

IN THE SUPREME COURT OF NORTH DAKOTA

	)	Supreme Court #20220092
State of North Dakota,	)	#20220093
)	
Plaintiff and Appellee,	)	Cass County 09-2020-CR-01830
	)	09-2020-CR-01835
)	
v.)	
)	
Zhiwar Ismail,	)	APPELLANT’S BRIEF
)	
Defendant and Appellant.)	

Appeal from the Criminal Judgments entered February 22, 2022, in Cass County District Court, East Central Judicial District, North Dakota, the Honorable Wade L. Webb, presiding

ORAL ARGUMENT REQUESTED

Elizabeth Brainard
ND Bar No. 08144
Fargo Public Defender Office
912 3rd Ave. S
Fargo, ND 58103
Phone (701) 298-4640
E-Service: fargopublicdefender@nd.gov
Attorney for Appellant

[¶ 1] TABLE OF CONTENTS

Table of Authorities..... ¶ 2

Preliminary Statement ¶ 3

Jurisdiction ¶ 5

Statement of Issues..... ¶ 7

Statement of the Case..... ¶ 11

Statement of Facts..... ¶ 16

Standard of Review..... ¶ 36

Law and Argument..... ¶ 38

 A. N.D.R.Crim.P. Rule 29 Motion in a Bench Trial..... ¶ 41

 B. Obvious error..... ¶ 43

 C. Ineffective Assistance of Counsel at Trial ¶ 45

 D. Constructive Possession..... ¶ 47

 E. The Trial was Marked by Ineffective Assistance of Counsel and Obvious
 Error. ¶ 49

Oral Argument Requested..... ¶ 61

Conclusion..... ¶ 63

Certificate of Compliance..... ¶ 65

[¶ 2] TABLE OF AUTHORITIES

Cases

City of Grand Forks v. Egley, 542 N.W.2d 104 (N.D. 1996). ¶¶ 56, 57

State v. Atkins, 2016 ND 13, ¶ 6, 873 N.W.2d 676. ¶ 37

State v. Bruce, 2012 ND 140, ¶ 16, 818 N.W.2d 747. ¶ 37

State v. Foard, 355 N.W.2d 822 (N.D. 1984) ¶¶ 54, 55

State v. Himmerick, 499 N.W.2d 568, 572 (N.D. 1993) ¶ 42

State v. Pemberton, 2019 ND 157, 930 N.W.2d 125. ¶¶ 37, 44, 58

State v. Yost, 2018 ND 157, ¶ 23, 914 N.W.2d 157. ¶ 46

Statutes

N.D.C.C. § 12.1-32-01(3). ¶ 13

N.D.C.C. § 12.1-32-01(5) ¶ 12

N.D.C.C. § 19-03.1-07(4). ¶ 13

N.D.C.C. § 19-03.1-11(4) ¶ 12

N.D.C.C. § 19-03.1-13(5) ¶ 12

N.D.C.C. § 19-03.1-23(1)(a). ¶ 13

N.D.C.C. § 19-03.1-23(7)(a). ¶ 12

N.D.C.C. § 19-03.1-23(7)(b) ¶ 12

N.D.C.C. § 29-28-03	¶ 6
N.D.C.C. § 29-28-06.....	¶ 6
Court Rules	
N.D.R.App.P. 32(a)(8)(A)	¶ 66
N.D.R.Crim.P. 29.....	¶¶ 35, 41, 42, 50, 60
N.D.R.Crim.P. 43.....	¶ 26
N.D.R.Crim.P. 52(b).....	¶¶ 37, 44
N.D.R. Evid. 609.....	¶ 26
N.D.R. Evid. 611.....	¶ 19
N.D.R.Evid. 614.....	¶¶ 55, 60
N.D.R.Evid. 614(c)	¶ 55
Other	
North Dakota Jury Instructions – Criminal K – 5.36 (2022)	¶ 48

[¶ 3] PRELIMINARY STATEMENT

[¶ 4] The record for file 09-2020-CR-1830 is referenced as RA. The record for file 09-2020-CR-1835 is referenced as RB. The trial transcript is the same for both files.

