

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

The State of North Dakota,)	
)	
)	Supreme Court Nos. 200500257,
)	200500258, 20050259
)	
Plaintiff and Appellee,)	
)	
)	District Court Nos. 18-04-K-001644,
)	18-04-K-001645, 18-04-K-001646
)	
vs.)	
)	
Leroy Kenneth Wheeler,)	
)	
Defendant and Appellant.)	

ON APPEAL FROM CRIMINAL JUDGMENT
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE DEBBIE KLEVEN, PRESIDING.

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

- I Whether sufficient evidence was presented at trial to support the jury's guilty verdict and the District Court's denial of the Defendant's motion for acquittal?
- II Whether the District Court erred in denying the Defendant's motion for a Franks hearing when the Defendant failed to make a substantial showing that false statements were made knowingly and intentionally or with reckless disregard for the truth?
- III Whether the District Court erred in denying the Defendant's Motion to Dismiss when the Defendant raised issues outside the proper scope of the of a Motion to Dismiss?
- IV Whether the District Court erred in denying the Defendant's Demand for Change of Judge?
- V Whether issues that have not been fully briefed and argued, such as issues IV., V., and XII. of the Defendant's Statement of the Issues, should be heard on appeal?
- VI Whether the Defendant's rights to a fair trial were violated?
- VII Whether the District Court erred in denying the Defendant's Motion for New Trial when evidence was presented to support the conviction and the conviction was not against the manifest weight of the evidence?
- VIII Whether the District Court's clerical error affected any substantial legal or constitutional rights of the Defendant?

STATEMENT OF THE CASE

[¶1] Leroy Kenneth Wheeler (Mr. Wheeler and Defendant herein), appeals from a judgment of criminal conviction in the District Court of Grand Forks County. On July 28, 2004, Mr. Wheeler was charged with Encouraging the Deprivation of a Minor, Contributing to the Delinquency of a Minor (2 Counts), and Gross Sexual Imposition arising from an incident on the 12th and 13th of June, 2004 in which the Defendant provided alcohol to two juveniles, encouraged and caused a juvenile victim one of the juveniles (Appellant's App. at 31-33). A trial was held on May 3, 2005 and the Defendant was subsequently convicted of all of the above mentioned charges on May 6, 2005. Trial Tr., vol. IV, p. 665, May 6, 2005. Notice of Appeal was entered on July 29, 2005. (Appellee's App. at 51-53).

STATEMENT OF THE FACTS

[¶2] On June 13, 2004, detectives with the Grand Forks Police Department began investigating a possible Gross Sexual Imposition. Trial Tr., vol. II., p. 357, May 4, 2005. Specifically, Detective Iwan, a juvenile investigator with the police department, was requested to assist Detective Murphy at Altru Hospital and speak with two juveniles, R.D. (twelve years old) and J.S. (thirteen years old) who were being examined after a possible sexual assault. Trial Tr., vol. II., pp. 358-359, May 4, 2005. After speaking briefly with the juveniles, Detective Iwan discovered that Mr. Wheeler, a fifty-two year old man, had engaged in sexual intercourse with R.D. Trial Tr., vol. II., pp. 358-360, May 4, 2005. According to police procedure and in order to avoid any further trauma to the victims, Detective Iwan did not perform an extensive interview with R.D. and J.S. at the hospital. Trial Tr., vol. II., p. 359, May 4, 2005. Detective Iwan did speak with the suspect, Mr. Wheeler, after Mr. Wheeler had been given his Miranda rights by Detective Murphy. Trial Tr., vol. II., p. 360, May 4, 2005. After indicating to Mr. Wheeler that he was investigating an alleged sexual assault complaint, but without giving any details regarding the allegation, Mr. Wheeler informed Detective Iwan that he had not provided J.S. or R.D. with any alcohol, that he did not have sex with them, and that he did not ask them to strip. Trial Tr., vol. II., p. 360, May 4, 2005. Mr. Wheeler further indicated that one of the girls drove his vehicle without his permission. Trial Tr., vol. II., p. 360, May 4,

2005.

[¶3] After speaking with Mr. Wheeler, Detective Iwan then interviewed the juvenile victims separately. Trial Tr., vol. II., p. 362, May 4, 2005. At trial, Detective Iwan noted that the interviews with the victims contained extensive consistencies regarding their versions of the events that occurred on June 12th and 13th, 2004. Trial Tr., vol. II., p. 363, May 4, 2005. J.S. and R.D. indicated that on the night of June 12th, 2004 they were riding their bikes and went to James McLeod's, Mr. Wheeler's cousin, where they agreed to meet the Defendant at Hugo's later that evening. Trial Tr., vol. II., pp. 218-220 and 296, May 4, 2005. After meeting Mr. Wheeler at Hugo's, both R.D. and J.S. placed their bikes in the back of the Defendant's van. Trial Tr., vol. II., pp. 221 and 298, May 4, 2005. R.D. and J.S. rode in Mr. Wheeler's van and eventually ended up at a storage unit that Mr. Wheeler rented. Trial Tr., vol. II., pp. 222 and 300, May 4, 2005. At the storage unit, Mr. Wheeler offered both R.D. and J.S. what they described as rose-flavored vodka and Mike's Hard Lemonade. Trial Tr., vol. II., pp. 224 and 300-301, May 4, 2005. While they were at the storage unit and sitting in the Defendant's van, the Defendant asked R.D. if she would perform a strip tease for him for money. Trial Tr., vol. II., pp. 224 and 301, May 4, 2005. R.D. then complied with the Defendant's request. Trial Tr., vol. II., pp. 222 and 301, May 4, 2005. After performing the strip tease, the Defendant then asked R.D. to have sex with him for money and a new bike. Trial Tr.,

