IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	Morton County District Court No. 30-2022-CR-00246
Plaintiff and Appellee,	)	Supreme Court No. 20220280
v.	)	
Travis Lee Jacobs,	)	**ORAL ARGUMENT REQUESTED**
Defendant and Appellant	)	

ON APPEAL FROM CRIMINAL JUDGMENT DATED AUGUST 24, 2022
FROM THE DISTRICT FOR THE
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE DOUGLAS BAHR, PRESIDING

BRIEF OF APPELLANT TRAVIS LEE JACOBS

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JURISDICTIONAL STATEMENT

[¶1.] Appellant and Defendant Travis Lee Jacobs ("Jacobs") timely appeals from the district court's final judgment of conviction of August 24, 2022 finding Jacobs guilty of Endangering By Fire or Explosion under N.D.C.C. §12.1-21-02 and Violation of Order Prohibiting Contact under N.D.C.C. §12.1-31.2-02. The Court has appellate jurisdiction under N.D.C.C. §29-28-06(1), (2).

STATEMENT OF THE ISSUES

[¶2.] Whether the district court erred by finding sufficient evidence existed to convict Jacobs of Endangering By Fire or Explosion under N.D.C.C. §12.1-21-02.

[¶3.] Whether the district court erred by finding sufficient evidence existed to convict Jacobs of Violation of Order Prohibiting Contact under N.D.C.C. §12.1-31.2-02.

[¶4.] Whether the district court erred by denying the Defendant's challenge to a prospective juror for cause.

STATEMENT FOR ORAL ARGUMENT

[¶5.] Jacobs is requesting the Court schedule oral argument in this case under N.D.R.App.P. 28(h). Oral arguments would be helpful to the court on the issues involving the sufficiency of the evidence issues, as well as the issue relating to the challenge to the prospective juror, by clarifying and emphasizing Jacobs's written arguments.

STATEMENT OF THE CASE

[¶6.] A criminal complaint was filed on March 14, 2022 alleging two counts against Jacobs. (R1:1:¶¶1–2). Count 1 alleged that Jacobs committed Endangering By Fire or Explosion in violation of N.D.C.C. §12.1-21-02, specifically alleging that he started or maintained a fire at an occupied residence, in disregard of the safety and lives of the

occupants. (R1:1:¶1). Count 2 alleged that Jacobs committed Violation of an Order Prohibiting Contact in violation of N.D.C.C. §12.1-31.2-02, specifically alleging he disobeyed an order entered by Morton County District Court Judge Bobbi Weiler on January 4, 2022 in case number 30-2022-CR-00009 protecting an individual and that he willfully violated the order by sending numerous text messages. (R1:1¶2). An Information with substantially the same allegations was filed by the State on May 2, 2022. (R18:1:¶¶1–2). A preliminary hearing was then held on May 3, 2022 where the district court found probable cause on each of the two counts, and Jacobs pled not guilty to each count.

[¶7.] During the jury selection, Jacobs sought to excuse Juror No. 22. (R88:46:5–17). Juror No. 22 worked in law enforcement from 1993 to 2001 as a 911 operator in Florida. (R88:34:222–24). The Court asked the prospective juror if that experience would impact his ability to be fair and impartial, and the prospective juror responded "probably not" (R88:34:25; R88:35:1–2). Following up, the Court inquired whether the prospective juror would "feel law enforcement or at – are more likely to be honest than someone else?" (R88:35:3–6). Juror No. 22 responded: "Perhaps." (R88:35:7). To the Court's later questions, Juror No. 22 responded that he would look at all of the testimony and not just the law enforcement's perspective, weigh the testimony of law enforcement the same as other witnesses, and he would be fair and impartial. (R88:35:11–24). In its ruling, the district court reasoned:

> I noted two things. First, [Jacob's counsel] had not done any follow-up questioning; that his subsequent responses were in the affirmative that he could be fair and impartial. There were no follow-up questions to cause additional concern. And I also noted the reality that we didn't have very many jurors to spare if we're going to have a jury of 12 in light of two more preemptory challenges and if I dismissed one for cause. And so I declined to dismiss your Juror No. 2 [sic] for cause.

