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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 9, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Mason Jordan Schuh, Defendant and Appellant.	Supreme Court File No. 20210257 Burleigh County District Court No. 08-2020-CR-01198 **APPELLANT BRIEF**

BRIEF OF APPELLANT, MASON JORDAN SCHUH

Appeal from the Criminal Judgment

Entered on the 8th day of September, 2021.

In District Court, Burleigh County, State of North Dakota

The Honorable Bonnie Storbakken Presiding

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶1] **ISSUE I.: Did the trial judge err when she failed to include the following words "even though that belief is mistaken" with the K 3.34 jury instruction?**

ISSUE II: Did the trial judge err when she allowed into evidence a rap audio recording of the Defendant?

NATURE OF THE CASE

[¶2] The charges in this case are three counts of attempted murder, all are class A felonies.

[¶3] This case began with the filing of an information and affidavit of probable cause on April 28, 2020.

[¶4] The initial appearance was held on April 30, 2020.

[¶5] At a preliminary hearing on June 19, 2020 probable cause was found to bind Mason Jordan Schuh (Mr. Schuh) over on all three counts. After the bind over Mr. Schuh plead not guilty to each of the three counts.

[¶6] A scheduling order was entered on June 19, 2020 setting a three-day felony jury trial for September 30, 2020 through October 2, 2020.

[¶7] An amended information and notice of state's amended exhibit list was filed on April 13, 2021.

[¶8] A second amended Information was filed on June 22, 2021.

[¶9] The jury trial on the second amended information began on June 30, 2021 and ended on July 2, 2021 with the jury finding Mason Jordan Schuh not guilty of count 4 and count 6, attempted murder, and guilty of count 5, attempted murder.

[¶10] The sentencing hearing was held on September 7, 2021 and the criminal judgment was entered on September 8, 2021.

[¶11] The notice of appeal, order for transcript, and notice of filing the notice of appeal were filed on September 20, 2021.

[¶12] The clerk's certificate on appeal was filed on October 15, 2021.

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

STATEMENT OF FACTS

[¶14] On April 24, 2020 at about 7:00 p.m. in Burleigh County three juvenile males had stopped at a stop light at the intersection of Tyler Parkway and Burnt Boat Drive in Bismarck North Dakota. Stopped at the same intersection was a tan two door 2001 Chevy blazer driven by Albert Crews. Mr. Schuh was a passenger in the back seat of that vehicle.

[¶15] The following testimony of Mr. Schuh tells what occurred on April 24, 2020 at that intersection, Jury Trial Day Two Tr. pg. 91 L. 11 to pg. 92 L. 25:

"BY MR. WIESE:

Q. Good afternoon, Mason. Can you state your name for the record, please.

A. Mason Jordan Schuh.

Q. What city do you currently reside in?

A. Bismarck, North Dakota.

Q. There's been a lot of testimony the last day and a half in regards to what happened that fateful April day of last year. Let's hear from you. What happened? You pull up to that stoplight, what happened?

A. When we pulled up to the stoplight, I was on my phone previously. So when we pulled up, the vehicle stops, and I looked up. We had a red light so -- and there was no traffic moving, so I didn't know which way -- who was going to go. We were in the right-turning lane, we could have turned. So I look left, didn't see any moving. I look right, didn't see any moving. I look left again. When I look left the second time, I witness a gun in the -- or the backseat of the vehicle next to me, and the closest person to that would have been my driver, Albert Crews, who was previously up here, and I truly felt that his life was in serious danger, and either he would get shot or killed. I was scared for him. And then since I'm not in physical control of the vehicle,

I can't just run away, so I would be next to follow suit. So I -- I was scared for the kid, honestly, and I would be next. I don't know these people. So I decided to grab my firearm from my lap and shot twice at the backseat passenger, who had his gun aimed at my co-defendant, as well as myself. Shot twice and left.

Q. Thank you, Mr. Schuh. So it's your contention that you fired in self-defense?

A. Absolutely. Not only for myself, but for Brandon. He's the closest one to it. He can't get out of there. What is he supposed to do? Take off in the middle of an intersection? That's a danger to everybody. And what happens if they would have pulled the trigger? He'd be dead. There's a chance that I could be dead. I -- absolutely self-defense. I defended him and I defended myself, 100 percent.

[¶16] At the trial the judge gave the following jury instruction on pg. 9 of the Jury Instructions:

"SELF-DEFENSE (REASONABLENESS OF ACCUSED'S BELIEF)
The Defendant's conduct is to be judged by what the Defendant in good faith honestly believed and had reasonable grounds to believe was necessary to avoid apprehended death or great bodily injury.