vol. II., pp. 225 and 302, May 4, 2005. Again, R.D. complied and engaged in sexual intercourse with Mr. Wheeler in the back seat of his van. Trial Tr., vol. II., pp. 225 and 302, May 4, 2005. J.S., although not watching this occur, felt horrible and sat in the front seat of the van with a curtain over her head and while listening to her friend being victimized. Trial Tr., vol. II., p. 303, May 4, 2005. After having sexual intercourse with R.D., Mr. Wheeler then drove with the girls in his van, purchased alcohol at the El Roco, and took the girls out to a truck stop restaurant. Trial Tr., vol. II., pp. 227 and 303, May 4, 2005. Both J.S. and R.D. indicated at one point that they stopped at a “mini store” and purchased beef jerky because they were hungry and both girls indicated that at the restaurant R.D. ate peaches and J.S. ate nothing. Trial Tr., vol. II., pp. 227-228 and 304, May 4, 2005; see also Trial Tr., vol. III., p. 550, May 5, 2005 (Defendant’s witness, James McLeod, corroborating these details). At some point over the course of the events, R.D. was permitted to drive the Defendant’s van, despite not having a license. Trial Tr., vol. II., pp. 229 and 305, May 4, 2005. R.D. lost control of the van and hit a wall, causing damage to the Defendant’s van, which was corroborated by J.S., the Defendant’s witness James McLeod, and the actual physical damage documented on the Defendant’s vehicle. Trial Tr., vol. II., pp. 229-230 and 305, May 4, 2005; Trial Tr., vol. II., pp. 222 and 300, May 4, 2005; Trial Tr., vol. III., p. 539, May 5, 2005. At the end of the day, J.S.’s mom finally discovered both R.D. and J.S. at the storage unit and followed them home in her vehicle while the girls rode their bikes. Trial Tr., vol. II., pp. 230-232 and 307, May 4, 2005. J.S., R.D., and Amy Shilling all testified that at no time did the girls converse with each other. Trial Tr., vol. II., pp. 230-232, 307, May 4, 2005; Trial Tr., vol. I., p. 183,

May 3, 2005. In fact, Amy Shilling testified that she watched the girls as they were riding their bike and observed them to not speak whatsoever on their ride home. Trial Tr., vol. I., pg. 183, May 3, 2005. After leaving the storage unit, Amy Shilling called the police and the girls were examined at the Altru Emergency room. Trial Tr., vol. I., p. 183, May 3, 2005. Although J.S. informed the doctor that she had not been sexually assaulted, she too was examined as a precaution. Trial Tr., vol. III, p. 571, May 5, 2005.

[¶4] Testimony was also provided at trial to corroborate the allegations of J.S. and R.D. During the investigation of Mr. Wheeler, officers discovered video tape evidence of Mr. Wheeler buying alcohol at the El Roco on the night in question as both J.S. and R.D. indicated. Trial Tr., vol. II., p.365, May 4, 2005. Further, officers executed a search warrant on Mr. Wheeler's van in which they found two empty beef jerky wrappers, a condom wrapper, and bottle caps of Mike's Hard Lemonade. Trial Tr., vol. II., pp. 369-373, May 4, 2005. Additionally, the description of the accident involving the Defendant's van was also corroborated during the search warrant. Trial Tr., vol. II., p. 374, May 4, 2005. After the evidence was presented at trial, the Defendant was subsequently found guilty by the jury on all three charges. Trial Tr., vol. IV., p. 665, May 6, 2005.

ARGUMENT

I. SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO SUPPORT THE JURY'S GUILTY VERDICT ON ALL CHARGES AND THE DISTRICT COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR ACQUITTAL.

[¶5] In the case at hand, the Defendant argues that sufficient evidence was not presented to support the jury's verdict in issue I of his brief. Further, in issue IX the Defendant argues that the District Court erred when denying the Defendant's Motion for Acquittal. Because this Court has stated that the standard of review for these issues is the same, the State has addressed these issues together. State v. Delaney, 1999 ND 189, ¶ 4, 601 N.W.2d 573.

A. Sufficient Evidence Was Presented At Trial To Support The Jury's Guilty Verdict On All Charges.

[¶6] In reviewing the sufficiency of the evidence to convict, the Supreme Court of North Dakota looks only to the evidence most favorable to the verdict and the reasonable inferences therefrom to determine if there is substantial evidence to warrant a conviction. State of North Dakota v. Kunkel, 548 N.W.2d 773 (N.D. 1996). 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. Id. Furthermore, the Court does not weigh conflicting evidence, nor

does it judge the credibility of the witnesses. Id. at 774.