(Second Alteration in Original) (R88:46:9–17). Ultimately the Defendant used a preemptory challenge on Juror No. 22. (R75:1).

[¶8.] A jury trial was then held on August 23, 2022. *See* (R87:3:1–11). During the trial, the State called two witnesses. The first witness was Craig Calkins, an officer with the Mandan Police Department. (R87:22:14–17; R87:23:6–8). The State's second witness was Desarae Bergquist, the alleged victim. (R87:45:1–25; R87:45:1–2). At the close of the State's case in chief, Jacobs moved to dismiss the charges under N.D.R.Crim.P. 29 for insufficient evidence to sustain a conviction. (R87:79:6–10). The district court, without elaboration, denied the motion and found there was sufficient evidence to submit both charges to the jury. (R87:79:11–17). Jacobs did not call any witnesses or testify on his own behalf. (R87:82:8–9).

[¶9.] After the jury's deliberation, Jacobs was found guilty of both counts that had been charged. (R78:1). Jacobs then timely appealed from the judgment on September 22, 2022 (R82:1).

STATEMENT OF THE FACTS

[¶10.] In Count 1, the State alleged that on or about March 8, 2022 Jacobs committed the offense of Endangering by Fire or Explosion in violation of N.D.C.C. §12.1-21-02. (R18:1:¶1). In Count 2, the State alleged that on or about March 11, 2022 Jacobs committed the offense of Violation of an Order Prohibiting Contact in violation of N.D.C.C. §12.1-31.2-02. (R18:1:¶2). According to the State, Jacobs was served an Order Prohibiting contact in a separate criminal matter on January 7, 2022. (R2:2:¶k). The victim contacted law enforcement on March 11, 2022 after receiving text messages believed to be from Jacobs. (R2:1:¶c). The victim believed that Jacobs had started a fire in an enclosed

entryway to her house on March 8, 2022. (R2:1:¶f). Ashes and scorch marks were observed in the entry way on March 11, 2022. (R2:1:¶g). The text messages that the victim received—which she believed came from Travis Jacobs—indicated that the fire may have been started by dropping a cigarette. (R2:2: ¶i). However, law enforcement did not verify that the phone number belonged to Jacobs. (R87:38:8–15). And the victim did not observe who actually started the fire. (R87:70:7–9).

ARGUMENT

I. Standard of Review for Sufficiency of the Evidence

[¶11.] The Court has previously held when reviewing the sufficiency of the evidence from a criminal jury trial:

> In deciding a motion for judgment of acquittal, the district 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. On appeal, to successfully challenge the sufficiency of the evidence, the defendant must show the evidence, when viewed in the light most favorable to the verdict, permits no reasonable inference of guilt.

State v. Gonzalez, 2000 ND 32, ¶14, 606 N.W.2d 873 (quotations omitted) (citing *State v. Hafner*, 1998 ND 220, ¶21, 587 N.W.2d 177). The Court has further held:

> When ruling on a motion for judgment of acquittal under Rule 29, N.D.R. Crim.P., the district court must assume the truth of the evidence supporting the State's case and then decide whether a reasonable person would be justified in concluding from this evidence that all the elements of the crime have been established beyond a reasonable doubt. To grant a judgment of acquittal, a district court must find the evidence is insufficient to sustain a conviction of the offenses charged.

Gonzalez, 2000 ND 32, ¶15, 606 N.W.2d 873 (citing *State v. Morris*, 331 N.W.2d 48, 55 (N.D. 1983); *State v. Allen*, 237 N.W.2d 154 (N.D. 1975); *State v. Delaney*, 1999 ND 189, ¶4, 601 N.W.2d 573). "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 (quoting *State v. Kunkel*, 548 N.W.2d 773, 773 (N.D. 1996)). Interpretation of the statutes "is a question of law fully reviewable on appeal." *State v. Corman*, 2009 ND 85, ¶15, 765 N.W.2d 530 (quoting *State v. Shafer-Imhoff*, 2001 ND 146, ¶29, 632 N.W.2d 825).

