that as a matter of law the State's evidence is insufficient to establish . . . factual guilt, . . . is an acquittal under the Double Jeopardy Clause." City of Dickinson v. Kraft, 472 N.W.2d 441, 443 (N.D. 1991) (internal quotation marks and citation omitted). Consequently, even without regard to the State's inability to appeal an acquittal under N.D.C.C. § 29-28-07, the Double Jeopardy Clause bars the State from appealing the trial court's Judgment of Acquittal. See In re B.F., 2009 ND 53, ¶ 16, 764 N.W.2d 170 (concluding the State could not appeal an acquittal under the Double Jeopardy Clause).

[¶41] At the very least, the Double Jeopardy Clause bars retrial after the trial court concluded the evidence was insufficient to support a conviction. See Yineman, 2002 ND 145, ¶ 8 ("The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial [where a court concludes evidence is legally insufficient to support a guilty verdict]"). "[O]nce acquitted, the accused cannot be retried on the same charge without violating the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and of Article 1, Section 12 of the North Dakota Constitution." Meyer, 494 N.W.2d at 366. Therefore, even if the State could appeal the Judgment of Acquittal, and even if it were successful in such an appeal, the State would be without any recourse, because it could not retry the

Defendant under the Double Jeopardy Clause. Under these circumstances, the State's appeal should be dismissed.

[¶42] The State argues the Double Jeopardy Clause is not implicated because Weight sought to terminate the trial on a basis unrelated to factual guilt or innocence of the offense. The State relies upon State v. Hogie, 424 N.W.2d 630 (N.D. 1988) and United States v. Scott, 437 U.S. 82 (1978), but those decisions are entirely inapposite to this case.

[¶43] In Hogie, the trial court quashed the information because the State charged the defendant with a class B felony, instead of charging him with a class C felony, which was required under the statute. 424 N.W.2d at 632-33. In making its ruling, the trial court stated, "The Motion for Acquittal is basically what you classify as a Motion for Dismissal which means the case stops at this particular point." Id. at 633. Accordingly, the defendant was not acquitted because it was "clear that the trial court's decision was based upon the legal conclusion that theft of an automobile could only be charged as a class C felony and not as a class B felony." Id.

[¶44] Likewise, in Scott, the trial court's "dismissal of the first count of the indictment was based upon a claim of preindictment delay and not on the court's conclusion that the Government had not produced sufficient evidence to establish the guilt of the defendant." 437 U.S. at 95. Therefore, the reason for the dismissal was unrelated to the evidence at trial, and the Court held the Double Jeopardy Clause did not apply. Id. at 98-99.

[¶45] This case stands in stark contrast to Hogie and Scott. Unlike those cases, the trial court's ruling had nothing to do with any defects contained in the Criminal Information, or any procedural issues before trial. As discussed above, the trial court reviewed all of the evidence presented by the State and determined the evidence was " insufficient to sustain a conviction." APP. 26. Hogie and Scott both reaffirmed that an appeal is barred "when it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." Hogie, 424 N.W.2d at 632 (quoting Scott, 437 U.S. at 97). The trial court's declaration that, "the State's evidence [was] insufficient to sustain a conviction" falls squarely within this prohibition, and therefore the State's appeal must be dismissed under the Double Jeopardy Clause.

[¶46] For the reasons set forth above, the State cannot appeal from the Judgment of Acquittal entered by the trial court. This attempted appeal should be dismissed. The argument which follows in Section III is offered only to assist the Court should it elect to consider the merits of the State's appeal.

III. Whether the trial court erred in entering Judgment of Acquittal after the court determined the evidence was insufficient to sustain a conviction under N.D.C.C. § 29-21-14

A. The trial court entered Judgment of Acquittal in accordance with the mandate set forth in Rule 29(a)

[¶47] "Under N.D.R.Crim.P. 29(a), a trial court must order entry of judgment of acquittal after the State closes its evidence or after the close of all the evidence if

the evidence is insufficient to sustain a conviction." State v. Kinsella, 2011 ND 88, ¶ 7, 796 N.W.2d 678. Rule 29(a) is mandatory, as it requires the trial court to enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. N.D.R.Civ.P. 29(a).

[¶48] The State contends the trial court "did not even address the legal standards under Rule 29." The State's claim finds no support in the record. Aside from the trial court's examination of the State's evidence on the record, the Judgment of Acquittal expressly states, "the State's evidence is insufficient to sustain a conviction[.]" APP. 26. This determination mirrors the language of Rule 29(a), which directs the court to consider whether "the evidence is insufficient to sustain a conviction." Accordingly, the State's argument that the trial court did not address the standards under Rule 29 has no merit, and the trial court was required to enter Judgment of Acquittal under Rule 29 after determining the evidence was insufficient to sustain a conviction.

