

## IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,

Plaintiff/Appellee,

v.

Jose Javier Rivera-Rieffel,

Defendant/Appellant.

Supreme Court File Numbers:  
20200210Burleigh County District Court Numbers:  
08-2018-CR-02497**APPELLANT BRIEF**

Appeal from the Verdicts entered on March 6, 2020

and the Criminal Judgment entered on August 7, 2020 in Burleigh County

District Court, South Central Judicial District, Bismarck, North Dakota

the Honorable Gail Hagerty presiding

Benjamin C. Pulkrabek  
ND Bar No. 02908  
Pulkrabek Law Office  
402 First Street NW  
Mandan, ND 58554  
Office: 701-663-1929  
[Pulkrabek@lawyer.com](mailto:Pulkrabek@lawyer.com)  
*Attorney for the Appellant*

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STATEMENT OF THE ISSUE

**[¶1] I. Did the State produce sufficient circumstantial evidence to convict Mr. Rivera-Rieffel of the crimes of Murder and Child Abuse?**

NATURE OF THE CASE

[¶2] The charges in this case are Murder (Count 1), Child abuse (Count 2), and Disobedience of a Judicial Order (Count 3).

[¶3] This case began with the filing of a complaint and affidavit of probable cause on 08/10/2018.

[¶4] The preliminary hearing and arraignment were held on 10/15/2018. At the conclusion of the preliminary hearing Defendant/Appellant Jose Javier Rivera-Rieffel (Mr. Rivera-Rieffel) was bound over in the above crimes.

[¶5] An information was filed and Mr. Rivera-Rieffel plead not guilty to the crimes.

[¶6] The information was amended on 05/15/2019.

[¶7] Mr. Rivera-Rieffel plead guilty to only Count 3, Disobedience of a judicial order on 02/04/2020 and judgment on Count 3 was entered on that day.

[¶8] The jury trial on Count 1 and Count 2 began on 03/02/2020 and ended on 02/05/2020 with the jury finding Mr. Rivera-Rieffel guilty of Count 1 and Count 2.

[¶9] Sentencing of Mr. Rivera-Rieffel was done via Zoom on 08/07/2020 and the judgment was filed on the same day.

[¶10] The notice of appeal, order for transcript, and notice of filing the notice of appeal was filed on 08/11/2020.

[¶11] The clerk's certificate of appeal was filed on 09/08/2020.

[¶12] This matter is now before the North Dakota Supreme Court.

## STATEMENT OF FACTS

[¶13] In this case the Defendant/Appellant Jose Javier Rivera-Rieffel (Mr. Rivera-Rieffel) was found guilty at a jury trial on two counts, (1) Murder, and (2) Child abuse. All the evidence the state presented against Mr. Rivera-Rieffel during the jury trial was circumstantial evidence.

[¶14] There were only two persons who were eye witnesses to the crime charged were K.R.L. and S.R.L. K.R.L. is the sister of S.R.L. and was only about a year and a half old at the time the above crimes were committed. Therefore, she was too young to testify. S.R.L. was the person who was murdered.

[¶15] The state's case focused on the two caretakers of K.R.L. and S.R.L. on April 18<sup>th</sup> and 19<sup>th</sup> of 2018 which are the dates the above crimes occurred. The two caretakers were K.R.L. and S.R.L.'s mother, J.L. and their father, Mr. Rivera-Rieffel.

[¶16] The address where K.R.L., S.R.L., and their mother lived on April 18<sup>th</sup> and 19<sup>th</sup> of 2018 was 1428 N. 21<sup>st</sup> Street Unit #1 Bismarck, ND

[¶17] Mr. Rivera-Rieffel at that time had no address. He was living in his car. He had been coming daily to the above address to take care of K.R.L. and S.R.L. while their mother J.L. worked at North Walmart.

[¶18] When the police investigated this case both J.L. and Mr. Rivera-Rieffel told more than one story as to what had occurred.

[¶19] J.L. according to the police was very upset about what happened to S.R.L. Mr. Rivera-Rieffel, according to the police, appeared calm and wasn't as upset as the police thought he should be.

[¶20] During the trial the only evidence the state produced against Mr. Rivera-Rieffel was circumstantial evidence.