[¶ 5] JURISDICTION

[¶ 6] Defendant Zhiwar Ismail was convicted of two counts of Possession of a Controlled Substance and Delivery of a Controlled Substance – Fentanyl on February 22, 2022 after a court trial, and timely appealed the final criminal judgment arising out of the district court. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to the North Dakota Constitution, Article VI, § 6, the North Dakota legislature enacted Section 29-28-03 which provides “An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right.” N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from . . . [A] final judgment of conviction. . . .” N.D.C.C. § 29-28-06.

[¶ 7] STATEMENT OF THE ISSUES

[¶ 8] Whether the court erred by improperly questioning the witnesses.

[¶ 9] Whether defense counsel was ineffective at trial.

[¶ 10] Whether the weight and sufficiency of the evidence was sufficient to convict.

[¶ 11] STATEMENT OF THE CASE

[¶ 12] These are criminal matters on direct appeal from the East Central Judicial District, Cass County Criminal Judgment. Criminal Informations were filed with the Cass County clerk of court on April 27, 2021. (RA:1)(RB:1) In 09-2021-CR-1830, Mr. Ismail

was charged with two counts of Unlawful Possession of a Controlled Substance in violation of N.D.C.C. §§ 19-03.1-23(7)(a), 19-03.1-11(4), 19-03.1-23(7)(b), and 12.1-32-01(5); and §§ 19-03.1-23(7)(a), 19-03.1-13(5), 19-03.1-23(7)(b), 12.1-32-01(5); both Class A misdemeanors.

[¶ 13] In 09-2021-CR-1835, Mr. Ismail was charged with Delivery of a Controlled Substance in violation of N.D.C.C. §§ 19-03.1-23(1)(a), 19-03.1-07(4), and 12.1-32-01(3), a class B felony.

[¶ 14] A consolidated court trial was held on February 22, 2022. Following a guilty verdict in each matter and count, Mr. Ismail was sentenced. In 09-2021-CR-1830, defendant was sentenced to 30 days in the custody of the Cass County Sheriff with credit for 4 days already served on each count. Fees of \$300 were also imposed.

[¶ 15] In 09-2021-CR-1835, defendant was sentenced to 360 days in the custody of the Department of Corrections and Rehabilitation, first to serve 30 days, with credit for four days previously served. The balance of the sentence was suspended for two years of supervised probation. Fees of \$750 were imposed. The sentence in both files and all counts was imposed to run concurrently.

[¶ 16] STATEMENT OF FACTS

[¶ 17] On March 9, 2021, Fargo Police Officer Hinz was dispatched on a report of an unconscious female. RB5. The officer found the female on the floor, lying on her left side with vomitus around her mouth, and was unresponsive with agonal respirations. *Id.* The officer initially felt a strong pulse, but then subsequently commenced chest compressions, reinstating a palpable pulse. *Id.*

[¶ 18] On April 6, 2021, the Fargo Narcotics Unit executed a search warrant on Mr. Ismail’s apartment locating two gabapentin pills and one clonazepam pill. RA5:1. Mr. Ismail was not located in the apartment. *Id.*

[¶ 19] On February 22, 2022, the parties stipulated on the record to consolidate the matters for trial and for a bench trial, and the trial court consented. RB61:8:5-15. The State made an opening statement, and the defense reserved its opening. RB61:8:21-RB61:9:12. Emma Meiers testified that she had met Mr. Ismail several months prior through a mutual friend. RB61:11:5-14. The State inquired, “he supplied you with controlled substances on occasion, correct?” RB61:11:18-19. The Defense objected on grounds of leading, but the court overruled the objection citing to N.D.R. Evid. 611, and uncited North Dakota caselaw. RB61:11:18 – R61:12:3. The State went on to inquire whether Ms. Meiers had contact with Mr. Ismail on March 9. RB61:12:6-8. Ms. Meiers clarified if that was the date of her overdose and the State confirmed it was. RB61:12:6-10. The witness admitted it would have been that day or the day before. RB61:12:11.

