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 IN THE SUPREME COURT OF NORTH DAKOTA
 

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State of North Dakota,	)	Supreme Court File No.
	)	20200020
Plaintiff and Appellee,	)	
	)	Dickey County No.
v.	)	11-2019-CR-00068
	)	
Francisco Eugenio Bethancorth,	)	APPELLANT'S BRIEF
	)	
Defendant and Appellant.	)	

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Appeal from the Criminal Judgment in Dickey County District

Court, Southeast Judicial District, Ellendale, North Dakota,

January 9, 2020, the Honorable Daniel D. Narum presiding

ORAL ARGUMENT REQUESTED

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### Cases

#### **STATE CASES**

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### Statutes, Rules, & Codes

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#### **Oral Argument:**

Oral argument has been requested to emphasize and clarify the Appellant’s written arguments on their merits.

#### **Transcript References:**

The Jury Trial for this matter was conducted on January 6, 2020 and January 7, 2020. The transcript of the jury trial day one is referred to as [Tr1.] in this Brief. The transcript of the jury trial day two is referred to as [Tr2.] in this Brief.

STATEMENT OF THE ISSUE

[¶1] **ISSUE I. Did the trial judge err when he denied Defendant/Appellant Francisco Bethancorth's Motion for acquittal on the criminal trespass charge at the end of the State's case?**

## NATURE OF THE CASE

[¶2] The charges in this case are:

1. Criminal Trespass
2. Gross Sexual Imposition
3. Disorderly Conduct

[¶3] All charges were brought on citations that were filed with an affidavit of probable cause on 06/10/2019.

[¶4] After the preliminary hearing an Information charging the above criminal offence was filed on 07/16/2019 and amended on 08/07/2019.

[¶5] The jury trial in this case began on 01/06/2020 and ended on 01/07/2020 when a jury found Defendant/Appellant Francisco Bethancorth Guilty of the charges of Disorderly Conduct and Criminal Trespass – dwelling and not guilty of Gross Sexual Imposition – sexual contact – victim under 15.

[¶6] A criminal judgment was entered on 01/09/2020 and the judgment of acquittal on the Gross Sexual Imposition was entered on 01/14/2020.

[¶7] A notice of appeal, order for transcript, and notice of filing the notice of appeal was filed on 01/27/2020.

[¶8] The clerk's certificate of appeal and the clerk's supplemental certificate of appeal were filed on 03/12/2020.

[¶9] This case is now before the North Dakota Supreme Court.

## STATEMENT OF FACTS

[¶10] At about 2:30 A.M. on June 28, 2019 in the city of Oaks, North Dakota the Oakes Chief of police Matt O'Brien (Chief O'Brien) and police officer Jeremy Sitzler (officer Sitzler) were patrolling the Oakes Street Dance. While they were looking at a line of people at the food court waiting for food, they noticed three people in that line arguing. One of these people was Francisco Bethancorth (Francisco). Because Francisco was really getting after the other two men Chief O'Brien and officer Sitzler thought they had better go over and break up the argument. When they reached the three men arguing Chief O'Brien started talking to Francisco. Francisco responded by getting right into Chief O'Brien's face and arguing. This caused Chief O'Brien to end talking to Francisco, go to his patrol car, and call and ask Sheriff Chris Estes (Sheriff Estes) for help. Sheriff Estes answered Chief O'Brien's call and decided to come and help Chief O'Brien.

[¶11] As soon as Sheriff Estes arrived Francisco's demeanor changed. He stopped arguing and listened to what Sheriff Estes had to say. After hearing what Sheriff Estes had to say Francisco agreed that he would walk to and did walk to his house with Sheriff Estes.

[¶12] A few minutes after Sheriff Estes left Francisco's house Francisco decided to and did leave his house and go to the back door of Last Shot Bar in Oakes and tried to get in. He couldn't get in because it was after hours and the Last Shot Bar was closed.

[¶13] Sheriff Estes found out Francisco was at the back door of the Last Shot bar and went there to talk to Francisco. During his talk with Francisco he convinced Francisco to return to his home. He then walked Francisco home for the second time.

[¶14] Francisco decided to leave his home again and went to the Main Street in Oakes. Sheriff Estes found Francisco on the Main Street of Oakes and again talked Francisco into going home. Then for the third time he walked Francisco to his house.