STANDARD OF REVIEW

[¶17] According to State v. Reddig, 876 N.W.2d 34 (N.D. 2016) an error derived from a statute is not of constitutional magnitude. In this case the error is derived from a statute. Therefore, the standard of review is to determine whether or not that error had significant impact on the verdict but that error does not have to be beyond a reasonable doubt.

ARGUMENT

ISSUE I.: Did the trial judge err when she failed to include the following words "even though that belief is mistaken" with the K 3.34 jury instructions?

[¶18] The North Dakota Statute that applies to this case is N.D.C.C. § 12.1-05-08:

> "Excuse. A person's conduct is excused if he believes that the facts are such that his conduct is necessary and appropriate for any of the purposes which would establish a justification or excuse under this chapter, even though his belief is mistaken. However, if his belief is negligently or recklessly held, it is not an excuse in a prosecution for an offense for which negligence or recklessness, as the case may be, suffices to establish culpability. Excuse under this section is a defense or affirmative defense according to which type of defense would be established had the facts been as the person believed them to be." (Emphasis added)

[¶19] The jury instruction given at the trial because of N.D.C.C. § 12.1-05-08 was K. 3.34, "Self-Defense (Reasonableness of Accused's Belief) 2012 The Defendant's conduct is to be judged by what the Defendant in good faith honestly believed and had reasonable grounds to believe was necessary to avoid apprehended death or great bodily injury..." N.D.J.I. Crim. No. K - 3.34 Self-Defense (Reasonableness of Accused's Belief) 2012 (North Dakota Jury Instructions - Criminal (2019 Edition)

[¶20] The above instruction doesn't, but should have included the following words: "even though his belief is mistaken". Without these words a jury could decide Mr. Schuh should be found guilty without considering he had a defense even if his belief was mistaken.

[¶21] In this case the Defendant did not object to the district judge giving N.D.J.I. Crim. No. K - 3.34 without the words "even though his belief is mistaken". Therefore, the state will argue that the Defendant/Appellant can't raise an issue for the first time on appeal. However, the following language used in State v. Kraft, 413 N.W. 2d 303 (N.D. 1987) says a Defendant can raise this issue even if he didn't raise it in the district court:

> "In Tatum v. United States, 190 F.2d 612, 615 (D.C.Cir.1951), cert. denied, 356 U.S. 943, 78 S.Ct. 788, 2 L.Ed.2d 818 (1958), quoting Kreiner v. United States, 11 F.2d 722, 731 (2d Cir.1926), the District of Columbia Court of Appeals stated that the "[f]ailure on the part of a trial court in a criminal case to 'instruct on all essential questions of law involved in the case, whether requested or

> not' " would clearly affect substantial rights within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure. 6 It was further stated that "in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility." Tatum, supra, at 617 (citing 53 Am.Jur., Trial Sec. 580); State v. Thiel, 411 N.W.2d 66 (N.D.1987); see also 75 Am.Jur.2d, Trial Secs. 575, 652 (1974).
>
> "In this instance, the trial court could take notice of the omission of an instruction to the jury on a defense based on the Uniform Commercial Code because it affected a substantial right of the defendant. In State v. Janda, supra, we stated that in cases of nonconstitutional error in failing to instruct where there was no objection, our task is to determine whether the error had a significant impact upon the verdict. After reviewing the record, we conclude that the error in not giving an instruction to the jury as to the defense or area of defense based on the Uniform Commercial Code had a significant impact upon the verdict and, therefore, constituted obvious error." (Emphasis added)
>
> "In State v. Janda, supra, we stated that in cases of nonconstitutional error in failing to instruct where there was no objection, our task is to determine whether the error had a significant impact upon the verdict. After reviewing the record, we conclude that the error in not giving an instruction to the jury as to the defense or area of defense based on the Uniform Commercial Code had a significant impact upon the verdict and, therefore, constituted obvious error" (Emphasis Added)

[¶22] Because of the above quote from Kraft the giving of an improper or incomplete jury instruction by the trial judge is an issue that a Defendant can raise on appeal even though he didn't raise it at the trial court. The question that is raised when the trial judge doesn't give a proper or incomplete jury instruction is "did the failure of a judge to give a proper or complete jury instruction have a substantial effect on the jury?". In this case the answer is "yes" because without the words "even though his belief is mistaken" the jury is allowed to convict Mr. Schuh without considering it is a defense even if his belief is mistaken.

