

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	
)	
vs.)	Supreme Court No. 20160349
)	
Darrell Froelich,)	
)	
Defendant/Appellant.)	

APPELLANT’S BRIEF

APPEAL FROM THE SEPTEMBER 16, 2016,
 JURY TRIAL CONVICTION AND CRIMINAL JUDGMENT
 BURLEIGH COUNTY DISTRICT COURT
 IN BISMARCK, NORTH DAKOTA
 THE HONORABLE JAMES S. HILL PRESIDING

ATTORNEY FOR APPELLANT
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ISSUES PRESENTED

- I. THE DEFENDANT HAS THE RIGHT TO APPEAL TO THE SUPREME COURT.

- II. WHETHER THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WITH THE WITNESS AGAINST HIM WAS VIOLATED?

STATEMENT OF THE CASE

[¶1] This is an appeal from the September 16, 2016, Jury Trial and Criminal Judgement entered on September 16, 2016. [Appendix 18-19; hereinafter A. 18-19].

[¶2] On February 10, 2016, a criminal complaint was filed charging Darrell Froelich (“Froelich”), with Simple Assault Domestic Violence. [A. 4]

[¶3] On September, 2016, a Jury Trial was conducted to determine the disposition of the case. During the trial State’s Exhibit 1 of a 911 call was admitted into evidence over objection. [A. 5-17]. Subsequently, Froelich was found guilty by the empaneled jury and a Criminal Judgment was entered. [A. 18-19].

[¶4] A Notice of Appeal and Request for Transcripts was filed on October 12, 2016. [A. 20-21].

STATEMENT OF THE FACTS

[¶5] On or about February 10, 2016, law enforcement was dispatched for a domestic violence situation at 2520 East Rosser Avenue #26, Bismarck, ND. The complainant, Krista Trehus, indicated that Froelich and Joshua Ensslin had got into a physical altercation. At the time both Froelich and Ensslin were residing together making the altercation a domestic investigation. Law enforcement made a determination after speaking with the complainant and Ensslin to charge Froelich with simple assault domestic violence. Froelich made his initial appearance in Court and plead not guilty to the charge. The case was set for trial on September 16, 2016.

[¶6] On September 16, 2016, a jury was empaneled to determine whether Froelich was guilty or not guilty of the charge. During the course of the trial the State had called Eric Moe to testify on behalf of the State. [A. 5-18]. Eric Moe works for the Central Dakota Communications Center, where he fields 911 emergency calls and nonemergency calls for the City of Bismarck, ND, and the City of Mandan, ND. [A. 6]. After an objection the Court allowed the State to introduce an audio tape of the complainant calling in the incident from February 10, 2016, without having the complainant available to testify. [A. 6-12]. The complainant was subpoenaed to testify at the trial but refused to come to Court to do such. [A. 9]. Subsequently, Froelich was found guilty of the charge.

LAW AND ARGUMENT

I. THE DEFENDANT HAS THE RIGHT TO APPEAL TO THE SUPREME COURT.

[¶7] Pursuant to NDCC § 29-28-03, a defendant may appeal from any or all verdicts, judgments, or orders enumerated in NDCC § 29-28-06. See also N.D.R.Crim.P. Rule 37. Accordingly, Froelich’s appeal of the jury verdict and Criminal Judgment are appropriately before the Court. State v. Jenkins, 339 N.W.2d 567 (N.D. 1983).

II. WHETHER THE DEFENDANT’S SIXTH AMENDMENT RIGHT TO CONFRONTATION WITH THE WITNESS AGAINST HIM WAS VIOLATED?

[¶8] The Sixth Amendment of the United States guarantees the Rights of the Accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

An accused's right to confrontation is fundamentally a trial right which consists of the right to cross-examination. State v. Manke, 328 N.W.2d 799 (N.D.1982). In addition to ensuring the accused the opportunity to cross-examine his accusers, the purpose of the Confrontation Clause is to ensure that a witness will give his statements in court under oath, thereby impressing upon him the seriousness of telling the truth as against penalty for perjury, and to permit the jury an opportunity to observe the demeanor of the witness in making his statement, thus aiding the factfinder in assessing credibility. California v. Greene, 399 U.S. 149, 158 (1970).

[¶9] The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54 (2004). During Froelich's trial the defense was clearly denied the opportunity for cross-examination. The Court allowed the 911 call to be played before the Jury without the complainant available to be cross examined by the defense. The complainant essentially was allowed to testify against Froelich without ever having to appear in Court. Froelich was clearly denied his Sixth Amendment right of confrontation. The complainant was subpoenaed but ignored the order to appear in Court to

testify. The statements made during the 911 call were testimonial about the incident from a witness who never had to testify in open court.

[¶ 10] An unavailable witness is defined in the North Dakota Rules of Evidence at 804 as:

a) Criteria for being unavailable. A declarant is considered to be unavailable as a witness if the declarant: (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; ...".

A witness is not "unavailable" when that witness simply does not appear for the court date after being subpoenaed at a correct address. In order to allow the jury to consider the 911 call without the testimony of the complainant, "the prosecution must either produce, or demonstrate the unavailability of, the declarant." Ohio v. Roberts 448 U.S. 56 at 65.

CONCLUSION

[¶11] WHEREFORE, for the reasons stated herein, the Appellant respectfully requests that the Court finds that the Appellant's Sixth Amendment right of confrontation was violated and reverses and remands the conviction and grants a new trial.

Respectfully submitted this 16th day of February, 2017.

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State of North Dakota,)	Supreme Court No. 20160349
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Plaintiff/Appellee,)	District Court No. 08-2016-CR-405
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vs.)	CERTIFICATE OF SERVICE
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Darrell Froelich,)	
)	
Defendant/Appellant.)	
)	
STATE OF NORTH DAKOTA)	
) ss.	
COUNTY OF BURLEIGH)	

Thomas Glass, the attorney for Petitioner/Appellant in the above action, hereby certifies under N.D.R.Civ.P. 5(f), that on February 16, 2017, he served the attached:

Appellant's Brief and Appellant's Appendix

upon the following person(s) by emailing a copy of the same to:

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upon the following person(s) by mailing a copy of the same to:

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