B. N.D.C.C. § 29-21-14 requires independent evidence connecting Weight to the commission of the offense to corroborate an accomplice's testimony

[¶49] The State also challenges the trial court's ruling with respect to N.D.C.C. § 29-21-14. N.D.C.C. § 29-21-14 states, "A conviction cannot be had upon the testimony of an accomplice unless the accomplice is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense,

or the circumstances thereof." The North Dakota Supreme Court described the requirements of N.D.C.C. § 29-21-14 as follows:

> The specific requirement, under this section, is that the corroborating evidence tends to connect the defendant with the commission of the offense. Whart. Cr. Ev. § 442, declares, "The corroboration requisite to validate the testimony of an alleged accomplice should be to the person of the accused. Any other corroboration would be delusive, since, if corroboration in matters not connecting the accused with the offense were enough, a party who, in the case against him, would have no hope of escape, could, by his mere oath, transfer to another the conviction hanging over himself." And Rose Cr. Ev. 130, states the principle thus: "There may be many witnesses, therefore, who give testimony which agrees with that of the accomplice, but which, if it does not serve to identify the accused parties, is no corroboration of the accomplice." Under this principle, which courts were compelled originally to adopt to protect innocent persons, and which, by innumerable decisions, was crystallized into universal law, and which is declared in clear and specific language by our statutes, it will not be necessary or proper for us to discuss any of that portion of the so-called corroborating testimony which simply goes to show that the crime was committed, and the time and manner of its commission. We can profitably discuss only such portions of this testimony as it may be claimed in some degree tend to identify this defendant with the commission of the crime.

State v. Coudotte, 72 N.W. 913, 913 (N.D. 1897).

[¶50] "The purpose of corroborative evidence is to demonstrate an accomplice is a reliable and credible witness." In re J.K., 2009 ND 46, ¶ 20, 763 N.W.2d 507. Moreover, given this purpose, "the accomplice cannot corroborate himself by his own words or deeds." State v. Kent, 62 N.W. 631, 638 (N.D. 1895) (rev'd on other grounds). "The corroboration, to satisfy the statute, must come from some independent source, and must tend to connect the accused with the crime." Id.; see

also Coudotte, 72 N.W. at 914 (stating is it "utterly untenable" for an accomplice to be able to corroborate himself). Finally, the North Dakota Supreme Court has required there to be more than speculation or suspicion in order for evidence to be deemed corroborative. See State v. Haugen, 449 N.W.2d 784, 789 (N.D. 1989) ("Speculation is not evidence tending to connect defendant with the commission of the crime.").

[¶51] The issue of whether corroborative evidence exists is a question of law for the court to decide. State v. Thorson, 264 N.W.2d 441, 445 (N.D. 1978). This Court has reversed trial courts that have erroneously submitted a charge to the jury where no corroborative evidence existed. See, e.g., Haugen, 449 N.W.2d at 789 ("Because there was no independent evidence tending to connect [the defendant] to the break-in at the Silver Dollar, it was error for the trial judge to have submitted that count to the jury.").

[¶52] For instance, in State v. Helmenstein, 163 N.W.2d 85, 88 (N.D. 1968), the defendant was charged with the burglary of a store. While multiple accomplices testified as to the defendant's involvement in the offense, the North Dakota Supreme Court concluded the State had to produce some independent corroborative evidence to connect the defendant with the offense. Id. In an attempt to meet this burden, the State called the owner of the store to testify about the burglary and the merchandise that was taken. Id. at 89. However, the Court concluded this "testimony in no way connected the defendant with the offense, but merely established the fact that an

offense had been committed." Id. Because there was no evidence, other than the testimony of multiple accomplices, to connect the defendant with the commission of the offense, the Court reversed the defendant's conviction under the statute. Id. at 91.

[¶53] Courts in other states have also reversed convictions where an accomplice's testimony was not supported by independent corroborative evidence, including in cases involving accomplices who testified to helping a defendant set fire to property. For example, in Rice v. State, 605 S.W.2d 895, 896 (Tex. Ct. App. 1980), the accomplice testified the defendant had recruited him to burn down a store and a barn the defendant owned so the defendant could obtain the insurance proceeds, and the two agreed the accomplice would receive $3,000 for his help. The store was successfully burned down, as was the barn, albeit after an unsuccessful attempt that required more effort and gasoline to ignite the fire. Id. at 896-97. The State produced evidence showing the barn had burned down, the insurance proceeds were paid out and deposited in the defendant's bank, and the defendant had withdrawn $3,000 upon depositing the insurance check. Id. The court concluded none of this evidence corroborated the accomplice's testimony that an act of arson occurred, however, because it was not inconsistent with the defendant's innocence. Id.