[¶7] In the case at hand, a jury properly found the Defendant guilty of all charges because substantial evidence was presented to warrant such a conclusion. The State presented the two minor victims who testified that the Defendant did in fact provide them alcohol, encouraged R.D. to perform a strip tease in exchange for money, and had sexual intercourse with R.D., who was thirteen years old at the time of the incident. Both R.D. and J.S. emphatically and consistently testified that R.D. engaged in sexual intercourse with the Defendant and performed a strip tease. Both victims described in detail the types of alcohol the Defendant provided to them. Bottle caps and a video tape showing the Defendant purchasing alcohol on the night of question were presented to the jury at trial. R.D. testified that the Defendant used a condom during intercourse, and testimony was presented at trial by Detective Iwan describing a used condom wrapper that was found in the Defendant's van. The Defendant attempts to argue that somehow the juvenile victims went so far as to fabricate this story for the purpose of avoiding juvenile detention. However, this argument is implausible, as it is unfathomable to suggest that two young girls would prefer to lie about being sexually assaulted, be physically examined and have a rape kit completed on them, have to testify at trial regarding embarrassing details of the night in question, and be forced to relive and repeatedly explain this event for over a year. Not only does the State find this argument implausible, but the jury did as well.

Detective Iwan, a juvenile investigator with the Grand Forks Police Department indicated that minor inconsistencies are to be expected in a case such as this, and that his suspicions regarding fabrications may have actually been raised had there not been any inconsistencies in the minor details. Trial Tr., vol. III., p. 474, May 5, 2005.

[¶8] As indicated in Kunkel, when reviewing the sufficiency of the evidence to convict all reasonable inferences are drawn in favor of the State. Because these victims were young girls at the time and had been involved in an extremely traumatizing event, minor inconsistencies in their reports are to be expected. The jury was presented with the testimony from the victims and were able to make a determination of their credibility on their own. The Defendant was given extensive leeway in his cross-examination of the witnesses in this case. Despite minor inconsistencies with small details of a night in which the victims had been up all night, had drank alcohol, and had witnessed or been involved in a sexual act with a fifty-two year old sexual offender, these juvenile victims never once wavered in their reports and testimony regarding the fact that the Defendant provided them alcohol, asked R.D. to perform a strip tease for money, and engaged in sexual intercourse with R.D. After reviewing the evidence in the light most favorable to the State, sufficient evidence was presented to justify a conviction and a denial of a motion for acquittal in this case.

B. The District Court Did Not Err When Denying The Defendant's Motion For Acquittal When Sufficient Evidence Was Presented At Trial To Warrant A Conviction.

[¶9] To grant a judgment of acquittal, a trial court must find the evidence is insufficient to sustain a conviction of the offenses charged. N.D. R. Crim. P. 29(a).

Additionally, a motion to direct a verdict is considered a motion for a judgment of acquittal under Rule 29. State v. Himmerick, 499 N.W.2d 568, 571 (N.D. 1993). In reviewing the denial of a motion for judgment of acquittal, the court must review the entire record on appeal in the light most favorable to the verdict, to determine if sufficient evidence was presented to sustain a conviction. State v. Delaney, 1999 ND 189, ¶ 4, 601 N.W.2d 573. Furthermore, when ruling on a motion for judgment of acquittal under N.D. R. Crim. P. 29, a 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. State v. Weaver, 2002 ND 4, ¶9, 638 N.W.2d 30. Because this Court has held that the standard for reviewing a denial of a motion for acquittal is based on the sufficiency of the evidence presented at trial, as is the review of the jury's verdict, the State would reassert the same analysis for this issue as set forth in issue I.A. above. Based on the analysis set forth in I.A. of the State's brief, the State would respectfully request that this Court find that, viewing the evidence in the light most favorable to the State, sufficient evidence was presented at trial to sustain a conviction and therefore the District Court's decision should be affirmed.

II. THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A FRANKS HEARING WHEN HE FAILED TO MAKE A SUBSTANTIAL SHOWING THAT FALSE STATEMENTS WERE MADE KNOWINGLY AND INTENTIONALLY OR WITH A RECKLESS DISREGARD FOR THE TRUTH.

[¶10] In order to warrant a Franks hearing, the Defendant must make a substantial showing that false statements were made knowingly and intentionally, or with reckless disregard for the truth and that the information contested was necessary to find probable cause. State v. Donovan, 2004 ND 201 ¶7, 688 N.W.2d 646. Defendants cannot meet this first Franks requirement by relying entirely on his or her own accusations of the agent's deliberate or reckless actions. United States v. Underwood, 364 F.3d 956, 964 (8th Cir. 2004).

[¶11] The trial court's ruling on whether a substantial preliminary showing has been made is considered a finding of fact. State of North Dakota v. Rangeloff, 1998 ND 135 ¶10, 580 N.W.2d 593. A trial court's finding of fact in a preliminary proceeding of a criminal case will not be reversed if, after the conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. Id.

[¶12] In the case at hand, the Defendant filed a request for a Franks hearing on November 26, 2004. (Appellant's App. at 54-55). The Defendant alleged that misleading statements were made to the Magistrate in the application for the search warrants dated June 18, 2004 and October 6, 2004 by Detective Iwan. (Appellee's App. 2-5). The Defendant claimed that the language used by Detective Iwan in obtaining the warrant was

misleading because Detective Iwan informed the Magistrate that the Defendant had been arrested thus inferring a lawful arrest had been made. (Appellee's App. 2-5). The Defendant also alleged that a Franks hearing was justified because Detective Iwan misled the Magistrate in respect to the veracity of the informants of this crime. (Appellee's App. 2-5). On February 9, 2005 the District Court entered an order denying the Defendant's request for a Franks hearing on the basis that the Defendant failed to make a substantial showing that false statements were made knowingly and intentionally, or with reckless disregard for the truth. (Appellant's App. at 54-55). The District Court determined that the Defendant failed to meet this first Franks requirement when he impermissibly relied entirely on his or her own accusations of the agents deliberate or reckless actions. (Appellant's App. at 54-55).