[¶15] Francisco decided again to leave his home. After he left, he ended up going to the home of Joy and Dave Jones. Prior to that night Francisco hadn't met either Joy or Dave Jones or ever been in their home. When he got to their home he went in, took his hat off and laid down on a couch that Joy and Dave Jones' 12-year-old daughter was sleeping on and passed out.

[¶16] When Francisco went into the Jones' home Joy Jones was in her bed in the basement. Because she thought she heard a door slam and footsteps she got up to investigate. During her investigation she saw Francisco passed out laying on a sofa on top of her 12-year-old daughter. She knew something was wrong and hollered for her husband Dave Jones. Dave came running from the basement bedroom, yelling at Francisco. When he got to the living room, he helped Francisco up and escorted Francisco to the door. When Dave got to the door with Francisco, he pushed him out onto the deck, Francisco then tried to come back into the house. Dave then pushed Francisco's as hard as he could. Francisco stumbled on the deck, got up, and ran away.

**II. ISSUE I. Did the trial judge err when he denied Defendant/Appellant Francisco Bethancorth's Motion for acquittal on the criminal trespass charge at the end of the State's case?**

ARGUMENT

[¶17] The standard of review after a trial judge denies a Defendants North Dakota Rules of Criminal Procedure 29 is according to State v. Gagnon 1999 ND 13 [¶23], 589 N.W.2d 560:

“[¶ 23] To successfully challenge the sufficiency of the evidence on appeal, a defendant must show there is no reasonable inference of guilt when viewing the evidence in the light most favorable to the verdict. *State v. Steinbach*, [1998 ND 18](#), ¶ 16, [575 N.W.2d 193](#). By presenting evidence after the denial of the motion, the defendant permits this Court to review on appeal the entire record to determine whether sufficient evidence exists to sustain the verdict. *Id.* at ¶ 17, [575 N.W.2d 193](#). In deciding whether there is sufficient evidence, we do not resolve conflicts in the evidence nor do we weigh the credibility of the witnesses. *Id.* at ¶ 17, [575 N.W.2d 193](#). We determine only whether there is competent evidence which could have allowed the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. *Id.* at ¶ 17, [575 N.W.2d 193](#). We conclude there is substantial evidence in the record to support Gagnon's conviction.”

[¶18] In the case now before the court after the trial judge denied Defendant/Appellant Francisco Bethancorth's (Francisco) Rule 29 North Dakota Rules of Criminal Procedure Motion for acquittal Francisco called two witnesses named Steven Horner and Matt O'Brien and had admitted into evidence Exhibit #2 (See Appendix Page 17).

[¶19] Because of the Standard of Review in Gagnon the testimony of these two witnesses and Exhibit 2 can be considered as part of Francisco's appeal of the trial judges' denial of his Rule 29 North Dakota Rules of Criminal Procedure Motion for acquittal.

[¶20] Francisco's case on appeal has some facts in it that are similar to the facts in *State vs. Delaney* 1999 ND 89, 601 N.W. 2d 573 (Delaney). Those facts are:

1. Both Francisco and Delaney had consumed alcohol before they entered the dwelling belonging to another person.
2. The entries to the dwelling belonging to another person by both Francisco and Delaney were made in the early morning and were made without rapping.

[¶21] Some of the different facts that have no similarity between Francisco and Delaney are:



In Delaney

1. He knew who the owner of the dwelling he was entering and had been in the dwelling before.
2. He brandished a knife.
3. He made life threatening gestures and remarked.
4. He stabbed a dog.
5. He said he would kill the home owner.

In Francisco's case

1. He didn't know the owners of the dwelling he was entering and had never been in that dwelling before.
2. He had no knife.
3. He didn't make any life-threatening gestures or remarks.
4. He didn't stab a dog.
5. He didn't threaten he was going to kill anyone.

[¶22] What Francisco is claiming occurred in his case is that the facts show he was so intoxicated at the time that the trespass occurred he could not have knowingly trespassed. The North Dakota Statute he is relying on for this intoxication defense is North Dakota Century Code 12.1-04-02 Intoxication...Evidence of intoxication is admissible whenever it is relevant to negate or to establish an element of the offense.

[¶23] The North Dakota Statute that sets out the Criminal Trespass as charged in this case is North Dakota Century Code 12.1-22-03 (1):

“An individual is guilty of a class C felony if, knowing that that individual is not licensed or privileged to do so, the individual enters or remains in a dwelling or in highly secured premises.”

[¶24] In this case the trial judge gave the following jury instruction on intoxication and how it reduces culpability (See Appendix Page 18 & 19).