[¶ 20] The witness further admitted she contacted the defendant via a mobile telephone application called Snap Chat for the purposes of getting “pills” from him. RB61:13:2-8. Ms. Meiers specific testimony was, “they weren’t too specific I would say. Opiates nonetheless.” RB61:13:8-9. However, the State, again, leading the witness, inquired in direct response to the witness’s statement that she specifically did not know what she was seeking, “And, specifically, are we talking about like M30 pills?” RB61:13:10-11. The witness agreed that is what she was “talking about,” and further offered that she had never used the substance before but is familiar at the time of testimony with what the substance is, stating, “opiates.” RB61:13:12-20.

[¶ 21] In direct controversy to her previous testimony that she had never used M30 previously, the State inquired how many pills Ms. Meiers purchased, and she replied, “I think maybe I got one or two. It was never more than that, I believe.” RB61:14:1-2.

[¶ 22] The State attempted to establish the location of the transaction, and the witness replied, “I want to say somewhere in South Fargo, a gas station probably. It’s hard for me to remember really.” RB61:14:6-8. Again, the State, by leading question inquired to confirm whether the purchase was in Cass County, (“but either way it was in Cass County”) to which the witness acquiesced. RB61:14:11. The witness did not remember how much she paid for the pills, but she recalled that she went home and ingested that pill, by “snorting.” RB61:14:19-25.

[¶ 23] The State further inquired about the overdose, going so far as to inquire about whether the witness remembered getting Narcan on that day, which she implausibly admitted remembering. RB61:15:14-17.

[¶ 24] Ms. Meiers further admitted that she did have a conversation with law enforcement, but didn’t really “recall much of it.” RB61:15:21-24. Upon inquiry, she affirmed, “I don’t recall much of it at all. It’s pretty hazy for me.” RB61:16:2-3. The State inquired about her phone, and a Snapchat user called “Z Royale.” RB61:16:13-15. The witness did not recall the conversation, but admitted she otherwise recalled Z Royale was Mr. Ismail’s Snapchat handle. RB61:16:15-17. Notably, no evidence of any Snap chats were introduced between Ms. Meiers and Mr. Ismail during the time in question.

[¶ 25] Next, the State offered an exhibit consisting of a photo lineup, which had Ms. Meiers purported dated signature. RB61:17:1-3. When inquired about whether she previously had signed the document, she admitted she did not recall doing it either at the

hospital or “when this happened,” but recognized it as her signature. RB61:17:5-12.
Defense objected on foundation and the objection was sustained. RB61:17:17-24.

[¶ 26] On cross-examination, Ms. Meiers could not recall any of her activities the day before the overdose, or whether she was out with friends the night before, and admitted to regular use, but offered, “It was a short period of time this was all happening in as well. This wasn’t an ongoing thing.” RB61:18:12 – RB61:19:5. Because she denied chronic use of controlled substances, defense impeached by a prior felony conviction for methamphetamine, a controlled substance, possession from 2013, to which the State objected. RB61:19:1-14. The court overruled the objection, noting it would consider under North Dakota Rules of Evidence 609 to “understand whether or not she’s convicted or not.” RB61:20:4-8. Defense then offered a 2021 felony burglary conviction, in which the object of the burglary was to obtain Xanax. RB61:21:8 – 20. On State’s objection, the Court ruled that it would again permit inquiry into the conviction, based on Rule 43 and 609, but would not permit inquiry into the facts of the case. RB61:22:25-RB61:23:1-4.

[¶ 27] Upon completion of the cross, the court inquired of the witness:

(RB61:27:24 – 61:30:21)

The Court: So, March 9, 2021 here in Fargo, North Dakota, about 3:00 a.m., from the earlier testimony, so I won’t go back and redo all that, but March 9, 2021 here in Fargo, North Dakota, about 3:00 a.m., you purchased an M30 pill; is that true?

The Witness: Yes.

The Court: Okay. And that’s a controlled substance, correct?

The Witness: Yes.

The Court: Okay, and so where did that happen?

The Witness: I would – I want to say it happened at Loaf ‘N Jug on University.

The Court: I’m sorry, Loaf ‘N Jug on University in Fargo?