[¶13] In this case, the District Court's decision should not be disturbed unless this Court finds that the decision is contrary to the manifest weight of the evidence. The manifest weight of the evidence clearly shows that the Defendant merely relied on his own allegations and accusations that Detective Iwan misled the Magistrate to obtain the search warrants. There was nothing presented to the Court to establish any objective concerns that there were any false statements made to the Magistrate, much less false statements made with knowingly or intentionally or with reckless disregard for their truth. Additionally, it should be noted that the Defendant did not in fact even allege that

Detective Iwan made any false statements. Rather the Defendant alleged that Detective Iwan mislead the Magistrate by setting forth the facts that the experienced Detective found to support a search warrant, rather than setting forth the Defendant's interpretation of the evidence. After reviewing the Search Warrant Transcript dated June 18, 2004, it is abundantly clear that Detective Iwan specifically stated that he had received a report from two minor victims reporting these crimes. Search Warrant Tr., pp. 3, 5, June 18, 2004. Further, although the Defendant alleges that Detective Iwan should have informed the Magistrate that there were "major inconsistencies" with the victims reports, this is contrary to the testimony provided at trial by Detective Iwan and other individuals investigating the case. Trial Tr., vol. III., pp. 474, May 5, 2005. The Defendant has interpreted minor inconsistencies, which are to be expected from young victims of these crimes under traumatic circumstances, to be major inconsistencies requiring disclosure. That is not the case, and the material weight of the evidence presented to the trial court establishes that Detective Iwan was forthcoming with the Magistrate and made no false statements, intentionally, knowingly, or with reckless disregard. Because the Defendant relied entirely on his own accusations of the agents deliberate or reckless actions and in fact failed to even allege that false statements were made, the District Court properly denied his request for a Franks hearing.

[¶14] Furthermore, although the Defendant claims that this issue is reviewed under a de novo standard of review, the North Dakota Supreme Court has clearly set forth in Rangeloff, that the District Court decision should not be reversed unless there is not sufficient competent evidence fairly capable of supporting the trial court's finding and the

decision is contrary to the manifest weight of the evidence. This Court has also stated that all conflicts in testimony should be resolved in the favor of affirmance when considering whether the decision is contrary to the manifest weight of the evidence. Rangeloff, 1998 ND 135, ¶ 10. Resolving any conflicts in favor of affirming the District Court's decision, coupled with the fact that the manifest weight of the evidence supports a denial of the Franks hearing, the State respectfully submits that this Court should affirm the District Court's denial of a Franks hearing.

III. THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS WHEN HE RAISED ISSUES OUTSIDE THE SCOPE OF THE PURPOSE FOR A MOTION TO DISMISS.

[¶15] The purpose of a Motion to Dismiss is to test the sufficiency of the information or indictment. State v. Perreault, 2002 ND 14, ¶7, 638 N.W.2d 541. This Court has stated that the Motion to Dismiss is not a summary trial of the evidence and facts not appearing on the face of the information cannot be considered. Id. A court is obliged to confine itself to the face of the information and all well-pleaded facts are to be taken as true. Id.

[¶16] In reviewing a denial of a Motion to Dismiss, this Court has stated that a trial court's findings of fact in preliminary criminal proceedings, such as a Motion to Dismiss, will not be reversed if, after the conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the

findings and if the trial court's decision is not contrary to the manifest weight of the evidence. State v. Berger, 2001 ND 44, ¶11, 623 N.W.2d 25 (citing State v. Tester, 1999 ND 60, ¶11, 592 N.W.2d 515). This Court also noted that deferential standard of review recognizes the importance of the opportunity of the trial court to observe and assess credibility of witnesses. Id.

[¶17] In the instant case the Defendant filed a Motion to Dismiss on November 26, 2004. (Appellant's App. at 7). The substance of the Defendant's Motion and Brief in Support of Motion to Dismiss included allegations of insufficient evidence and an illegal arrest. (Appellee's App. at 16). In accordance with Perreault, the District Court denied the Defendant's Motion on the basis that the Defendant was using the motion as a summary trial of the evidence and asking the Court to consider facts outside the face of the information. (Appellant's App. at 52). Taking into consideration the deferential standard of review on appeal for preliminary criminal proceedings, the District Court properly followed North Dakota case law when denying the Defendant's Motion to Dismiss and therefore its decision should be affirmed.

IV THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S DEMAND FOR A CHANGE OF JUDGE.

[¶18] Under § 29-15-21 of the North Dakota Century Code, any party to a civil or criminal action or proceeding pending in the District Court may obtain a change of judge by filing with the clerk of court a written demand for such a change provided that the demand is filed not later than ten days after the notice of assignment of the judge, the date of notice that a trial has been scheduled, or the date of service of any ex parte order in the

case signed by the judge against whom the demand is filed. N.D.C.C. § 29-15-21 (2005).