[¶12.] N.D.R.Crim.P. 29(a) specifically provides:

> After 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. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the prosecution's evidence, the defendant may offer evidence without having reserved the right to do so.

[¶13.] The statute in question for Count 1 provides:

> 1. A person is guilty of an offense if he intentionally starts or maintains a fire or causes an explosion and thereby recklessly:
>
> a. Places another person in danger of death or bodily injury;
> b. Places an entire or any part of a building or inhabited structure of another or a vital public facility in danger of destruction; or
> c. Causes damage to property of another constituting pecuniary loss in excess of two thousand dollars.
>
> 2. The offense is a class B felony if the actor places another person in danger of death under circumstances manifesting an extreme indifference to the value of human life. Otherwise it is a class C felony.

N.D.C.C. §12.1-21-02. The Court's unchallenged jury instructions provided that the essential elements of the offense were:

1. On or about March 8, 2022;

2. In Morton County, North Dakota;

> 3. The Defendant, Travis Jacobs;
>
> 4. Intentionally started or maintained a fire or caused an explosion; and
>
> 5. The Defendant recklessly placed an entire or any part of a building or inhabited structure of another in danger or destruction.

(R77:7:5–12).

[¶14.] For Court 2, the relevant statute provides that "An individual who violates a court order issued under this section is guilty of a class A misdemeanor." N.D.C.C. §12.1-31.2-02(4). The order at issue in this case provided that "It is a violation of this Order for you to contact the victim via telephone, mail, writing, electronic mail (including social media), or any other means, whether directly or through third parties." (R69:1:¶5). The jury instructions provided that the essential elements of the offense were as follows:

> 1. On or about March 11, 2022;
>
> 2. In Morton County, North Dakota;
>
> 3. The Defendant, Travis Jacobs;
>
> 4. Had an Order Prohibiting Contact with the Victim issued against him; and
>
> 5. The Defendant willfully violated the Order Prohibiting Contact with the Victim.

(R77:7:22-24; 77:8:1–4).

[¶15.] During closing arguments, Jacobs conceded that the State had established the first two elements of each offense, but otherwise argued the State had failed to meet its burden. (R87:98:2–3).

II. <u>The District Court Erred In Finding Sufficient Evidence to Identify Jacobs As The Perpetrator of the Crimes</u>

[¶16.] In this case, the State provided insufficient evidence that Jacobs was the individual that was responsible for the incident that occurred at the victim's residence on March 8, 2022. None of the testimony provided by Officer Caulkins provided support that Jacobs was the individual who committed the crimes alleged. During his investigation three days after the alleged fire, Officer Caulkins testified that Bergquist suspected Jacobs was in a vehicle nearby, but his investigation revealed that the vehicle was misidentified and Jacobs was not present. (R87:24:17–24). The officer reviewed text messages on the victim's phone and claimed that the messages were from Jacobs. (R87:26:5–9). However, his testimony regarding the victim's statements were not introduced for the truth of the matter. (R87:26:10–19). The text messages themselves do not identify who was sending the messages. *See* (R62:1; 63:1; 64:1; 65:1, 66:1, 67:1, 68:1). Officer Caulkins initially testified he could not recall whether he confirmed that the phone number belonged to Jacobs. (R87:38:8–15). Later he testified that he did nothing further to confirm the identity of the person who sent the text messages. (R87:39:9–12; 87:43:11–16).