The Witness: Next to the Taco Shop. Yeah.

The Court: Okay. In Fargo?

The Witness: Yes.

The Court: Okay. And you purchased – so who did you purchase from?

The Witness: From the defendant.

The Court: Okay. When you say, “the Defendant,” is that Zhiwar Ismail?

The Witness: Yes.

The Court: Okay. And you pointed at him here in the court. Is that the guy you bought it from?

The Witness: Yes.

The Court: Okay. And you said you purchased it; so what did you purchase it with, other drugs, money?

The Witness: Cash. Cash.

....

The Court: So currency, like how much: Do you remember?

The Witness: I would guess \$15 or \$20.

The Court: But you don't remember?

The Witness: I don't remember the exact amount. No.

The Court: Okay. But it was a single pill.

The Witness: Yes.

The Court: So you gave him money, he gave you that one M30 pill.

The Witness: Yes.

The Court: And, thereafter then, you went back home and you snorted it?

The Witness: Yes.

The Court: And I think there was some earlier testimony you snorted part of it or all the pill or what?

The Witness: Not all of it because that small amount that I snorted took me out.

The Court: When you say, "took me out," help me out.

The Witness: I passed out. I don't remember, but the police officers also said there was more left. So, obviously I didn't do it all.

The Court: Okay. And so you snorted that pill, not other drugs, but that pill and then passed out.

The Witness: Yes.

The Court: And when you say passed out, you passed out because you were tired or you passed out from a reaction to the pill?

The Witness: So, my mom found me upstairs covered in my own vomit. So, I must have gone up there. Like, I don't remember this. And she's like, I found you on the floor, passed out in your own vomit, did CPR on you, called the police. I don't remember any of that. After I snorted it, black out. That's it.

The Court: When you say you passed out, that was after you snorted part of this M30 pill that you purchased that day.

The Witness: Yes.

The Court: You didn't pass out because you were tired from work.

The Witness: No.

.....

[¶ 28] After further examination by the State, the court inquired further:

(RB61:33:13-25).

The Court: But, did you pass out from Hydrocodone on March 9, 2021, in Fargo, North Dakota.

The Witness: I did not take any hydrocodone that day.

The Court: You passed out from the M30 pill or from something else?

The Witness: From the pill that I had purchased.

The Court: And it's your testimony here today that based upon your knowledge and experience, M30 pills are Fentanyl.

The Witness: Absolutely.

The Court: And you believe that was Fentanyl.

The Witness: Absolutely.

[¶ 29] Defense was permitted to recross. The State called witness Fargo Police Officer John Hinz, and then Detective Weston Christianson. The State re-offered the photographic lineup exhibit through Detective Christianson and the defense again objected on foundation. The court responded, "Well, let's ask him. So, Officer Christianson, so Exhibit 1 right there in front of you."

The Witness: Yeah.

The Court: March 9, 2021, were you there when that was shown to Ms. Meiers?

The Witness: Yes.

The Court: Okay. So, you saw that exhibit right there, Exhibit No. 1, those pictures, that photo lineup, shown by a different officer to Ms. Meiers. You actually saw that with your own eyes.

The Witness: Correct.

The Court: And is that the same as what was shown to her.

The Witness: Yes.

The Court: Okay. Any other questions or objections from the State?

Mr. Steiner: I'm just going to note, Your Honor said March 9th. March 24th is when the lineup took place on.

The Court: I apologize. So March 24th, Officer, does that change your testimony? I apologize.

The Witness: No.

The Court: So March 24 is the actual day of the lineup, you were there, that's the lineup that was used.

The Witness: Correct.

...

The Court: And she identified Mr. Ismail, number one.

The Witness: Yes.

(RB61:53:18- RB61:54:21.

Whereupon, the State was permitted to voir dire the witness and declined, and the defense declined further voir dire, but continued objection as to foundation. The Court found sufficient foundation, noting potential argument as to weight, and the exhibit was received.