An untimely demand pursuant to the statute is deemed invalid and is properly denied by the reviewing court. City of Fargo v. Habiger, 2004 ND 127, ¶14, 682 N.W.2d 300; Adolph Rub Trust v. Rub, 473 N.W.2d 442, 445 (N.D. 1991). Additionally, no demand for a change of judge may be made after the judge sought to be disqualified has ruled upon any matter pertaining to the action or proceeding in which the demanding party was heard or had an opportunity to be heard. N.D.C.C. § 29-15-21 (2005). When reviewing whether the District Court properly interpreted the language of the statute, the standard is de novo as it is a question of law. Wheeler v. Gardner, 2006 ND 24, ¶10, 708 N.W.2d 908.

[¶19] In the case at hand the Defendant filed a Demand for Change of Judge with the Grand Forks County District Court on April 6, 2005. (Appellant's App. at 9). The District Court, via Presiding Judge Karen Braaten, entered a denial on April 8, 2005 on the basis that the Demand for Change of Judge was untimely due to the fact that the assignment of Judge Debbie Kleven to preside over the case was dated June 17, 2004. (Appellant's App. at 65). Because the Demand for Change of Judge was filed more than nine (9) months after the notice of the assignment of the judge, the request did not comply with the statute and was deemed invalid. (Appellant's App. at 65). On April 12, 2005 the Defendant filed his Notice of Appeal from the order denying his demand for Change

of Judge to this Court. (Appellee's App. at 38). This Court dismissed the Defendant's appeal based on Adolph Rub Trust v. Rub, stating that an order denying a demand for a change of judge is not appealable. (Appellee's App. at 38); Adolph Rub Trust v. Rub, 473 N.W.2d 442 (N.D. 1991).

[¶20] In Adolph Rub Trust, this Court stated that normally, an order denying a demand for a change of judge by itself is a nonappealable order. Id. at 444 (citing N.D.C.C. §28-27-02). However, in Adolph Rub Trust, the Court considered the appeal due to the fact that the appellant currently had an appeal pending before the Court from the district court's judgment and a party is entitled to have an interlocutory order considered on an appeal from a final judgment. Id.

[¶21] In the instant case, should this Court consider the merits of this issue on appeal from the District Court's final judgment, the State respectfully requests that the District Court's decision be affirmed in this case. The District Court in this case properly denied the Defendant's Demand for Change of Judge. Although the District Court did cite in its denial one basis for denying Mr. Wheeler a Change of Judge, from a clear reading of the statute, the Defendant was not entitled to a change of judge because his demand was made more than nine months after Judge Kleven had been assigned and had ruled upon an extensive number of matters pertaining to the action. See N.D.C.C. §29-15-21(3) (2005). Therefore based on a plain reading of N.D.C.C. § 29-15-21, and upon full review by this Court, the State respectfully requests that the District Court's decision denying the Defendant's Demand For A Change of Judge be affirmed.

V. ISSUES NOT FULLY BRIEFED AND ARGUED SHOULD NOT BE HEARD ON APPEAL.

[¶22] Issues that have not been fully briefed and argued should not be heard on appeal. Ernst v. State, 2004 ND 152 ¶ 15, 683 N.W.2d 891 (citing State v. Backlund, 2003 ND 184, ¶38, 672 N.W.2d 431). Additionally where a party has failed to provide supporting argument for an issue stated in his brief, he is deemed to have waived that issue. State v. Obrigewitch, 365 N.W.2d 105, 109 (N.D. 1984).

[¶23] In the case at hand, the Defendant's request for an extension of the page requirement to sixty (60) pages was denied. (Appellee's App. at 39). Despite this, the Defendant's brief was written with sixty (60) pages, and in an attempt to comply with the appellate rules, the Defendant tore out pages 35-42 and 57, leaving a total of fifty-two (52) pages in his Appellant Brief. Pages 35-42 appear to have addressed issues V. and VI. according to the Defendant's Statement of the Issues. The argument portion of the Defendant's brief contains no headings addressing these issues and the State is not able to effectively respond to any potential arguments by the Defendant.

[¶24] Page 57 appears to have addressed issue XII. relating to the Defendant's argument regarding a denial of the right to have the record corrected. The Defendant had also made a Motion to Correct the Record En Banc prior to this appeal. This Court denied the Defendant's Motion and informed the Defendant that he was free to argue this issue on appeal. (Appellee's App. at 40). In this case, the Defendant has failed to argue

this issue on appeal as the majority of the argument for that issue was torn out of the Defendant's brief. Even if the Court were to consider this issue on appeal due to the partial paragraph contained on page 58 of the brief, the State would submit that the District Court did not err when denying the Defendant's request to correct the record. From a review of the partial paragraph regarding this issue on page 58 of the Defendant's brief, it appears the Defendant is making the same self-serving arguments regarding altering the transcript that he did prior to this appeal. The District Court denied the Defendant's motion to correct the record as there was no evidence presented that the transcripts were incorrect beyond the Defendant's allegations that certain lines in the transcript do not "make sense" to him or that the State has somehow altered the transcripts. These allegations are directly contradicted by the fact that the court reporters have signed and certified the transcripts as accurate in this case. Further, despite the Defendant's allegations that but for any of his proposed corrections to the transcripts, a review of this case is not possible, it is clear that there are an exhaustive amount of transcripts, briefs, motions, and orders in this case that will provide the Court extensive guidance in a meaningful and intelligent review of this case on appeal.

