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NOVEMBER 29, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Carrie Lee Lusby, Defendant and Appellant.	Supreme Court File No. 20210266 Stark County District Court No. 45-2020-CR-00421 **APPELLANT BRIEF**

BRIEF OF APPELLANT, CARRIE LEE LUSBY

Appeal from the Criminal Judgment

Entered on the 20th day of September, 2021.

In District Court, Stark County, State of North Dakota

The Honorable Dann Greenwood Presiding

ORAL ARGUMENT REQUESTED

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Oral Argument:
Oral argument has been requested to emphasize and clarify the appellant's written arguments on their merits.

Abbreviations:

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STATEMENT OF THE ISSUES

[¶1] **ISSUE I.: Did the trial court err in not giving the jury an instruction that allowed the jury to consider whether or not there were facts that excused Defendant/Appellant Lusby of criminal trespass?**

ISSUE II.: Did the trial judge err when he denied Defendant/Appellant Lusby's Rule 29 Motion?

NATURE OF THE CASE

[¶2] On May 7, 2020 a complaint was filed charging Defendant/Appellant Carrie Lee Lusby (Ms. Lusby) with criminal trespass. The next day a warrant of arrest was issued.

[¶3] Ms. Lusby made her first court appearance on the above charge on May 11, 2020.

[¶4] The preliminary hearing in this case was held on June 15, 2020. At the conclusion of that hearing a bench warrant was issued. On July 16, 2020 the preliminary hearing was waived.

[¶5] The criminal information was filed on July 17, 2020.

[¶6] A number of hearings were held that involved Ms. Lusby's fitness to proceed and treating her with forced medication.

[¶7] Trial was held in this case on May 13, 2021. At the conclusion of this trial Ms. Lusby was found guilty of class C felony criminal trespass.

[¶8] Prior to sentencing there was a pre-sentence investigation.

[¶9] Sentencing took place on September 7, 2021 and the criminal judgment was entered on September 20, 221.

[¶10] A notice of appeal and order for transcript were filed by on September 29, 2021.

[¶11] The notice of filing the notice of appeal was filed on September 29, 2021 and the clerk's certificate of appeal was filed on October 21, 2021.

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

STATEMENT OF FACTS

[¶13] Kevin Fugere is a rancher and his residential address is 4349 – 131st Avenue Southwest Belfield, ND. Living with him at that address is Laura Godowski. This residence is located about seven and a half miles South of Belfield, North Dakota.

[¶14] Neither Mr. Fugere nor Ms. Godowski were at the above residence on April 27, 2020. They were both at another ranch Northwest of Medora. Prior to April 27, 2020 when they left their above residence, they didn't lock the house. The reason they didn't lock the house is they have a hired man, Justin Backman, who lived in a house about 250 feet from the above residence. Mr. Beckman needed to get into their house to get veterinary medicine for Mr. Fugere's livestock.

[¶15] The Defendant/Appellant, Carrie Lusby, on April 27, 2020 believed her boyfriend, Ian Travis, lived at the above residence. She wanted to see her boyfriend so on April 27, 2020 she went to the above residence to see him. She drove there in her white Jeep. Because the door to the residence was unlocked, she entered the residence and waited for her boyfriend, Ian Travis. When he didn't arrive, she decided to leave.

[¶16] Before she left she wrote a note which read "Hello Babee – I was here love you" and left it on the bar in the kitchen.

[¶17] On April 29, 2020 Mr. Fugere and Ms. Godowski returned to their residence at 4349 – 131st Avenue Southwest Belfield, North Dakota. On that date Mr. Fugere returned to their residence about an hour before Ms. Godowski. When Mr. Fugere returned home,

he found Ms. Lusby's note and the lights on over an elk head he had mounted. When Ms. Godowski returned home Mr. Fugere showed her these things. They were both upset about someone going in their residence. Ms. Godowski called the Stark County Sheriff office and told the deputy who answered about someone going into their residence.

[¶18] On April 27, 2020 Justin Beckman worked as Mr. Fugere's hired man. The house Mr. Backman lived in was about 250 feet from Mr. Fugere and Ms. Godowski's residence.

[¶19] Mr. Backman on April 27, 2020 noticed a white jeep parked in front of the residence of Mr. Fugere and Ms. Godowski's. Mr. Backman was able to get the license number of the white jeep. He gave that number to Stark County deputies.