[¶25] Therefore the question in the case now before the court becomes: “from the time Francisco entered the dwelling of Joy and Dave Jones until the time he was pushed out by Dave Jones did his degree of intoxication negate his knowledge?”

[¶26] Francisco relies on the following testimony of witnesses at his trial and Exhibit #2 (Appendix Page 17) and jury instructions on Appendix Page 18 & 19 as proof that the only possible interpretation of his mental condition on June 8, 2019 is that he was so intoxicated at the time he entered the dwelling of the Jones’ until he was forcefully removed by Dave Jones, that his degree of intoxication negated his knowledge so he wasn’t able to commit criminal trespass.

[¶27] The testimony at trial Francisco is relying on starts with what the Oakes Chief of Police, Matt O’Brien testified to at trial after Francisco had left his home for the fourth time on June 8, 2019 found at Tr.2, Page 62 Line 20 to Page 64 Line 25:

“Q. So after the fourth time, the decision was made. Enough is enough. We’re taking him in.

A. Correct.

Q. What would be the reasoning or the rationale for taking him in? Was there a charge that was going to be filed? Or?

A. Disorderly.

Q. Okay. Would it also have been for detox, as well, would you say?

A. It would have to be determined after the fact. Like I said, we knew he was under the influence of something, but it was only suspicion, so we didn’t know.

Q. So, it would be determined, he would go in and take a breath test, and if he’s under the influence, detox would be also.

- A. For jail, they would want to have him do a breath test, so.
- Q. And so why would the jail want that?
- A. The jail does that to determine their mental state and physical state, so they're not held liable for anything that happens to him in the jail.
- Q. Essentially so they can be segregated from the other population in the jail if they're under the influence.
- A. That -- it depends. Even being aggressive and stuff like that, too, and they'll separate people as well.
- Q. So, essentially, the -- was there a consideration -- prior to the fourth time Mr. Bethancorth leaving his residence, was there a consideration for him being taken to the jail for detox?
- A. So when the Sheriff decided that he was going to try to take him home, we would go with that solution. We're not going to escalate things. Because the way he responded to myself trying to get him to go home and being aggressive towards me, we decided we'll see if the Sheriff can get him to go home. Like I said, we had too much going on in the city of Oakes. We wanted to try one more time, and that was it. That's what we said. Was, if he left this final time, we would take action, so we weren't wasting our man-hours in the middle of the night when we have other things going on.
- Q. So the rationale was, essentially, you didn't have the manpower to deal with a detox situation until it became a necessity.
- A. Well, my Officer Cihak just got done transporting somebody to Fargo, so we had a two-man department until he got back after -- I think it was the second time -- or, third time that Francisco left. So we were actually shorthanded before we were going to be done with the situation.
- Q. Oh, okay. And so when Mr. Bethancorth is eventually arrested, later on, you transported to Stutsman County; is that correct?
- A. He is transported to the hospital in Jamestown.
- Q. Okay. So he's transported to the hospital, first, to be medically cleared.

A. Correct.

Q. And then transported to the jail.

A. Correct.”

[¶28] The question of Francisco’s degree of intoxication is answered by Exhibit 2 (Appendix Page 17) as being .123 (PBT) on June 8, 2019 at 10:15 A.M. The fact his PBT would be higher at 2:30 A.M. is found in the testimony of Oakes Chief of Police Matt O’Brien in Tr. 2 Page 67, lines 6 through 13:

“Q. At the time that you had encountered Mr. Bethancorth until he was arrested, had you observed him consuming any alcoholic beverages?

A. I did not observe him drinking anything, no.

Q. Okay. So is it fair to say that, since he had a breath -- a blood test -- blood alcohol content of .123 at 10:15 in the morning, his blood alcohol content would have been exponentially higher at 2:30 in the morning?

MS. DEPUYDT: Objection. Calls for speculation.

THE COURT: Overruled.

THE WITNESS: From my training and experience, yes, it would be higher.”

[¶29] Francisco had never been in the dwelling he entered on June 8, 2019 and he didn’t know the dwelling belonging to Joy and Dave Jones according to Tr. 2, Page 10, Lines 7 through 14:

“Q. Prior to seeing Mr. Bethancorth in your living room, had you ever interacted with Mr. Bethancorth before?