[¶25] In accordance with Obrigewitch, the Defendant's failure to provide arguments for issues V., VI. and XII constitutes a waiver, and therefore the State respectfully requests that these issues should not be heard on appeal.

VI THE DEFENDANT'S RIGHTS TO A FAIR TRIAL WERE NOT VIOLATED.

[¶26] In the instant case, the Defendant has made numerous arguments alleging he did not receive a fair trial. In issue VII the Defendant's arguments appear to relate to

issues and evidentiary rulings of the trial court in which the Defendant did object to at trial, whereas issue VIII appears to address issues to which the Defendant did not make objections to at trial, but instead is alleging obvious error of the trial court. The State will address these issues separately.

A. The District Court Did Not Err When Denying The Defendant Access To Other Libraries Beyond The Law School, Providing The Defendant A Private Investigator, Or Suppressing Irrelevant Evidence At Trial.

1. The District Court did not err when it denied the Defendant's request to access libraries other than the law school.

[¶27] The government need not furnish every means of access to the courts. Kelsey v. State of Minnesota, 622 F.2d 956, 958 (8th Cir. 1980); see also Lewis v. Casey, 518 U.S. 343, 354 (1996) (explaining the limits on an inmate's constitutional right to access to the courts); Jensen v. Satran, 303 N.W.2d 568, 569 (N.D. 1981) (recognizing the constitutional right of access to the court and limits implicit in that right). Instead, the government need only to provide some opportunity for a prisoner to gain equal access to the courts. Id. In the facts presented in this case, it does not appear that this Court has determined a standard of review when a Defendant is appealing this issue from a criminal judgment, rather than in a post-conviction relief or habeas corpus petition as in Jensen v. Satran. However, the Court has stated that an appellate court's standard of review for a violation of a constitutional right is de novo. State v. Wicks, 1998 ND 76, ¶17, 576 N.W.2d 518. Even if this issue is fully reviewable by this Court, the State would submit

that consistent with the holding by this Court in Jensen, the District Court's decision should be affirmed.

[¶28] In the case at hand, the District Court entered an order on October 29, 2004 permitting the Defendant to have access to the UND Law Library. See (Appellee's App. at 41-42). The Defendant then filed an Ex Parte Request on November 15, 2004 requesting that the order be extended to give him access to the Chester Fritz library and the UND Medical School library. (Appellee's App. at 43). Based on the decisions set forth in Lewis and Jensen, the District Court properly determined that the Defendant had been provided ample opportunity to gain equal access to the courts. Not only did the Defendant have access to the UND Law School Library, he was also provided with stand-by counsel in this case. The Defendant has claimed that the bulk of the State's case rested upon medical testimony. However, as this Court will see upon an examination of the record, the State did not even call a medical witness. The State did not rely on the testimony of any medical doctors and the only time it elicited medical testimony was on cross-examination of the Defendant's witness. Additionally, the District Court did have discretion regarding what means must be provided to the Defendant to meet his constitutional rights. Further, the extensive motions, briefs, requests, and transcripts in this case illustrate that the Defendant's constitutional right to have access to the court was in no way infringed upon. As was explained in Kelsey, the District Court was not required to provide the Defendant every means of access to the court, and therefore it did not abuse its discretion when denying the Defendant access to libraries other than the law school.

2. The District Court did not deny the Defendant the right to prepare his witnesses.

[¶29] The District Court did not deny the Defendant the right to prepare his witnesses, nor does the Defendant offer any proof to support such allegations. The Defendant cites State v. Wicks in support of his allegation that he was denied access to his witnesses and therefore his 6th Amendment rights were violated. However, State v. Wicks is in no way factually similar to the case at bar. In State v. Wicks, this Court ruled that the Defendant's 6th Amendment rights were violated when the Defendant's counsel was permitted to withdraw the day of the Defendant's trial, and the Defendant was forced to represent herself. State v. Wicks, 1998 ND 76, 576 N.W.2d 518. The Defendant was not given a continuance to prepare herself for trial and the court failed to grant her stand-by counsel. Id. Contrasted from Wicks, in the case at hand, the Defendant had ample opportunity and assistance in preparing for trial. As the Defendant indicates he was granted a private investigator to assist him in interviewing and preparing his witnesses. In addition, the Defendant had stand-by counsel, David Dusek, to assist him with these matters. If the Defendant felt that his private investigator did not adequately interview the witnesses, he could have requested to depose the witnesses himself. Therefore, the District Court in no way denied the Defendant the ability to prepare for trial in this case.

3. The District Court did not abuse its discretion when it properly suppressed irrelevant and sensitive information.

[¶30] A trial court has broad discretion over evidentiary matters, and an appellate court will not overturn a trial court's decision to admit or exclude evidence unless the court abuses that discretion. State v. Miller, 2001 ND 132, ¶6, 631 N.W.2d 587. A trial court abuses its discretion only when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law. Id. In determining what evidence is admissible at trial, the District Court can exclude any evidence that is irrelevant, as well as evidence that although relevant, the probative value is substantially outweighed by the danger of unfair prejudice. N.D.R.Evid. 401-403.