[¶17.] The victim herself also did not provide sufficient testimony that would allow a reasonable factfinder to make a reasonable inference of guilt. Most of her testimony attempted to address the identity of the person who sent her the text messages because one of the messages stated "I'm sorry my cigarette fell an I couldn't find it. I never thought it would start a fire I thought it fell on the concrete." (R87:57:8–10). Initially she claimed that Jacobs had sent the messages to her. (R87:50:20–22). However, she only based her assumption it was Jacobs by "[j]ust the way he talks." (R87:51:18–21). She did not provide a further explanation of his manner of talking. *See id.* And when asked specifically how

she knew, she testified "I just knew." (R87:67:13–16). And she did not have any specialized training that would assist her in identifying the sender of the messages. (R87:68:25; 87:69:1–3). The victim attempted to identify Jacobs as the individual who sent the text messages due to a reference to an incident at a bar where Jacobs allegedly took a beer bottle and hit the person on the head. (R87:55:5–14). However, she did not identify how many individuals were present when this incident happened and did not testify that Jacobs was the only person who had known that information. *See id.* She later gave contradictory statements as to whether or not Jacobs was using the phone number (R87:60:4–10). She admitted that Jacobs had never used that number before (R87:67:10–12).

[¶18.] Overall, there is insufficient evidence in the record to establish that Jacobs committed the alleged offenses. As a matter of law, the testimony of Officer Caulkins and the victim in this matter were not sufficient to permit a reasonable factfinder that Jacobs committed either of the offenses. The Court should therefore reverse the district court's judgment on both counts.

III. <u>The District Court Erred In Finding Sufficient Evidence that The Fire Was Intentionally Started Or Maintained</u>

[¶19.] Even if the Court were to hold that there was sufficient evidence to identify Jacobs at the perpetrator of both offenses, there is also insufficient evidence for Count 1 that the fire was intentionally started or maintained. The photographic evidence that was submitted into the record was taken by Officer Caulkins three days after the fire occurred. (R87:28:20–25; 87:29:10–18); *see* (R57:1; 58:1; 59:1; 60:1; 61:1). Although his testimony established that a fire occurred, Officer Caulkins did not testify as to the cause of the fire.

(R87:28–36). He had no specific training investigating fires. (R87:36:17–21). Nor could he testify as to whether the scene has been altered between March 8 and March 11. (R87:37:20–25). Nor could he testify as to the materials that had been burnt. *See* (R87:38:5–7). The only evidence regarding the cause of the fire was from the text messages indicating that it was a cigarette that fell. (R87:57:8–10).

[¶20.] The victim claimed in her testimony that leaves and dog feces had been piled up in the entry way and had been ignited. (R87:60:19–24). She only identified the leaves because "I guess, it looked like leaves" and she identified the dog feces because "that's what it looked like." (R87:61:2; R87:61:6). However she did not witness the fire being lit, but rather smelled the smoke when she left her bathroom. (R87:65:10–14). She was unsure where leaves would have been available with snow on the ground. (R87:69:11–13). And she did not have any training or experience investigating fires. (R87:69:14–16). And the victim confirmed that the dog feces would have been frozen at that time of year. (R87:69:22–25).

[¶21.] The record only provides sufficient information to determine that a fire occurred at the victim's residence. There is insufficient evidence to establish that the fire was intentionally started or maintained. A reasonable factfinder could not find evidence beyond a reasonable doubt on element four for the Endangering by Fire or Explosion count. The Court should therefore reverse the district court's judgment on Count 1.

IV. <u>The District Court Erred In Denying Jacobs's Challenge For Cause to a Prospective Juror</u>

[¶22.] The trial court's decision whether to excuse a juror for cause is reviewed under an abuse of discretion standard. *State v. Garnder*, 2016 ND 161, ¶7, 883 N.W.2d

471 (citing *State v. Smaage*, 547 N.W.2d 916, 919 (N.D. 1996)). As the Court has previously held:

> Persons accused of crimes have a right to a trial by an impartial jury. In *State v. Fredericks*, 507 N.W.2d 61, 64–65 (N.D.1993), we explained:
>
> A criminal defendant's right to an impartial jury trial under the Sixth Amendment requires the selection of the jury from a representative cross section of the community. The Fourteenth Amendment makes the provisions of the Sixth Amendment binding upon the states. Although the North Dakota Constitution's guarantee of the right to a jury trial does not explicitly require an impartial jury, see N.D. Const. art. I, § 13, we would read the Sixth Amendment's impartiality and fair-cross-section requirements into our state constitution.
>
> In determining whether a defendant was deprived of a fair and impartial jury, the court will not readily discount the assurances of a juror as to his impartiality. It remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror to overcome a presumption of impartiality and raise a presumption of partiality.
>
> A trial judge must excuse a juror if the judge finds grounds for challenge for cause. A juror can be excused on the basis of either actual or implied bias. Implied bias is based on any of the enumerated causes found in § 29–17–36, N.D.C.C. Actual bias is defined as the existence of a state of mind on the part of the juror, with reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion, that the juror cannot try the issue impartially without prejudice to the substantial rights of the party challenging, and which is known in this title as actual bias.

(Cleaned up) *State v. Garnder*, 2016 ND 161, ¶¶5–6, 883 N.W.2d 471.

[¶23.] In this case, the Juror No. 22 originally informed the district court that he was not able to be impartial with respect to witnesses who were in law enforcement. Although the prospective juror ultimately did indicate that he would be fair and impartial, the district court should have exercised its discretion and struck the juror for actual bias. Furthermore, the district court should not have denied the for-cause dismissal of the juror due to concerns about the number of jurors remaining. Although it would have been inconvenient to reschedule the trial and summon a new jury pool, Jacobs would have been

more likely to receive a fair trial. And even though ultimately Juror No. 22 was excused under a preemptory challenge, Jacobs was still harmed by the district court's error because he was denied the ability to use his additional peremptory challenge. N.D.R.Crim.P. 24(b)(2)(B) (stating each side is entitled to six peremptory challenges when a twelve-person jury is to be impaneled).

CONCLUSION

[¶24.] The Court should reverse the district court on counts 1 and 2 because there was insufficient evidence to establish that Jacobs committed the alleged offenses. Even if the Court finds there was sufficient evidence to establish Jacobs was the person who committed the alleged offenses, the Court should still reverse the district court on count 1 because there is insufficient evidence to establish that the fire was intentionally started or maintained. Finally, the Court should reverse the district court because the district court abused its discretion in not striking Juror No. 22 for cause due to actual bias.

Dated: December 27, 2022.

/S/ William D. Woodworth

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CERTIFICATE OF COMPLIANCE

[¶25.] I, William Woodworth, as the attorney for the Appellant and the author of this brief, hereby certify that this brief is in compliance with N.D.R.App.P. 32(a)(8)(A). This brief is 16 pages long, excluding any addendum.

Dated: December 27, 2022.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	Morton County District Court No. 30-2022-CR-00246
Plaintiff and Appellee,	)	Supreme Court No. 20220280
v.	)	
Travis Lee Jacobs,	)	**CERTIFICATE OF SERVICE**
Defendant and Appellant	)	

I, William D. Woodworth, certify that on December 27, 2022, I served the following documents by Electronic Service under N.D.R.App.P. 25(b)(1)(D):

1. Brief of Appellant

Paul Edward Jensen
MortonSA@MortonND.org

Dated: December 27, 2022

/S/ William D. Woodworth

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee,	Morton County District Court No. 30-2022-CR-00246
v.	Supreme Court No. 20220280
Travis Lee Jacobs, Defendant and Appellant	**CERTIFICATE OF SERVICE**

I, William D. Woodworth, certify that on January 3, 2023, I served the following documents by Electronic Service under N.D.R.App.P. 25(c)(1)(D):

1. Brief of Appellant (Corrected)

Paul Edward Jensen
MortonSA@MortonND.org

I further certify that on January 3, 2023, I served the following documents by first class mail under N.D.R.App.P. 25(c)(1)(B):

1. Brief of Appellant (Corrected)

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Dated: January 3, 2023

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