[¶ 30] The State also put on evidence regarding the A misdemeanor charges of possession of a controlled substance, including photographs of pills, alleged to be one-half of a Klonopin tablet, a controlled substance, and several alleged Gabapentin tablets, also a controlled substance. No lab reports were entered to confirm the substances were what

was alleged. Nor was a pharmacy record introduced to show that Mr. Ismail did not have a prescription.

[¶ 31] The court returned guilty verdicts on all charges. The court first relied on the credibility of Ms. Meiers, noting that she was “very credible,” RB61:79:8-9, “candid, honest, forthright, confident in her identification of the Defendant,” RB61:79:22-23, “confident that this occurred about 3:00 a.m. on March 9th,” RB61:79:24-25, but noted that there may have been some confusion regarding the date, but “we’re within a matter of hours in regards to this matter,” RB61:80:1-2. Further the court noted she was “confident in what the transaction was, money for the pill, the M30 pill.” RB61:80:3-4.

[¶ 32] The Court also relied on circumstantial evidence, including the officer’s testimony that Ms. Meiers apparent overdose was consistent with an opiate overdose, “consistent with an Opiate overdose, including could be Fentanyl” RB61:80:22-23. The court also relied on Officer Christianson’s testimony that she identified Mr. Ismail in a photo lineup on March 24, approximately 15 days after the alleged transaction, and when she had already testified that she previously knew Mr. Ismail for months. RB61:81:9-14; The court disregarded that she had hydrocodone, an opiate, also in her possession, but noted that “Ms. Meiers’ overdose can be circumstantial evidence as to what type of pill she was taking. . . .” RB61:82:5-7.

[¶ 33] The testimony as regards the pills found in the home, “They were either controlled substances, which Mr. Ismail had a pill bottle that corresponded that would match in which he would legally possess those or they were determined not to have markings indicative of being a controlled substance.” RB61:70:2-8. Further, the officer

testified that he did not know if the pills were “left by a guest,” RB61:70:11-13; or whether Mr. Ismail even knew if the pills were in his residence. RB61:70:14-16.

[¶ 34] In the file 09-2021-CR-1830, the court found constructive possession, and relied on the fact that the pills were found in Mr. Ismail’s residence, and that there was no proof of anyone else living there. RB61:83:4-6. The court aptly noted the pills were on the countertop, and nobody was in the apartment at the time the search warrant was executed. RB61:83:5-7. The court noted there was no evidence that there were valid prescriptions for the pills, and the officer noted he wouldn’t have included them on the warrant list if there had been prescriptions. RB61:83:8-13.

[¶ 35] The defense did not make an opening statement, make a Rule 29 motion, or present any evidence or case.

[¶ 36] STANDARD OF REVIEW

[¶ 37] On appeal from an insufficiency of the evidence claim, the Supreme court reviews the record to determine if there is competent evidence allowing the trier of fact to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. *State v. Bruce*, 2012 ND 140, ¶ 16, 818 N.W.2d 747. On direct appeal for an ineffective assistance of counsel claim, the Supreme Court reviews the record to determine if counsel was plainly defective. *State v. Atkins*, 2016 ND 13, ¶ 6, 873 N.W.2d 676. Unless the record affirmatively shows ineffectiveness of constitutional dimensions, the complaining party must show some evidence in the record to support its claim. *Id.* Issues not raised at trial will not be addressed on appeal unless the alleged error rises to the level of obvious error under N.D.R.Crim.P.52(b). *State v. Pemberton*, 2019 ND 157, ¶ 8, 930 N.W.2d 125.

[¶ 38] LAW AND ARGUMENT

[¶ 39] Defendant Zhiwar Ismail appeals his convictions for insufficiency of the evidence, verdict against the weight of the evidence, and improper questioning by the trial court, and ineffective assistance of counsel at trial. Specifically, until the court, by leading question, established the facts of the delivery, Ms. Meiers, the witness and alleged purchaser of a controlled substance, did not know the date of the purported transaction, or anything else that occurred on that date, whether it was one or two pills, the actual price, where the alleged transaction occurred, or whether the pill was, in fact, an opiate. She further admitted that the pills are often counterfeit, contradicting her own testimony that she was a new and infrequent user. She was further found to be in possession of an opiate hydrocodone, which could have been the source of the overdose, which was offered as circumstantial evidence of the purchase and subsequent use. Other controlled substances were also found in her possession. No evidence was offered that established delivery, other than a witness who repeatedly stated she did not recall, and her testimony was reformed by the court by leading question, unobjected to by counsel, which inquired about specific facts that the witness had previously been equivocal about. Specifically, Ms. Meiers testified her phone had been taken by police, but no phone records were admitted. Further she was hospitalized, and on laboratory records were admitted. No analysis of any of the recovered controlled substances for either case were admitted.