[¶20] The Stark County deputy sheriffs who investigated this case were Holly Bloodsaw and Colton Trout. After their investigation Ms. Lusby was charged with criminal trespass, a class C felony.

STANDARD OF REVIEW

[¶21] According to State v. Kraft, 413 N.W. 2d 303 (N.D. 1987), _____ Did the trial court's failure in this criminal case to instruct the jury on all essential questions of law involved in this case, whether requested or not, clearly effect Ms. Lusby's substantial rights?

ARGUMENT

ISSUE I.: Did the trial court err in not giving the jury an instruction that allowed the jury to consider whether or not there were facts that excused Defendant/Appellant Lusby of criminal trespass?

[¶22] In this case the facts are:

1. Ms. Lusby went into the residence of Mr. Fugere and Ms. Godowski on September 27, 2020 believing that her boyfriend, Ian Travis, lived at that residence.
2. She was able to enter said residence because Mr. Fugere and Ms. Godowski left the residence unlocked.
3. She waited a few hours and when her boyfriend Ian Travis didn't appear she wrote a note to her boyfriend and left.
4. The note said, "Hello Babee – I was here love you".

[¶23] From the above facts at best there is evidence Ms. Lusby entered the residence of Mr. Fugere and Ms. Godowski because she believed her boyfriend, Ian Travis, lived there. Therefore, N.D.C.C. §12.1-05-08 applies to this case:

> "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."

[¶24] When N.D.C.C. §12.1-05-08 applies to a case the jury instruction that must be given is N.D.J.I. Crim. No. K - 3.80 Excuse, "A person's conduct is excused if the person believes that the facts are such that the conduct is necessary and appropriate, even though that belief is mistaken...".

[¶25] In this case at trial neither the Defendant Ms. Lusby or her counsel requested jury instruction K – 3.80. Therefore, the state will argue that Ms. Lusby can't raise the issue of the jury not being instruction on K – 3.80 because it wasn't raised before the trial court.

[¶26] In raising the failure of the trial judge to give K – 3.80 instruction Defendant/Appellant Carrie Lee Lusby relies on State v. Kraft, 413 N.W. 2d 303 (N.D. 1987), a North Dakota case that involved a failure to include a jury instruction.

[¶27] According to Kraft:

> "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)
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[¶28] In the case now before the Court the questions are:

1. Whether or not the trial judge's failure to give a jury instruction on excuse; and

2. Whether that failure had a significant impact on the verdict.

[¶29] In this case the jury was looking for a reason to find Ms. Lusby not guilty. This is apparent from the note the jury sent to the court. That note said, "Was the defendant in the right state of mind? Was her state of mind altered?" (Appellant Appendix page 72).

[¶30] The failure to give an instruction had a significant impact on the jury because it failed to give a reason to acquit Ms. Lusby.

ISSUE II.: Did the trial judge err when he denied Defendant/Appellant Lusby's Rule 29 Motion?

STANDARD OF REVIEW

[¶31] N.D. R. Crim. P. 29 that "[a]fter the prosecution closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." State v. Kautzman, 738 N.W.2d 1, 2007 ND 133 (N.D. 2007). The appellate standard of review regarding a claim of insufficiency of evidence is well-established. In State v. Schmeets, 2007 ND 197, ¶ 8, 742 N.W.2d 513 (N.D. 2007) the court stated: "When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction." State v. Igou, 2005 ND 16, ¶ 5, 691 N.W.2d 213, 691 NW 127 (N.D.2005). The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. Id. "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 (N.D. 2003).

ARGUMENT

[¶32] In this case Defendant/Appellant Carrie Lee Lusby made a Rule 29 Motion for Acquittal, Tr. p. 83 L. 25 - p. 84 L. 4:

> "Pursuant to Rule 29 of criminal procedure, we'd make a motion for acquittal at this point. The State has failed to present sufficient evidence to prove their case; specifically, there's been no evidence presented that Ms. Lusby knew she couldn't be where she was alleged to be."