[¶21] At the end of the states case the Defendant made a Rule 29 North Dakota Rules of Criminal Procedure, Motion for directed verdict, Jury Trial Day 4 Transcript dated March 5, 2020 P. 22 L. 11 – 23:

“MR. MORROW: Yes. Pursuant to Rule 29, North Dakota Rules Criminal Procedure, we'd ask for a directed verdict of acquittal on both charges. The State has not shown prima facia evidence that each and every one of these essential elements has been proven to a prima facia level, especially on the issue of causation. They -- I do not believe that there was any evidence that -- essentially, what the State is arguing is, she died, we need to figure out who did it. But they never placed any weapon or instrument that could have caused the injuries from the death in the hands of Mr. Jose Rivera-Rieffel. So we'd ask for a directed verdict of acquittal on both the murder and the child abuse charges.”

[¶22] The trial court denied Defendants request for a directed verdict of acquittal.

**ISSUE I. Did the State produce sufficient circumstantial evidence to convict Mr. Rivera-Rieffel of the crimes of Murder and Child Abuse?**

ARGUMENT

STANDARD OF REVIEW

[¶23] According to Rourke v. State, 2018 ND 137, 912 N.W.2d 311, the standard of review standard of review is well established when a defendant challenges the sufficiency of the evidence to support a jury verdict:

“In reviewing the sufficiency of the evidence to convict, we look only to the evidence most favorable to the verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction. A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor.

State v. Knowels, 2003 ND 180, ¶ 6, 671 N.W.2d 816 (quotation marks omitted) (citations omitted). “A conviction may be justified on circumstantial evidence alone if the circumstantial evidence has such probative force as to enable the trier of fact to find the defendant guilty beyond a reasonable doubt.” State v. Noorlun, 2005 ND 189, ¶ 20, 705 N.W.2d 819 (citing State v. Steinbach, 1998 ND 18, ¶ 16, 575 N.W.2d 193). “A verdict based on circumstantial evidence carries the same presumption of correctness as other verdicts.” Noorlun, 2005 ND 189, ¶ 20, 705 N.W.2d 819 (citing Steinbach, 1998 ND 18, ¶ 16, 575 N.W.2d 193). “[A] jury may find a defendant guilty even though evidence exists which, if believed, could lead to a not guilty verdict.” Noorlun, at ¶ 20 (citing State v. Wilson, 2004 ND 51, ¶ 9, 676 N.W.2d 98)”

[¶24] The jury instruction given by the trial judge in this case on circumstantial evidence was:

**“DIRECT AND CIRCUMSTANTIAL EVIDENCE** a fact can be proved by either direct evidence or circumstantial evidence, or by both. If an eyewitness testifies about what the witness saw, that is an example of direct evidence. If the ground is bare when you go to sleep but is covered with a blanket of snow when you awake, this is circumstantial evidence that it snowed while you were asleep.

A person can be convicted on circumstantial evidence alone if the circumstantial evidence is consistent. If one piece of circumstantial evidence contradicts another piece of circumstantial evidence, the circumstantial evidence is not consistent. You can convict a person on circumstantial evidence alone if the circumstances proved exclude every reasonable theory except that the accused is guilty.”

[¶25] In this case a young child, S.R.L., died because of injuries. Medical professionals who examined the child’s body determined the child’s injuries had to be caused by someone. However, their examination couldn’t determine who that someone was.

[¶26] The police narrowed their search for someone down to two people who were caretakers of the child during the time she could have been injured. These two caretakers were her mother, J.L., and her father, Mr. Rivera-Rieffel. The police decided during their investigation that the mother, J.L. couldn’t have caused the injuries and that the father was the one that caused the child’s injuries.

[¶27] The police’s case against the father, Mr. Rivera-Rieffel, is based on the testimony of witnesses that said he didn’t act as concerned or as excited as he should have been when and after the child died.

[¶28] The following testimony was given by the mother, J.L. on March 3, Tr. P. 262 L. 24 – P. 263 L. 12:

- “Q. So did you have any trouble with the way that Jose would watch the girls?  
A. Not until the last day.  
Q. You felt comfortable with him taking care of the girls?  
A. Yes.  
Q. You didn't see any signs that he was abusing them or taking advantage of them and not feeding them when they should have been fed?  
A. No.  
Q. So when you got back on those nights -- on the morning hours of those nights previous to April 18th, everything was okay with S.?  
A. Everything was okay with S. and K.”