[¶ 40] As to the possession charges, the State's only witness could not tell the court whether the pills belonged to the defendant, only that there was no corresponding prescription bottle, whether the defendant even knew if they were in his home. No

pharmacy report was admitted for Mr. Ismail, despite the fact that both gabapentin and clonazepam are often prescribed.

[¶ 41] A. N.D.R.Crim.P. Rule 29 Motion in a Bench Trial

[¶ 42] This Court has previously held that, in a criminal bench trial, it is not necessary for a defendant to bring a Rule 29 motion to preserve the issue of insufficiency of the evidence for appeal. *State v. Himmerick*, 499 N.W.2d 568, 572 (N.D. 1993). However, this Court has held that such a motion is necessary to preserve the issue of weight of the evidence for appeal, because weight is a credibility question involving evidentiary events unfolding at trial, for which the trial judge is in the best position to assess. *Id.*

[¶ 43] B. Obvious error

[¶ 44] Obvious error is an error or defect that affects substantial rights and may be considered even though it was not brought to the court's attention. N.D.R.Crim.P. 52(b). When asserting a claim of obvious error, the defendant must show error, that is plain, and the error affects the defendant's substantial rights. *State v. Pemberton*, 2019 ND 157, ¶ 8, 930 N.W.2d 125. Even if the defendant meets his burden of establishing obvious error affecting substantial rights, the determination whether to correct the error lies within the discretion of the appellate court, which should exercise that discretion only if the error affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at ¶ 9.

[¶ 45] C. Ineffective Assistance of Counsel at Trial

[¶ 46] To prevail on an appeal for ineffective assistance of counsel, the defendant must show either ineffectiveness of constitutional dimension, or other evidence to support the claim. *State v. Yost*, 2018 ND 157, ¶ 23, 914 N.W.2d 157. Such a claim must establish counsel's representation fell below an objective standard of reasonableness and

the defendant was prejudiced. *Id.* To demonstrate prejudice, the defendant must establish a reasonable probability that but for the unprofessional errors, the result of the proceeding would have been different, where counsel erred, and the probable different result. *Id.*

[¶ 47] D. Constructive Possession

[¶ 48] North Dakota Criminal Jury Instructions provide “Possession” may be actual or constructive and may be proven by direct or circumstantial evidence. North Dakota Jury Instructions – Criminal K – 5.36 (2022). A person who has the ability and power to exercise control over an object is in constructive possession of it. *Id.* Constructive possession can be inferred from the totality of the circumstances. *Id.* Mere presence in the same location as the contraband is not enough to establish constructive possession. *Id.* There must be some link between the individual and the contraband. *Id.*

[¶ 49] E. The Trial was Marked by Ineffective Assistance of Counsel and Obvious Error.

[¶ 50] Here, defense counsel did not bring a motion for Rule 29 relief preserving the appellate issue of weight of the evidence, outlining to the court the discrepancies in Ms. Meier’s testimony, specifically, that she could not recall the date of the alleged sale (RB61:12:11); that she sought “pills,” not “too specific,” and only agreed they were M30s when offered by the State. (RB61:13:6-13). Further, she could not provide a location for the purported exchange on direct examination, stating, “a gas station probably. It’s hard for me to remember really.” (RB61:14:7-8). Ms. Meiers specifically testified she did not remember how much she paid for the pills. (RB61:14:20). She testified she did not remember anything else after snorting the purported pill or pills, until she was on a gurney. (RB61:15:2-3).