[¶23] Another North Dakota case that deals with jury instruction is State v. Steffes, 500 N.W. 2d 608 (N.D. 1998) which states, "On appeal, jury instructions are fully reviewable and must be viewed as a whole; and when so considered, if they correctly advise

the jury as to the law, their inclusion or exclusion is sufficient." City of Minot v. Rubbelke, 456 N.W.2d 511 (N.D.1990); State v. Haakenson, 213 N.W.2d 394 (N.D. 1973).

CONCLUSION

[¶24] In this case the trial judge in her jury instruction failed to include the words "even though his belief is mistaken." This failure allowed the jury to convict Mr. Schuh without considering he had a self-defense defense even if his belief in self-defense was mistaken.

[¶25] This case should be remanded to the district court with an order telling the district judge to grant Mr. Schuh a new trial that will include adding the following language to the K 3.34 jury instruction: "even though his belief is mistaken.".

ISSUE II.: Did the trial judge err when she allowed into evidence a rap audio recording of the Defendant?

STANDARD OF REVIEW

[¶26] According to State v. Newnam, 409 N.W.2d 79 (N.D. 1987), "In ruling on the admissibility of evidence under Rule 403, N.D.R.Evid., the trial court has broad discretion to balance the probative value of the evidence against the risk of unfair prejudice, and the trial court's decision will not be overturned on appeal except for abuse of discretion." State v. Olson, 290 N.W.2d 664 (N.D.1980).

ARGUMENT

[¶27] The second issue in this case arises because Mr. Schuh on January 30, 2021 while incarcerated at the Burleigh Morton County Detention Center made a phone call on a detention center phone. All phone calls made on that detention center phone are recorded. The state reduced that recording to just the song Mr. Schuh rapped during his January 30, 2021 phone call and marked it Exhibit #52. This rap song included things that could be

related to the crimes charged against Mr. Schuh in this case and many things that aren't related to this case.

[¶28] The objections to State's Exhibit #52 made by Mr. Schuh's trial attorney are found in the Jury Trial Day Two Tr. pg. 72 L. 5 – L. 19:

> "MR. WIESE: Your Honor, the defense would object and -- on several grounds; first, the -- we believe the -- the prejudicial nature of the -- what's going to be played is going to be out -- is -- is going to outweigh any probative value of nature. We would request that the Court review the -- the playing before it would be presented to the jury because, like I said, we believe that the probative value is not going to be outweighed by the prejudice to Mr. Schuh. And then we would also object on the issue of relevancy, because there's nothing to say that it was -- it's specifically related to the incident. A phone call made at the jail months after isn't directly related. So on -- on several grounds we would be objecting, Your Honor, but we would strenuously recommend that the Court review the proposed exhibit."

[¶29] Another objection from Mr. Schuh's trial attorney is found in the Jury Trial Day Two Tr. pg. 75 L. 6 – L. 21:

> "MR. WIESE: Well, Your Honor, the testimony has been that it was a 9-millimeter, not a .45, there's no AR-15, which are both referenced in the video. There's inflammatory language. The N-word is a trigger word for many people, and we have no idea how members of the jury are going to be prejudiced by hearing the N-word.
>
> Rap music has -- has got a terrible reputation, and a lot of it is sheer artistic expression. They get away with it. But at the end of the day, rappers aren't out doing what they're talking about doing. And it's just -- he's charged with three attempted murders, yes. He's talking about what he's charged with. But the inflammatory language, this isn't -- this isn't a confession.
>
> This isn't he's in -- he's being spoken to by law enforcement. There's -- it's just -- it's not, Your Honor, and it's completely prejudicial to Mr. Schuh."

[¶30] The state's response to Mr. Schuh's objection is found in the Jury Trial Day Two Tr. pg. 74 L. 7 – L. 13:

> "MS. LAWYER: Yes, Your Honor. In that audio, he talks about how they're talking tough on Snapchat. Obviously we had that testimony that there were Snapchat messages that were provided between the parties, and that he pulled up and "blat blat" indicates what happened that evening. He talks about how he's charged with three attempted murders. So this is right on point with what happened that night.

[¶31] The state's goes on to say in Jury Trial Day Two Tr. pg. 74 L. 15 to pg. 75 L. 2:

> "MS. LAWYER: Your Honor, these are the defendant's own words. He's the one that -- in fact, part of the phone call is he wanted this recorded so he could get this out. I don't believe it's overly prejudicial as we've already got information established that these were people that wanted to be in gangs, which we all know involves violence like this.
> They indicated that -- sorry, Albert Crews had indicated that there was a beef between the two because of the switching of the gangs, and so the fact that he's talking about how he gets paid to kill and he's got an AR and he's got a .45, I think it all relates to all of this and is not overly prejudicial, Your Honor, given the circumstances and given the case."

