

THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	SUPREME COURT NUMBER 20150144
Appellee/ Plaintiff	)	
	)	
vs.	)	
	)	
Jeremy Hannah	)	
Appellant/ Defendant,	)	
	)	
	)	
	)	

---

APPELLANT’S BRIEF

---

APPEAL FROM THE GUILTY VERDICT AND JUDGMENT ENTERED ON  
APRIL 7, 2015 IN THE NORTHWEST JUDICIAL DISTRICT

Honorable Paul Jacobson, Judge of the District Court.

---

ASHLEY GULKE (ID# 06829)  
Attorney for Defendant  
Post Office Box 931  
Minot, ND 58702  
(701) 353-5855  
ashleygulke@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS ..... page 2

TABLE OF AUTHORITIES ..... page 3

STATEMENT OF ISSUES PRESENTED FOR REVIEW ..... page 4

STATEMENT OF THE CASE .....Paragraph 1-4

STATEMENT OF THE FACTS ..... Paragraph 5- 6

JURISDICTIONAL STATEMENT.....Paragraph 7

STANDARD OF REVIEW..... Paragraph 8

LAW AND ARGUMENT ..... Paragraph 9-13

CONCLUSION ..... Paragraph 14

## TABLE OF AUTHORITIES

Statute or Rule	Paragraph
N.D.C.C. 12.1-17-01.	1
N.D. Const. art. VI, §§ 2 and 6	7
North Dakota Rules of Appellate Procedure	7
North Dakota Rules of Criminal Procedure	7
N.D.C.C. 12.1-1701(1)(a).	10
N.D.C.C. 12.1-01-4 (4).	10

Case Law	Paragraph
<u>State vs. Graf</u> , 2006 N.D. 1996 at paragraph seven; 721 N.W. 2d 381	8
State v. Miller, 357 N.W.2d 225 (N.D. 1984)	9
State v. Holy Bull, 238 N.W.2d 52 (N.D. 1975)	9
Thomas v. State, Supra; People v. Johnson, 356 N.E.2d 1373 (Ill.App.Ct. 1976)	9
United States v. Jones, 545 F.2d 1112 (8 Cir. 1976), cert. denied, 429 U.S. 1075, 97 S.Ct. 814, 50 L.Ed2d 793 (1977).	9
State v. Cruikshank, 13 N.D. 337, 100 N.W.697 (N.D. 1904)	10
Bunnell v. Sullivan, 947 F. 2d 341 (1991)	10
Craig v. Chater 76 F. 3d 585 (1996)	10
Belinsky v. Hansen 261 N.W.2d 390 (1977)	10
People v. Perez 965 N.Y.S.2d 702, 40 Misc.3d 448 (2013)	10
State v. Godinez, 111 Ariz. 397, 398, 531 P.2d 154, 155 (1975)	10
State v. Schneider, 550 N.W.2d 405, 407 (N.D.1996)	11

## STATEMENT OF THE ISSUES

1. Can a third party testify to whether an alleged victim experienced pain where there is absolutely no indicia, by testimony nor by photograph, of physical injury and where the alleged victim maintained from the time of the alleged incident to the time of trial that she was never injured by nor experienced pain due to actions of the defendant?
2. Is it good public policy to allow someone to be convicted of assault based on the testimony of a third party when the alleged victim never showed any signs of physical injury and never stated that she experienced any pain, and always maintained that she was not hurt nor injured?

## STATEMENT OF THE CASE

[1] This is an appeal from the Criminal Judgment entered on April 6, 2015 by Judge Jacobson after a guilty verdict from a jury trial. A complaint was filed against Appellant on October 10, 2014 alleging Appellant had committed the crime of Simple Assault Domestic Violence in violation of N.D.C.C. 12.1-17-01. The issue went to trial on April 6, 2015.

[2] The Appellant made a Rule 29 Motion for Acquittal after the state was finished presenting its evidence. Judge Jacobson ruled by stating the following, “Well, I ‘ll tell you what, obviously this has got to be one of the closer motions for 7 acquittal that I’ve see under Rule 29..... I ‘m going to deny the motion. We’ll let the jury decide who is to be believed and what happened.” [Transcript Page 82, Lines 5-12] On April 6, 2015, the jury delivered a guilty verdict and a judgment was entered accordingly.

[3] On April 13, 2015, Appellant filed a motion to renew his Rule 29 Motion for Judgment of Acquittal which was denied on June 23, 2015 by Judge Paul Jacobson.

[4] The appeal is now before the Court.