[¶31] In respect to the juvenile records, the District Court issued an order on December 7, 2004 stating that an in camera inspection of the juvenile victims' school records would be utilized to determine if the items were relevant and admissible at trial. (Appellee's App. at 44-45). After doing so, the court determined that these items would be protected due to their immateriality and irrelevancy to the case. Although it does not appear that there was North Dakota precedent directly on point to guide the District Court, the District Court properly suppressed the sensitive and irrelevant materials. Not only did the District Court rule in accordance with the law set forth in the North Dakota Rules of Evidence, the court also considered cases in other jurisdictions which set forth a procedure for examining records in camera to determine their relevancy. See State v. Slaback, 492 N.W.2d 187, *3 (Wis. Ct. App. 1992); Zaal v. State, 602 A.2d 1247, 1251, 1261-1262 (Md. 1992). The District Court did not abuse its discretion in this case as it

permitted the records to be reviewed in camera to determine their admissibility. See State v. Hummel, 483 N.W.2d 68, 71-72 (Minn. Ct. App. 1992). The District Court's decision was within the bounds of the applicable case law and court rules and was not arbitrary, unreasonable, or a misapplication of the law. Furthermore, despite the fact that the Defendant argues that he had no knowledge that such items would be suppressed at trial, the Defendant actually included in his appendix the Order Granting Protective Order For Minor Victims and Order Granting State's Protective Order. (Appellant's App. at 62-63). Both these documents clearly indicate that the District Court determined the items to be irrelevant and immaterial to the case at bar.

[¶32] Similarly, the Defendant had requested access to Detective Iwan's disciplinary records for the previous nineteen years of his service with the Grand Forks Police Department. However, as the Defendant has cited in his appendix, the District Court issued an Order Granting State's Motion for Protective Order due to the fact that the Defendant had failed to establish a relevant purpose and substantial need beyond a fishing expedition for the documents.

[¶33] Therefore, the District Court's decision to suppress those materials should be affirmed as it was not an abuse of discretion.

B. The District Court Did Not Commit Obvious Error.

[¶34] Issues not objected to at the trial level, even those alleged to be constitutional violations, generally will not be addressed on appeal unless the alleged error rises to the level of obvious error. State v. Miller, 2001 ND 132, ¶ 24, 631 N.W.2d 587. This Court has stated that the Court reviews whether obvious error has been committed cautiously and only finds such errors in exceptional circumstances where the defendant has suffered serious injustice. Id. at ¶25. In order to establish obvious error, the defendant has the burden to show (1) error, (2) that is plain, and (3) that affects substantial rights. Id. An alleged error does not constitute obvious error unless there is a clear deviation from an applicable legal rule under the current law. Id. Even if the defendant has met the burden of establishing obvious error affecting a substantial right, this Court has stated that at the appellate level the error should not be corrected unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id.

[¶35] In the case at hand, the Defendant makes numerous allegations in support for his claim that his rights to a fair trial were violated. However, the Defendant fails to meet his burden of alleging what actual errors were committed by the District Court, that were plain, and that affected his substantial legal right. At no point in the Defendant's brief does he set forth what rule or law the District Court clearly deviated from to even constitute an obvious error. Interestingly, the Defendant makes an argument in his brief that one reason his rights to a fair trial was violated was due to the testimony of Dr. Scanzenbach which he alleges the State elicited unlawful or fabricated testimony and

failed to disclose testimony it planned to elicit from the doctor. It should be noted that this witness was one the Defendant himself called to the stand. The State never called this witness and merely cross-examined the doctor after the Defendant called him to the stand. The Defendant's bare assertions that the State elicited unlawful or fabricated testimony unsupported by any proof besides his own allegations are not enough to meet the heavy burden of proving obvious error. The Defendant was given the opportunity at trial to make objections to the testimony being offered, and failed to do so. Further, the Defendant was also entitled to, and did, conduct lengthy cross-examinations in order to enlighten the jury to any alternative interpretations in the testimony presented at trial. Simply because the Defendant disputes the testimony of the State's witness, or even his own witness, does not mean that he was denied his right to a fair trial. After a careful review of the hundreds of pages of trial transcripts in this case, it is clear that the Defendant received an extremely fair trial in this case. Therefore, the State respectfully requests that this Court affirm the criminal judgments in this case.

VII. THE DISTRICT COURT DID NOT ERR WHEN IT DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL.

[¶36] Under Rule 33 of the North Dakota Rules of Criminal Procedure, a new trial may be granted if the interests of justice so require. N.D.R.Crim.P. 33(a). A claim that sufficient evidence was not presented to support a conviction has been determined to be

grounds in which a motion for a new trial may be based upon. State v. Bull, 238 N.W.2d 52, 54 (N.D. 1975), reversed on other grounds, State v. Himmerick, 499 N.W.2d 568 (N.D. 1993). Additionally, a defendant may make a motion for a new trial, in the interests of justice, on the basis that although the evidence to support the verdict is sufficient, it is against the manifest weight of the evidence. State v. Kringstad, 353 N.W.2d 302 (N.D. 1984). On appeal, a court will not set aside a trial court's denial of a motion for a new trial unless the court has abused its discretion in denying the motion. State v. Garcia, 462 N.W.2d 123, 124 (N.D. 1990). Furthermore, a motion for a new trial is committed to the sound discretion of the trial court and the judgment is conclusive unless the court abused its discretion. Kringstad, 353 N.W.2d at 307.