[¶32] The trial judge's ruling on the admissibility of state's Exhibit #52 is found in the Jury Trial Day Two Tr. pg. 76 L. 10 – L.12:

> "THE COURT: 52. Thank you for clarifying that for the record. There was objections made by Mr. Wiese. I did review, and the objections are overruled. 52 is received."

[¶33] According to State v. Wangstad, 917 N.W.2d 515, 2018 ND 217 (N.D. 2018):

> "[¶ 9] Statements made by a defendant showing a defendant's attitude, state of mind, and intent to commit the crime charged are not subject to N.D.R.Ev. 404(b) if they do not constitute prior bad acts. State v. Phelps, 297 N.W.2d 769, 773 (N.D. 1980). In Phelps, a witness testified the defendant made prior statements about his ability to commit future burglaries. Id. at 772. This Court held that 404(b) does not

> apply and the statements should be construed as evidence of "frame of mind" and not prior acts. Id. at 773. This Court also noted the district court's instruction to the jury carefully accounted for the fact that the statements made by the defendant were only to be considered *520 on the issue of intent or proof of motive. Id."

[¶34] The song rapped by Mr. Schuh are statements that can only be construed as evidence of "his frame of mind" and are not prior bad acts. Therefore N.D.R.Ev.404(b) does not apply and the trial judge erred when she admitted State's Exhibit #52 into evidence. There were also no findings entered into the record the record regarding the reasons for overruling the trial attorney's objection and allowing the jury to view Exhibit #52.

[¶35] This trial judge's ruling in this case doesn't contain any balancing of probative versus prejudice.

[¶36] In the case now before the court the record contains nothing to show how the court determined admissibility of State's Exhibit #52.

[¶37] The proper record a court should make in determining admissibility of evidence is found in State v. Parisien, 2005 ND 152, 702 N.W. 2d 306 (N.D. 2005):

> "¶26 The record in this case reflects the trial court followed the three-part test in determining that the prior-act evidence was admissible. The record does not affirmatively show that the trial court applied the N.D.R.Ev. 403 balancing test to weigh the probative value of the evidence against the possible prejudicial effect to Parisien. Trial courts should place on the record their reasons for admitting or excluding prior-act evidence to show that they have complied with all of the N.D.R.Ev. 404(b) and 403 requirements."

ORAL ARGUMENT

[¶38] Oral argument has been requested to emphasize and clarify the appellant's written arguments on their merits.

CONCLUSION

[¶39] In this case Mr. Schuh claims that N.D.R. Ev. 404(b) does not apply because State's Exhibit should be construed as evidence of "frame of mind" and not prior acts.

[¶40] Even if his claim is wrong the trial judge's ruling on the admissibility of the State's Exhibit #52 contains no N.D.R. Ev. 403 balancing test so there is no way of determining how the trial judge reached her decision to admit state's Exhibit #52 into evidence. Without the N.D.R. Ev. 403 balancing test the only conclusion is that the trial judge's ruling admitting State's Exhibit #53 is an abuse of discretion.

[¶41] This case should be remanded to the district court with an order stating Mr. Schuh is to get a new trial and at that trial State's Exhibit #52 is not admissible.

Dated this 9th day of December, 2021.

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IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Mason Jordan Schuh, Defendant and Appellant.	Supreme Court File No. 20210257 Burleigh County District Court No. 08-2020-CR-01198 **CERTIFICATE OF COMPLIANCE**

[¶1] This appellant's brief and appendix complies with the page limit of 38 for the brief and 100 pages for the appendix set forth in N.D. R. App. P. 32(a)(8)(A). The brief in this matter consists of 14 pages and appendix consists of 64 pages.

Dated this 9th day of December, 2021.

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State of North Dakota, Plaintiff and Appellee, v. Mason Jordan Schuh, Defendant and Appellant.	Supreme Court File No. 20210257 Burleigh County District Court No. 08-2020-CR-01198 **CERTIFICATE OF SERVICE**

[¶1] I certify that a true and correct copy of the following, specifically:

1. Appellant Appendix
2. Appellant Brief
3. Certificate of Compliance
4. Certificate of Service

by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

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and by U.S. postal service with proper postage affixed to:

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Dated this 9th day of December, 2021.

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1. Appellant Appendix
2. Certificate of Service

by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

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Dated this 14th day of December, 2021.

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