[¶ 51] Ms. Meiers testified that she didn't recall "much" of her conversation with law enforcement at the hospital, "I don't recall much at all. It's pretty hazy for me." (RB61:15:21-RB61:16:3). She testified she did not recall signing the photo lineup at all, even though it purportedly occurred fifteen days after the hospitalization. (RB61:17:5-9). Further, defense counsel did not object on relevancy grounds given that Ms. Meiers testified that she previously knew Mr. Ismail, and apparently knew none of the other persons in the lineup.

[¶ 52] Nor did the defense object to examination by the court, the results of which were subsequently relied on by the court in reaching its verdict. The court then established a record by leading question, the burden of which is on the State to establish, that a purchase of one M30 was made on March 9, 2021 in Fargo, North Dakota at 3:00 a.m., the M30 being a controlled substance. The court inquired *after the witness had already said she didn't know where the sale occurred*, as to the location of the sale, and the response was "I would – I want to say it happened at Loaf 'N Jug." This question had already been asked and answered that she did not specifically recall the location. The court inquired *after the witness had already said she didn't know how much she paid*, and she replied, "I would guess \$15 or \$20." This question too had already been asked and answered that she did not specifically recall how much she paid.

[¶ 53] Overall, the direct examination prior to the court's inquiry revealed that Ms. Meiers knew Mr. Ismail from friends. She had no recollection of where she allegedly purchased any pills, how much she paid, or what the purported pill or pills might be, other than a counterfeit opiate. She subsequently testified that the pill she ingested might have been fentanyl, but they are counterfeit. (RB61:32:1-12). No lab test was introduced to

support the pill was, in fact, Fentanyl, and no evidence other than a witness who cannot recall much at all was introduced to support a delivery by Mr. Ismail. Finally, Ms. Meiers admitted to having hydrocodone in her possession from a previous leg injury, an opiate, the effects of which would have been quite similar to the effects of purported fentanyl. (RB61:33:8-9). Upon which, the court again inquired of the defendant by leading question whether she had consumed hydrocodone, whether M30s contain fentanyl, after ascertaining that M30s are counterfeit, and that she had passed out from fentanyl, not hydrocodone.

[¶ 54] The trial court's position as advocate in this case constitutes obvious error. This Court has briefly examined judicial clarification of testimony in *State v. Foard*, 355 N.W.2d 822 (N.D. 1984). There, this Court said judges must be allowed to clarify testimony and ferret out elusive facts. *Id.* at 823. However, these duties must be performed without partiality, and a judge's authority is not unbounded. *Id.* at 823, 824. A judge may not be a partisan advocate for either side, and must respect rules and concepts which guaranty a fair trial. *Id.* at 824. A judge's conduct will be unduly prejudicial to a defendant when a judge abandon's a properly judicial role and assumes that of an advocate. *Id.* at 824.

[¶ 55] The *Foard* Court also relied on N.D.R.Evid. 614, which allows a judge to call and interrogate witnesses. Rule 614 provides that the court may call and examine a witness. It further provides that a party may object to the court's examination of a witness. N.D.R.Evid. 614(c). Here, defense counsel did not object.

[¶ 56] This Court evaluated this rule in *City of Grand Forks v. Egley*, 542 N.W.2d 104 (N.D. 1996). There, the trial judge inquired about the procedure used to obtain an

Intoxilyzer result.. *Id.* at 108. There the trial court confirmed the process used to administer the Intoxilyzer test, and this Court found that the questions were “designed solely to clarify testimony. . . .” *Id.* Further, in its analysis, this Court noted that the defendant’s attorney did not object at the first available opportunity to the trial court’s interrogation of the witness. *Id.*

[¶ 57] This Court said there are two concerns that must be balanced when reviewing a judge’s interrogation of witnesses, which are the defendant’s right to a fair trial and clarification of testimony and impartially ferreting out elusive facts. *Id.* at 109. It can hardly be said that clarification was the goal in this case, given the trial court suborned testimony for which the witness had previously said she did not know.

[¶ 58] Whether to correct obvious error is a determination made by the trial court, and should be exercised with discretion and only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *State v. Pemberton* at ¶ 9.