[¶29] The above testimony of J.L. makes it clear that she thought Mr. Rivera-Rieffel was a good father and he was very concerned when S.R.L. died.

[¶30] Further testimony of J.L. on March 3, 2020 p.283 L. 14 – p. 284 L. 15:

- “Q. Then you said that when you saw the defendant performing CPR on S. and then you took S., that you said he was scared. Why did you say he was scared?  
A. He was shaking. He was worried.  
Q. Did he say what he was worried about, if he was worried about S., or if he was worried about getting in trouble?  
MR. MORROW: I'll object and move to strike as a leading question.  
THE COURT: Objection overruled.  
Q. (MS. LAWYER CONTINUING) So did he say why he was worried, if he was worried about S. or worried about himself?  
MR. MORROW: I'll still object, Your Honor. I think the question should be did he say anything, not why he said something.  
THE COURT: Well, there were alternatives and she may answer, if neither of those alternatives fits what she knows about the situation.  
Q. (MS. LAWYER CONTINUING) You can answer.  
A. So, like, no, I don't know what he was, like, worried about, but he did -- he was worried about.”



- Q. And you've known him, you said, for about -- how long at that time had you been together, had you known him?
- A. Six years.
- Q. And so you had seen him worried before, you knew what that looked like?
- A. Yes.”

[¶31] Ashley Price who lived in apartment 3 in the same apartment house as the one J.L. lived in on April 18th and 19th of 2020 when questioned about what occurred said on

Wednesday, March 4, 2020 Tr. P. 69 L. 3 – L. 22:

- “Q. Ms. Price, do you recall speaking with law enforcement officers concerning this instance?
- A. I do.
- Q. Do you recall seeing anything out of the ordinary the evening prior on April 18, 2018?
- A. I don't recall.
- Q. Did you hear anything out of the ordinary that evening?
- A. I don't remember anything specific at that time, no.
- Q. Did you hear a baby crying the night prior?
- A. I heard baby crying quite often from their apartment; very often, in fact. Me and my husband would often say, boy, that baby cries a lot, but I don't remember if it was that specific night or not.
- Q. Do you recall talking to law enforcement officers about a baby crying?
- A. I'm -- I don't really. I mean, I'm sure I said that I had heard lots of crying out of there, but I guess I don't recall telling them on the specific day that it was – that the baby was crying.”

[¶32] From the above testimony Ashley Price didn't hear anything unusual coming from Apartment #1 on February 18<sup>th</sup> and 19<sup>th</sup>, 2020.

[¶33] According to the testimony of Brett Naill on March 4, 2020, Tr. P. 187 L. 9 – P. 190 L. 25:

- “Q. Okay. You subsequently obtained a search warrant for DNA tissue and -- and samples?
- A. I'm going to -- I don't believe we -- oh, yes, yes, yes. On the 30th. That's what we were looking for, yes.
- Q. Okay. So you were in the apartment on the 25th? Excuse me, was that the initial time you were in the apartment?
- A. The 19th. The night of the 19th.
- Q. 19th. Okay. And was that when you noticed the holes in the wall?

A. Yes.

Q. And then armed with that information, you went to the courts and obtained, on the 30th of April, a search warrant?

A. Yes.

Q. Okay. What caused you to suspect there might be evidence on the hole in the sheetrock?

A. My inexperience as an investigator, while speaking with Dr. Koponen, at the autopsy, he made me realize that, yes, if somebody hit this sheetrock wall, if somebody hit this TV, if S. was swung into it, struck it, whatever, her DNA may be on that wall. So my inexperience as an investigator, I did not collect that the first day that we were in that apartment.

Q. Is -- did you bring that example to the -- to Dr. Koponen or did he mention it? This might be something --

A. As far as what could have caused the injuries? I described -- oh, I'm sorry.

Q. Did you talk to Dr. Koponen, give him the information that you had suspicions about the DNA being left behind at the hole in the sheetrock?