[¶37] On May 10, 2005, the Defendant made a motion to the court for a new trial. The basis for his motion included two issues: 1. That insufficient evidence was presented at trial to support a guilty verdict and 2. That the guilty verdict was against the weight of the evidence. The State respectfully requests that this Court affirm the District Court's decision on this motion because the guilty verdict at trial was supported by sufficient evidence and was not against the weight of the evidence.

A. The District Court Properly Denied The Defendant's Motion For A New Trial Because There Was Sufficient Evidence Presented At Trial To Support A Guilty Verdict.

[¶38] A motion for a new trial based on insufficient evidence is properly denied when the evidence presented at trial was sufficient to support a conviction. Kringstad, 353 N.W.2d 302. In Kringstad, this Court, when considering the denial of a defendant's motion for a new trial, examined the applicable legal standards for determining whether a

conviction rests upon sufficient evidence. 353 N.W.2d at 306. This Court stated that a conviction rests upon insufficient evidence, when after viewing the evidence in the light most favorable to the prosecution, and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. Id.

[¶39] Because this standard is the same standard set forth in issue I.A. of the State's brief, the State would submit that sufficient evidence was presented at trial to support the District Court's denial of the Defendant's motion for a new trial. The facts set forth in the analysis portion of issue I.A. of this brief apply equally to this issue and based on that analysis the State would request that this Court affirm the District Court's decision because denying a motion for a new trial when sufficient evidence was presented at trial is not an abuse of discretion.

B. The District Court Properly Denied The Defendant's Motion For A New Trial Because The Guilty Verdict Was Not Against the Weight Of The Evidence.

[¶40] Sufficient evidence presented at trial is not against the weight of the evidence, unless the evidence preponderates sufficiently heavy against the verdict constituting a serious miscarriage of justice. Kringstad, 353 N.W.2d at 306. In Kringstad, this Court reviewed a district court's denial of a motion for a new trial based on the allegation that the verdict was against the weight of the evidence. The Court

found that the trial court properly denied the defendant's motion for a new trial because the evidence was fairly evenly balanced and a guilty verdict was not against the manifest weight of the evidence presented at trial. Id. at 307. After reviewing the testimony presented at trial in this case, it is clear that the verdict was consistent with the manifest weight of the evidence presented at trial. The Defendant claimed in his brief in support of his Motion for a New Trial, that the verdict was against the manifest weight of the evidence because according to the Defendant, the testimony of the juvenile victims, Amy Schilling, and Doctor Schnazenbach was not credible. (Appellee's App. at 46-50). The Defendant alleges that the juvenile victims lied about the night in question and fabricated the sexual assault. (Appellee's App. at 46-50). This argument lacks any merit whatsoever. At no point at trial did the juvenile victims admit that they lied about the relevant issues regarding the night in question. Both R.D. and J.S. emphatically testified that the Defendant victimized them by providing them alcohol, inducing R.D., a thirteen year old girl, to perform a strip tease for money, and proceeding to have sex with R.D. At no point did they retract those statements, and in fact testimony was presented at trial to corroborate their statements and further established that despite the traumatic experience of proceeding in the court system since the very night in which they were victimized they had never wavered in their allegations against the Defendant. The Defendant also argues that the State fabricated testimony, however, supplies no proof beyond the Defendant's own allegation that the testimony does not make any sense to him. (Appellee's App. at 46-50). Simply because the Defendant disagrees with the testimony presented by a medical doctor, does not mean that the guilty verdict is against the manifest weight of the

evidence. Further, if the Defendant had concerns about the testimony of the doctor damaging his case, the Defendant should have refrained from calling him as a witness.

[¶41] Even contrasted from Kringstad, where the evidence was equally balanced, in this case, there was very little testimony, provided to refute evidence presented by the State to establish that the Defendant had preyed upon two juvenile victims engaging in sexual acts and providing alcohol to them. The credibility of the victims was well established at trial, as well as the other witnesses who testified on behalf of the State. In actuality, the manifest weight of the evidence overwhelmingly supports a conviction in this case and to find otherwise would have resulted in a serious miscarriage of justice. The District Court did not abuse its discretion when it denied the Defendant's motion for a new trial on this basis.

VIII. THE DISTRICT COURT'S CLERICAL ERROR DOES NOT IMPINGE UPON ANY OF THE DEFENDANT'S LEGAL OR CONSTITUTIONAL RIGHTS.

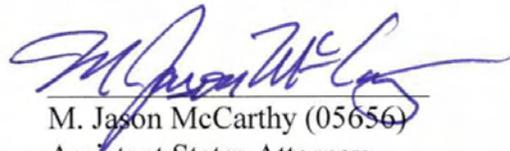
[¶42] In issue XI of the Defendant's brief, he argues that an unlawful judgment was entered in this case because the judgments state that he entered a plea of guilty. (Appellant's App. at 85-87). The State would agree that there appears to be a clerical error on the face of the criminal judgments. However, these clerical errors do not affect any substantial legal or constitutional rights of the Defendant and are not a basis for an appeal. Further, it is unclear as to what remedy the Defendant is seeking for this error. Should the Court deem appropriate, the State would submit that the criminal judgments

should be amended to appropriately reflect that the Defendant did not plead guilty but rather had been convicted of the offenses as charged.

CONCLUSION

[¶43] Based on the foregoing law and conclusion, the State respectfully request that this Court affirm the District Court's rulings and the criminal judgments in this case.

Respectfully submitted,



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