[¶ 59] In determining the probable effect absent error in this case, Ms. Meiers testified on the State’s direct examination she purchased a pill or two on an uncertain date, at an unknown location, for an unknown amount, from the defendant. She signed an irrelevant photo lineup given she previously knew Mr. Ismail, which she did not recall doing. Her testimony was undermined by the fact that she minimized her illicit drug use, and she stated she had never purchased this type of drug before but then later admitted she never purchased more than 1-2 pills. She was often speculative, and couched her answers in what she was told by her mother or the police or the medical providers. Overall, her testimony was generally marked by her poor recollection. She had hydrocodone in her

possession, another opiate, which could have also accounted for the overdose. It also could be evidence of her stockpiling illicit drugs.

[¶ 60] Defense counsel failed to object to the court's reformation of both Ms. Meiers and Detective Christianson's testimony. Because leading questions are generally objected to, especially ones that have already been asked and answered favorable for the defense, and because the Rule 614 provides that counsel may object to court's examination, it is evident defense counsel's representation fell below an objective standard of reasonableness. Defense counsel closed on the weight issues, specifically Ms. Meier's lacking memory and contradicting testimony, but failed to bring a Rule 29 motion. Because a Rule 29 motion is common practice, and required to preserve sufficiency arguments, it is evidence that defense counsel's representation fell below an objective standard of reasonableness. To that end, had objections been properly raised and a Rule 29 motion brought, the outcome in the trial likely would have been different, and the standard of review in this appeal would have been plain error, and not obvious error.

[¶ 61] ORAL AGRUMENT REQUESTED

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

[¶ 63] CONCLUSION

[¶ 64] WHEREFORE, for the foregoing reasons, Defendant Ismail respectfully requests this Court to vacate the criminal judgment, and remand for a new trial.

Submitted this 6th day of June, 2022.

/s/ Elizabeth Brainard
Elizabeth Brainard (ND # 08144)
FARGO PUBLIC DEFENDER OFFICE
912 3rd Avenue South
Fargo, ND 58103-1707
Telephone: (701) 298-4640
Facsimile: (701) 239-7110
fargopublicdefender@nd.gov

[¶ 65] CERTIFICATE OF COMPLIANCE

[¶ 66] The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(a)(8)(A), that this *Brief of Appellant* was prepared with proportional typeface, 12-point font, and the total number of pages in the above Brief, including the table of contents, the table of authorities, the certificate of compliance, and the certificate of service is 25 pages.

Submitted this 6th day of June, 2022.

/s/ Elizabeth Brainard
Elizabeth Brainard (ND # 08144)
FARGO PUBLIC DEFENDER OFFICE
912 3rd Avenue South
Fargo, ND 58103-1707
Telephone: (701) 298-4640
Facsimile: (701) 239-7110
fargopublicdefender@nd.gov

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court #2022092
	)	#2022092
Plaintiff and Appellee,)	
	)	Cass County #09-2020-CR-01830
	)	#09-2020-CR-01835
)	
v.)	
)	
Zhiwar Ismail,	)	CERTIFICATE OF SERVICE
)	
Defendant and Appellant.)	

¶ 1 I, Amy L. Mihulka, an employee of the Fargo Public Defender Office, hereby certifies that on **June 6, 2022**, the following documents

Appellant’s Brief

was filed with the Supreme Court Clerk of Court. A copy of these documents was served electronically on all separately represented parties at the e-mail addresses pursuant to N.D.R.Ct. 3.5 to the party below:

Derek Steiner, Cass County State’s Attorney Office
Sa-defense-notices@casscountynd.gov

¶ 2 This service was made under N.D.R.Ct. 3.5; N.D.R.Crim.P. 49; and N.D.R.Civ.P. 5(b).

Dated: June 6, 2022.

/s/Amy L. Mihulka
 Amy L. Mihulka, CP
Certified Paralegal
FARGO PUBLIC DEFENDER OFFICE
 912 3rd Avenue South
 Fargo, ND 58103-1707
 Telephone: (701) 298-4640
 E-service: fargopublicdefender@nd.gov
Attorneys for Defendant/Appellant