A. Yes.

Q. Okay. That caused you suspicion? There might be something there?

A. Yes.

Q. And ultimately there was nothing there?

A. Yes.

Q. That could be confirmed by DNA testing?

A. Correct.

Q. Okay. How about the TV and the TV stand? Was that also a similar outcome?

A. Yes.

Q. Okay. Were you able to determine when that hole in the master bedroom was placed there?

A. Me -- me, during my investigation, I was not able to determine when that hole was placed.

Q. Okay. Did you notice anything like saw dust -- sheetrock dust or particles on the ground or around that that would indicate it was a fairly recent strike in the wall?

A. On the hole in the bedroom, yes. On the kitchen I don't believe so -- or the wall between the kitchen and living room, I don't think there was. On the - - the hole in the bedroom, yes, there was sheetrock dust.

Q. Did you either ask J. or Jose about that hole in the wall?

A. I did ask J. about it.

Q. And what was her comment?

A. She didn't know where it came from.

Q. How about the one in the kitchen, the smaller one in the kitchen?

A. She told me that that hole was made by her punching the wall.

Q. Did she indicate why she punched the wall?

A. She said when she was younger in Puerto Rico she would hit the wall to strengthen her knuckles to protect herself.

- Q. Okay. And she had no -- no idea how that bigger hole had gotten into the sheetrock?
- A. She did not provide an answer to me about that hole.
- Q. Okay. So she just didn't give you any answer?
- A. She said she didn't know.
- Q. Oh, okay.
- A. I'm sorry.
- Q. That's okay. What was the general overall condition of the apartment when you first went in there on the 19th?
- A. It was lived in. It was organized but there was clutter.
- Q. Okay. Did you see any other -- anything else in the apartment that led you to believe that that should be collected? Any blood or --
- A. No.
- Q. There wasn't any blood in -- by the hole in the sheetrock?
- A. No.
- Q. Okay. Did you ever find anything that you believed to be the mechanism for the injuries to S.?
- A. The mechanism was blunt force trauma from my understanding. As far as what caused that trauma, no.
- Q. So there wasn't anything else like a board or baseball bat or anything else that would be solid enough to cause those injuries?
- A. There were multiple items in the apartment that would have been solid enough but nothing that stuck out.

[¶34] According to officer Naill's testimony there was nothing ever found in Apartment #1 that could be connected to S.R.L.'s death.

#### CONCLUSION

[¶35] There wasn't sufficient circumstantial evidence to convict Mr. Rivera-Rieffel of the crimes of Murder – Extreme indifference – Child victim and Child Abuse – Victim under the age of six. Therefore, this case should be remanded to the district court with an order to dismiss this case.

Dated this 9<sup>th</sup> day of November, 2020.

/S/ Benjamin C. Pulkrabek

Benjamin C. Pulkrabek

Pulkrabek Law Office

402 – 1<sup>st</sup> Street NW

Mandan, ND 58554

P: (701) 663-1929

Email: [pulkrabek@lawyer.com](mailto:pulkrabek@lawyer.com)

Attorney for Defendant, Jose Javier Rivera-Rieffel

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**CERTIFICATE OF COMPLIANCE**

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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 N.D. R. App. P. 32 and N.D. R. App. P. 25, as the Brief consists of 12 pages and Appendix consists of 24 pages.

Dated this 9<sup>th</sup> day of November, 2020

/S/ Benjamin C. Pulkrabek  
Benjamin C. Pulkrabek  
ND Bar No. 02908  
Pulkrabek Law Office  
402 First Street NW  
Mandan, ND 58554  
(701) 663-1929  
pulkrabek@lawyer.com

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**CERTIFICATE OF SERVICE**

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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:

Julie Lawyer  
Burleigh County States Attorney  
Bc08@nd.gov

North Dakota Supreme Court  
supclerkofcourt@ndcourts.gov

And by placing a true and correct copy of said items in a sealed envelope with USPS mail with proper postage affixed to:

Jose Javier Rivera-Rieffel  
C/O North Dakota State Penitentiary  
P.O. Box 5521  
Bismarck, ND 58506-5521

Dated this 9<sup>th</sup> day of November, 2020.

/S/ Cassy Larson  
Cassy Larson  
Legal Assistant to Benjamin C. Pulkrabek  
Pulkrabek Law Office  
402 – 1<sup>st</sup> Street NW  
Mandan, ND 58554  
(701) 663-1929  
pulkrabek@lawyer.com