A. No.

Q. Did you know him?

A. No.

Q. At any point in time, did you indicate that he could ever enter your home?

A. No.”

[¶30] After Francisco entered Joy and Dave Jones’ dwelling on June 8, 2019 he took off his cowboy hat and went over to a couch where the Jones’ 12 year old daughter was sleeping, lay down on top of her, and passed out:

Tr.2, Page 10, Lines 15 – 19:

“Q. After your daughter beckoned for you to get her father, what did you do?

A. I said I would be right back, and I ran downstairs and woke my husband up and told him that I needed help. There was a drunk guy passed out on top of my daughter.”

Tr.2, Page 16, Lines 20 – 25:

“Q. You had said a couple of times that you believed that Mr. Bethancorth had passed out. That he was passed out; is that right?

A. Yep.

Q. Do you believe he was drunk that night?

A. Yes.”

Tr.2, Page, 21, Lines 7 – 11”

“A. No. I would not know if he could have gotten up by himself. He was sleeping, passed out; however, you want to call it. He was sleeping. He was snoring when my husband ran in there. That’s automatically what he did. I was too busy focused on my daughter. My husband was handling that.”

[¶31] The trial judge in his ruling denying Francisco’s motion for acquittal under Rule 29 North Dakota Rules of Criminal Procedure said in Tr. 2, Page 48, Lines 1 – 6:

“On the Trespass, interestingly, I wasn’t aware of the facts as testified to. But, apparently, the defendant, based on the testimony of Mr. Jones, came back into the home after being ejected one, two, or three times. Clearly, on notice at that point that he was not invited or licensed or privileged to be there.”

[¶32] The above statement of the trial judge doesn’t agree with the following testimony of Dave Jones on Tr. 2 Page 25, Lines 20 to Page 26 Line 8...

“A. So I’m screaming at him to get out of my house. I open the door, and I shove him through the door, and he stumbled onto my deck that was attached to my house and tried to come back into my house.

Q. And what happened when he tried to come back in?

A. I shoved him again, and he go -- went across my deck, doubled over the rail, and came -- and stumbled onto the ground, the ground on my deck, not the “ground” ground.

Q. How hard did you push him that second time?

A. As hard I could.

Q. And after the second incident of you pushing Mr. Bethancorth from your door, what happened?

A. I noticed once he had fell onto -- to his knees or whatever, I noticed in the alley that there was -- there was...

[¶33] The crime of criminal trespass requires entry of the dwelling. Dave Jones pushing of Francisco out before he could enter the dwelling.

[¶34] There was also testimony of Dave Jones that Francisco said he would come back in Tr. 2, Page 27 Lines 1 - 7:

“Q. Did the defendant say anything to you during the course of this interaction?

A. I told -- I had told the defendant, as I was escorting him through the door, that he was pretty lucky that he didn’t get murdered doing something like this, and he told -- he had told me that he would be back, twice -- and he said that twice to me.”

[¶35] Francisco saying he was going to return is not a violation of criminal trespass in North Dakota Century Code 12.1-22-03 (1).

### CONCLUSION

[¶36] Francisco believes that the above and foregoing paragraphs set out all of the competent evidence and testimony in his case. From that evidence and testimony, there is only one conclusion, that his degree of intoxication negates his knowledge so he wasn't able to commit criminal trespass.

[¶37] That an order of remand should be sent by this court to the district judge that would require him to grant Francisco motion for acquittal under Rule 29 North Dakota Rules of Criminal Procedure and to dismiss the charge of criminal trespass.

Dated this 31<sup>st</sup> day of March, 2020

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Plaintiff and Appellee,	)	
	)	Dickey County No.
v.	)	11-2019-CR-00068
	)	
Francisco Eugenio Bethancorth,	)	CERTIFICATE OF COMPLIANCE
	)	
Defendant and Appellant.	)	

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[¶1] This Appellant’s Brief and Appendix complies with the pages limit of 38 for the Brief and 100 pages for the Appendix set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, as the Brief consists of 15 pages and Appendix consists of 33 pages.

Dated this 31<sup>st</sup> day of March, 2020

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	)	
Francisco Eugenio Bethancorth,	)	CERTIFICATE OF SERVICE
	)	
Defendant and Appellant.	)	

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[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Appendix  
Appellant's Brief

By email at the below address upon:

Mary E. Depuydt  
Dickey County States Attorney  
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North Dakota Supreme Court  
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And by placing a true and correct copy of said items in a sealed envelope with USPS mail

to:

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Dated this 31<sup>st</sup> day of March, 2020

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