## STATEMENT OF THE FACTS

[5] The facts are that Ms. Pogue, the alleged victim, never stated she was in pain and there was no testimony at trial what-so-ever that she had any impairment of physical condition. On the contrary, evidence was presented by all police officers that there were no indicia of bodily injury to Ms. Pogue. Officer Mees testified that the alleged victim did not have a black eye, no lacerations on her face, no bruises, no red marks and when asked, "So you didn't observe any signs of injury?" Mees's response was, "no" [Transcript Page 53 lines 15-25] When Dylan Bostic, Watford City Police Officer, testified, he stated that the arrest of appelland was based solely on the reports of Ms. Robinson and that there was not any injury on the victim. [Transcript page 61 lines 7-9] He also answered that if someone was whaling on somebody that the victim would probably have some visible marks. [Transcript Page 59-60]

[6] Ms. Pogue's story never changed. At the time of the initial arrest, she testified that she requested that the police officer take photographs of her because she had not been hit. The police officer denied her request and told her to take pictures of herself- so she did and these pictures were offered into evidence and show a young woman with not one mark upon her face or neck. [Transcript Page 73-74] The only evidence offered of any physical pain caused to Ms. Pogue was the speculation of Ms. Robinson, a passerby, who believes she saw, albeit through tinted windows of a "jacked up" pickup truck, a fight between two people. [Transcript Page 34 to 43] In Ms. Robinson's testimony, she points out that she could not see well and thought that the Appellant and alleged could be joking or "roughhousing" [Transcript Page 35 line 16]. So in an attempt to view the situation she moved to the back of jacked up pickup truck with tinted windows and

peered over the bed through the backseat to see what was happening in the front seat.

[Transcript Page 38] Ms. Robinson claimed that the alleged victim was punched in the upper part of the body- yet the pictures entered into evidence show no signs of bruising or harm to the alleged victim. [Transcript- Exhibits page 77] Ms, Robinson guessed that if she were being hit she would be in pain. [Transcript- Page 39] However, the transcript is devoid of any evidence suggesting that the alleged victim, herself, experienced any pain what-so-ever. In fact, the alleged victim testified that she didn't experience any pain. [Transcript page 77 lines 13 and 15; Transcript Page 78 lines 13-15].

## JURISDICTIONAL STATEMENT

[7] This court has jurisdiction to hear this appeal under N.D. Const. art. VI, §§ 2 and 6, and the North Dakota Rules of Appellate Procedure and the North Dakota Rules of Criminal Procedure.



## STANDARD OF REVIEW

[8] In Graf, this court stated very specifically questions of law are fully reviewable on appeal and whether a finding of fact meets a legal standard is a question of law. State vs. Graf, 2006 N.D. 1996 at paragraph seven; 721 N.W. 2d 381 Therefore, it follows that the trial court's determination of guilt based upon its findings of fact are subject to the fully reviewable on appeal standard of review that was most recently set out in State vs. Graf.

## ARGUMENT

1. Can a third party testify to whether an alleged victim experienced pain where there is absolutely no indicia, by testimony nor by photograph, of physical injury and where the alleged victim maintained from the time of the alleged incident to the time of trial that she was never injured by nor experienced pain due to actions of the defendant and if that person's testimony is admissible, does it rise to the level of proof beyond a reasonable doubt?

[9] A third-party cannot testify to whether an action hurt another individual.

Obviously, mere speculation, surmise, guesswork, conjecture, or suspicion that an accused is guilty is insufficient to overcome the presumption of innocence and does not authorize a conviction. *State v. Miller*, 357 N.W.2d 225 (N.D. 1984); *State v. Holy Bull*, 238 N.W.2d 52 (N.D. 1975); *Thomas v. State*, *Supra*; *People v. Johnson*, 356 N.E.2d 1373 (Ill.App.Ct. 1976); (*United States v. Jones*, 545 F.2d 1112 (8 Cir. 1976), cert. denied, 429 U.S. 1075, 97 S.Ct. 814, 50 L.Ed2d 793 (1977)). The testimony of Ms. Robinson was mere speculation and does not authorize a conviction.

[10] The important constituent elements of the offence of simple assault requires one to willfully cause bodily injury. Previously, "assault" only required a "threatened violence with apparent ability to commit a battery." *State v. Cruikshank*, 13 N.D. 337, 100 N.W.697 (N.D. 1904). The 1973 Legislature eliminated the concept of "battery" and now the term "assault" required that there be a "bodily injury." N.D.C.C. 12.1-1701(1)(a). Bodily injury is defined as "any impairment of physical condition, including physical pain." N.D.C.C. 12.1-01-4 (4). Bodily injury as defined has two components: an objective component that is readily measurable (any impairment of physical condition) and a

subjective component which is solely left to the person who is injured (physical pain). This is to ensure that even if someone does not appear injured but insists he is, there will be recourse. However, it was not set in place so that another person can presume injury upon another who insists he did not have any pain. Case law, criminal and civil, federal and state, has established time and again that pain is subjective. See *Bunnell v. Sullivan*, 947 F. 2d 341 (1991), *Craig v. Chater* 76 F. 3d 585 (1996) *Belinsky v. Hansen* 261 N.W.2d 390 (1977); *People v. Perez* 965 N.Y.S.2d 702, 40 Misc.3d 448 (2013). *State v. Godinez*, 111 Ariz. 397, 398, 531 P.2d 154, 155 (1975). Only the person who allegedly experiences the pain can testify to whether she experiences the pain. Subjective measurements of bodily injury would include bruising, scrapes, broken bones, and the like.