[¶54] Similarly, in other cases, courts have refused to find it corroborative where a defendant had a possible motive for the fire and suspicion arose with respect to the defendant's involvement in the offense. See Bowdoin v. State, 444 So.2d 911

(Ala. Ct. App. 1984) (concluding the fact the defendant and the accomplice were seen together before a house fire, or that the house was insured, or that the defendant had expressed a desire to remove the house from the property, did not corroborate the accomplice's testimony because motive and suspicion was not enough to constitute evidence of guilt); Jordan v. State, 57 S.W.2d 127, 128 (Tex. Ct. App. 1933) (concluding no evidence existed other than the accomplice's testimony to show the defendant intentionally burned a house, and therefore his conviction was reversed). These courts have concluded "mere suspicion is not sufficient to corroborate an accomplice." State v. Somers, 90 P.2d 273, 274 (Utah 1939) (reversing an arson conviction after determining evidence of the defendant's presence with the accomplice on the night of the fire and defendant's threats to others who might testify against him was not enough to corroborate the accomplice's testimony).

C. The State produced no independent evidence corroborating C.G.'s testimony and connecting Weight to the commission of the offense

[¶55] The corroboration requirement is particularly important in this case because C.G. admitted to lying under oath and to authorities on numerous occasions. C.G. admitted he lied to the Chief of Police about his involvement in an unrelated criminal mischief charge, and he perjured himself by providing false testimony in court while under oath. Trial Tr. Vol. II 103:22-104:21; 105:7-25. In another matter, C.G. conceded he lied to attempt to stay out of trouble on theft and arson allegations. Id. at 107:5-24; 108:18-109:4. C.G.'s testimony in this case was a condition of his

plea deal with the State after C.G. was charged with nine felonies in juvenile court. Id. at 111:1-25; 113:7-23; 114:16-22. Against this backdrop, it was imperative that the State produce some independent evidence connecting Weight to the commission of the offense in order to corroborate C.G.'s testimony and demonstrate he is "a reliable and credible witness." In re J.K., 2009 ND 46, ¶ 20.

[¶56] The trial court correctly determined the State failed to produce evidence to corroborate C.G.'s testimony in accordance with the statute. For example, the State put on extensive evidence showing the combine was burned, including numerous photographs, testimony from the insurance adjuster and claims representative, and testimony from fire department officials. The ultimate effect of this evidence was to prove a point no one disputes --- that the combine burned. Simply showing the combine burned does not corroborate C.G.'s testimony that Weight intentionally set fire to that combine.

[¶57] The State also relies on evidence of phone calls made between C.G. and Weight around the time of the fire, as well as testimony from fire department officials that Weight was present as they attempted to put the fire out. At most, this would create suspicion or speculation of Weight's involvement in the offense, but this Court has held suspicion and speculation are not enough to connect a defendant with the commission of the crime. See Haugen, 449 N.W.2d at 789; see also Beavers v. State, 497 So.2d 612, 614 (Ala. Ct. App. 1986) ("[T]he evidence must do more than raise

a suspicion of guilt and must be inconsistent with the innocence of the accused in order to adequately corroborate accomplice testimony.").

[¶58] Additionally, like the Rice case discussed above, this evidence is not inconsistent with Weight's innocence. Rice, 605 S.W.2d at 896-97. It does nothing to corroborate C.G.'s testimony because it does not show Weight was connected to the commission of a criminal offense. See State v. Washington, 330 P.3d 596, 620 (Or. 2014) ("[E]vidence of a defendant's association with an accomplice at a particular location, by itself, is insufficient to satisfy the corroboration requirement[.]"); Dickerson v. State, 718 S.E.2d 564, 566 (Ga. Ct. App. 2011) ("The additional evidence must be independent of the accomplice testimony and must connect the defendant to the crime or lead to the inference he is guilty."); State v. Bough, 152 S.W.3d 453, 464 (Tenn. 2004) ("There must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity."); State v. Wallert, 402 N.W.2d 570, 572 (Minn. Ct. App. 1987) ("[W]hen evidence is as consistent with the defendant's innocence as with her guilt, the evidence is not sufficient to corroborate the testimony of accomplices."); Nix v. State, 211 S.E.2d 26, 27 (Ga. Ct. App. 1974) ("[C]orroborating circumstances must connect the defendant with the crime independently of accomplice's testimony and it is not sufficient that the accomplice

be corroborated with respect to time, place and circumstances if there is nothing to connect the defendant therewith."). Here, the State's corroborative evidence was not inconsistent with Weight's statement to investigators that the combine spontaneously caught fire during harvest.