[¶33] The trial judge's response to Defendant/Appellant Lusby's Rule 29 Motion is found at Tr. p. 84 L. 18 – 25 and p. 85 L 1 – 3:

> "THE COURT: All right. The Court's going to deny the motion. In terms of the suggestion that there is no evidence, I would suggest that there's sufficient evidence in the record that would allow the jury to make a determination. While you may be correct and I'm not suggesting this is true, there may be no evidence -- direct evidence that the defendant did not know she was going to be there, but under the circumstances and then based on the testimony that was given, that's a fair inference that could be drawn from the evidence. To my understanding, inferences can constitute the evidence necessary as well, so I'm going to deny the motion. Anything else that either of you wish to address?

[¶34] According to State v. Kingsley, 383 N.W.2d 828 (N.D. 1986):

> "On appeal, we will treat Kingsley's motion for dismissal in each case as a motion for judgment of acquittal under Rule 29(a), N.D.R.Crim.P. See State v. Engebretson, 326 N.W.2d 212 (N.D.1982). In deciding a motion for judgment of acquittal the trial court, upon reviewing the evidence most favorable to the prosecution, must deny the motion if there is substantial evidence upon which a reasonable mind could find guilt beyond a reasonable doubt. See State v. Engebretson, supra; State v. Allen, 237 N.W.2d 154 (N.D.1975). In the instant case, Kingsley proceeded to present evidence at each trial after the trial court denied his motion for dismissal. We have previously held that, by presenting evidence after a motion for judgment of acquittal is denied at the close of the prosecution's case in chief, the defendant permits this court to review on appeal the entire record to determine whether substantial evidence exists to sustain the verdict. State v. Wilson, 267 N.W.2d 550 (N.D.1978); State v. Allen, supra."

[¶35] Defendant/Appellant Lusby's claims and there is no fair inference from the facts that she knowingly trespassed on the residence of Mr. Fugere and Ms. Godowski.

[¶36] Since Defendant/Appellant Lusby did present evidence after the denial of her Rule 29 Motion that evidence, according to Kingsley, must also be examined. This evidence is found in Tr. p. 85 L. 25 to p. 86 L 1 – 19:

DIRECT EXAMINATION BY MR. POWELL:

Q. Could you state your name, please?
A. Carrie Lusby.
Q. Ms. Lusby, you heard the testimony earlier. Did you go into the residence at 4349 131st Avenue Southwest, Belfield?
A. Yes, I did.
Q. And why did you go into that residence?
A. I thought my boyfriend was there.
Q. Okay. And what did you do while you were there?
A. I waited for him, and he didn't show up so I left a note.
Q. And why did you leave a note?
A. To let him know I was there.
Q. Okay. And were you mistaken that was his house or not?
A. Yes, sir.
Q. And since you've found out that was not his home, have you returned to that home?
A. No, sir. I never went back.

[¶37] The above evidence doesn't contain even an inference that Defendant/Appellant Lusby knowingly trespassed into the residence of Mr. Fugere and Ms. Godowski. Therefore Defendant/Appellant Lusby's Rule 29 Motion should have been granted.

CONCLUSION

[¶38] In Issue I Defendant/Appellant Lusby has established that under North Dakota Law she was entitled to North Dakota Jury Instruction K – 3.80 and that the trial judge was required to give the jury that instruction.

[¶39] The failure to give that instruction had a significant influence on the jury because it prevented Ms. Lusby's acquittal.

[¶40] Therefore, this case must be remanded to the district trial court with an order requiring the trial court to give her a new trial that includes North Dakota Jury Instruction K – 3.80.

[¶41] In Issue II Defendant/Appellant Lusby's Rule 29 Motion for acquittal should have been granted. Therefore, this case must be remanded to the trial judge with an Order requiring the trial judge to grant the Rule 29 Motion and dismiss the case.

Dated this 29th day of November, 2021.

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IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Carrie Lee Lusby, Defendant and Appellant.	Supreme Court File No. 20210266 Stark County District Court No. 45-2020-CR-00421 **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 13 pages and appendix consists of 88 pages.

Dated this 29th day of November, 2021.

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IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Carrie Lee Lusby, Defendant and Appellant.	Supreme Court File No. 20210266 Stark County District Court No. 45-2020-CR-00421 **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:

North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

James Hope
Stark County States Attorney
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and by U.S. postal service with proper postage affixed to:

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Dated this 29th day of November, 2021.

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