[11] In this case there was neither objective nor subjective evidence of physical injury to Ms. Rebekah Pogue. Not one person testified that she had bruises, scrapes, a bloody nose, any lacerations, marks or physical manifestations of distress. Not one person testified that she was crying, moaning, or ever stated that she was in pain. There is simply no subjective evidence of physical injury. Furthermore, she testified herself that she did not experience any pain that day. Her story never changed from the date of the incident to the time of trial. Due process requires and protects an accused from conviction except upon proof beyond a reasonable doubt of every element of the offense. *State v. Schneider*, 550 N.W.2d 405, 407 (N.D.1996). In this case, the state did not produce one piece of evidence to meet the second prong of the charge simple assault- domestic violence let alone provide evidence that supports a conviction beyond a reasonable doubt.

[12] Because the state did not present any evidence that there was any impairment of

physical condition, including physical pain to Ms. Pogue, Defendant hereby requests that the court overturn the jury's guilty verdict.

2. Is it good public policy to allow someone to be convicted of assault based on the testimony of a third party when the alleged victim never showed any signs of physical injury and never stated that she experienced any pain, and always maintained that she was not hurt nor injured?

[13] To uphold a guilty verdict in this case is terrible public policy. It leaves room for vindictive people to make false accusations against perceived enemies. It doesn't serve to protect anyone. Upholding a guilty verdict would allow someone previously in an abusive relationship to perceive a flirtatious tickling match between two young lovers in a car as abuse and to destroy the alleged perpetrator's life. Upholding a guilty verdict in this case where there is absolutely no physical evidence of harm to the alleged victim does not promote any valid public policy.

#### CONCLUSION

[14] When there are serious consequences to a crime, whether it be to reputation, gun rights, or merely jail time and fines—a guilty verdict based on the mere conjecture of a third-party observing through tinted windows on a jacked-up truck does not promote justice and makes way for a severely slippery slope. The Court should overturn the guilty verdict as a matter of law because there is no evidence of physical injury to the alleged victim nor is there any reliable evidence of pain of the alleged victim. One of these elements must be found for the appellant to be guilty as a matter of law and the evidence is simply lacking.

Submitted this 14<sup>th</sup> Day of September, 2015,

/s/ ASHLEY GULKE

---

ASHLEY GULKE (ID# 06829)  
Attorney for Defendant  
Post Office Box 931  
Minot, ND 58702  
(701) 353-5855  
ashleygulke@gmail.com

THE SUPREME COURT OF NORTH DAKOTA

Jeremy Hannah	)	SUPREME COURT NUMBER 20150144
Appellant,	)	
	)	
vs.	)	
	)	CERTIFICATE OF SERVICE
State of North Dakota,	)	
Appellee.	)	
	)	
	)	
	)	

[¶1] I certify that a true and correct copy of the foregoing document was filed on the 14<sup>th</sup> day of September, 2015 with the North Dakota Clerk of the Supreme Court through email:

APPELLANT’S BRIEF.

with the Clerk of the Supreme Court through email to the following:

Charles Neff, Jr. (# 06406)  
MCSA@mckenzie.co.nd.us

/s/ ASHLEY GULKE

---

ASHLEY GULKE (ID# 06829)  
Attorney for Defendant  
Post Office Box 931  
Minot, ND 58702  
(701) 353-5855  
ashleygulke@gmail.com

THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	SUPREME COURT NUMBER 20150144
Appellee/ Plaintiff	)	
	)	
vs.	)	CERTIFICATE OF SERVICE
	)	
Jeremy Hannah	)	
Appellant/ Defendant,	)	
	)	
	)	
	)	

I certify that a true and correct copy of the AMENDED  
 APPELLANT’S BRIEF was served upon the Mckenzie County  
 State’s Attorney’s Office on September 25, 2015. It was served  
 electronically through email to:

Mckenzie County State’s Attorney’s Office  
 MCSA@co.mckenzie.nd.com

/s/ ASHLEY GULKE

---

ASHLEY GULKE (ID# 06829)  
 Attorney for Defendant  
 Post Office Box 931  
 Minot, ND 58702  
 (701) 353-5855  
 ashleygulke@gmail.com