[¶59] Finally, the State argues it put on evidence showing the fire was incendiary in nature. The State points to the testimony of Rummel, who testified he believed he found fuel near the combine and in the Powerade bottles described by C.G. Once again, this "testimony in no way connected the defendant with the offense[.]" Helmenstein, 163 N.W.2d at 88. There was no video tape surveillance showing Weight setting a fire, no fingerprint or DNA evidence on the alleged fuel sources (despite Weight's request to Rummel to conduct such testing), and no corroborative testimony the Powerade bottles were connected to the fire or that Weight ignited the combine.

[¶60] "The court must bear in mind that the testimony of an accomplice is considered inherently untrustworthy, and the accused is exposed to the danger of imprisonment based on the testimony of a witness naturally inclined to shift or diffuse criminal responsibility." Wallert, 402 N.W.2d at 572. Here, the only evidence to connect Weight to the alleged offense was the testimony of an accomplice who not only continually lied but, by his own admission, would personally benefit if Weight were to be convicted of the charged offense. The plain language of N.D.C.C.

§ 29-21-14 requires more, and the State simply failed to produce corroborative evidence connecting Weight to the offense.

[¶61] Under similar circumstances, this Court has repeatedly held a conviction cannot stand where there is no independent corroborative evidence. See In re Interest of B.S., 496 N.W.2d 31, 34 (N.D. 1993) (concluding there was not admissible corroborative evidence that would support the charge); State v. McMorrow, 286 N.W.2d 284, 287 (N.D. 1979) (reversing a conviction for criminal mischief where the only evidence linking the defendant with breaking windows was a telephone call to a witness where the caller identified himself as the defendant and reported the broken windows); State v. Thompson, 256 N.W.2d 706, 712 (N.D. 1977) (reversing a conviction where no admissible corroborating evidence connected the defendant with the commission of the crime); State v. Fichtner, 226 N.W. 534, 536 (N.D. 1929) (overturning a conviction where there was no evidence the defendant committed any crime outside the testimony of the accomplice). This case should be affirmed based upon this well-established authority.

[¶62] In sum, N.D.C.C. § 29-21-14 dictates the result in this case. "The language of [N.D.C.C. § 29-21-14] is so plain that no room is left for interpretation." Kent, 62 N.W. at 638. The only evidence the State produced connecting Weight to the commission of the criminal mischief charge was the testimony of an accomplice, C.G. "But, tested by an inflexible rule of law, that testimony cannot support a conviction." Coudotte, 72 N.W. at 916. There is

simply no corroborative evidence connecting Weight with the commission of the offense, and which is inconsistent with Weight's innocence, and therefore the trial court correctly entered Judgment of Acquittal.

CONCLUSION

[¶63] The State has no ability to appeal from a trial court's judgment of acquittal. This is precisely what the State is attempting to do in this matter, as the trial court entered a Judgment of Acquittal after determining the State's evidence at trial was insufficient to sustain a conviction. Given the lack of statutory authority under N.D.C.C. § 29-28-07, the Court must dismiss the State's appeal.

[¶64] Alternatively, the State is prohibited from appealing under the Double Jeopardy Clause of the United States Constitution and Article 1, Section 12 of the North Dakota Constitution. The trial court acquitted Weight after concluding the evidence was legally insufficient to support a guilty verdict. Consequently, the State's appeal must be dismissed because the State cannot appeal or retry the matter under the Double Jeopardy Clause.

[¶65] Finally, if the Court considers the merits of the State's appeal, the trial court's determination under N.D.C.C. § 29-21-14 should be affirmed. N.D.C.C. § 29-21-14 prohibits a conviction based on accomplice witness testimony, unless that testimony is corroborated in the manner set forth under the statute. Specifically, there must be independent evidence, aside from the accomplice's testimony, that connects the Defendant with the commission of the offense and is inconsistent with the

Defendant's innocence. Evidence that merely shows the commission of the offense, or the circumstances of the offense, or evidence that merely raises a suspicion or speculation as to the Defendant's guilt, is not sufficient under the statute. The trial court reviewed all of the evidence offered by the State and correctly concluded there was no corroborative evidence that satisfies the dictate set forth under N.D.C.C. § 29-21-14. Because the State failed to produce corroborative evidence under the statute, the trial court's Judgment of Acquittal should be affirmed.

Dated: March 23, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for Appellee Taylor Weight in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 7,219 words (excluding words contained in **(1)** the table of contents, **(2)** the table of authorities, and **(3)** this certificate), which is within the limit of 8,000 words.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellant, vs. Taylor Weight, Defendant and Appellee,	))))))))))	Supreme Court No. 20140382 District Court No. 23-2014-CR-00037 **CERTIFICATE OF SERVICE**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

I hereby certify that on March 23, 2015, I caused to be electronically filed the **Appellee's Brief *and* Motion to Dismiss State's Appeal from Judgment of Acquittal** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same electronically as follows:

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Dated: March 23, 2015.

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