
THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff-Appellee

v.

Alan Daniel Sevigny,

Defendant-Appellant

Supreme Court No. 20050315
Pembina Co. No. 04-K-00514

AFFIDAVIT OF FILING AND SERVICE BY E-MAIL

Kelly R. Jones, being first duly sworn, deposes and says that on the 23rd day of March, 2006, she filed by email the attached Brief for Appellant according to the N.D. Sup. Ct. Admin. Order 14 upon:

supclerkofcourt@ndcourts.com

Kelly R. Jones, being first duly sworn, deposes and says that on the 23rd day of March, 2006, she served by email the attached Brief for Appellant as required by N.D. Sup. Ct. Admin. Order 14(D)(1), in Adobe PDF Format (document formatting and page numbering may be slightly different than Word), upon:

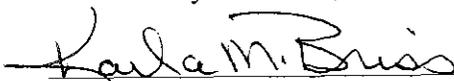
Stuart Askew
Attorney for Appellee
saskew@state.nd.us

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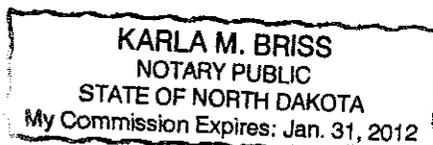


KELLY R. JONES

SUBSCRIBED AND SWORN to before me this 23rd day of March, 2006.



Notary Public, State of North Dakota



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

**SUPREME COURT NO. 20050315
DISTRICT COURT NO. 34-04-K-514**

STATE OF NORTH DAKOTA,

PLAINTIFF/APPELLEE,

vs.

ALAN DANIEL SEVIGNY,

DEFENDANT/APPELLANT.

**APPEAL FROM DISTRICT COURT, PEMBINA COUNTY,
NORTH DAKOTA, NORTHEAST JUDICIAL DISTRICT**

BRIEF FOR APPELLANT

**Jay D. Knudson/ID#05907
218 South 3rd Street
Grand Forks, ND 58201
701-787-8802 (phone)
701-787-8460 (fax)
Attorney for Defendant/Appellant**

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III. JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction of this matter pursuant to North Dakota Century Code § 29-28-06(1) and Rule 3 of the North Dakota Rules of Appellate Procedure. Sevigny timely appealed after being convicted by a jury of his peers.

IV. STATEMENT OF THE ISSUES

1. DID THE TRIAL COURT ERR BY EXCLUDING DEFENDANT'S ALIBI EVIDENCE BECAUSE THE DEFENDANT DID NOT GIVE NOTICE OF AN ALIBI DEFENSE BEFORE TRIAL WHEN THE DATES OF THE ALLEGED OFFENSE ONLY CAME AFTER THE TRIAL HAD BEGUN AND WHEN THE STATE THEREBY AMENDED ITS COMPLAINT TO INCLUDE THE NEW DATES?
 - A. The trial court erred when it did not allow alibi evidence as an exception to Rule 12.1 because Sevigny had good cause for not giving prior notice of an alibi defense.
 - B. The trial court erred and it violated Sevigny's Due Process rights when it did not allow Sevigny to testify at trial in regards to his own alibi defense
2. DID THE TRIAL COURT ERR BY ALLOWING HEARSAY TESTIMONY UNDER NORTH DAKOTA RULES OF EVIDENCE, RULE 803 (24), WHEN THERE WAS INSUFFICIENT INDICIA OF RELIABILITY AS FAR AS TIME, CONTENT, AND CIRCUMSTANCES OF THE STATEMENT AND WHEN IT DID NOT MAKE SUFFICIENT FINDINGS OF FACT IN REGARDS TO THE TIME, CONTENT, AND CIRCUMSTANCES OF THE STATEMENT THAT PROVIDE SUFFICIENT GUARANTEES OF TRUSTWORTHINESS?
3. DID THE TRIAL COURT ERR WHEN IT ALLOWED THE TESTIMONY OF HEARSAY WITNESSES UNDER NORTH DAKOTA RULE OF EVIDENCE, RULE 803(24), BEFORE THE TESTIMONY OF THE ACTUAL CHILDREN WITNESSES DURING THE TRIAL?
4. DID THE TRIAL COURT ERR IN HOLDING THE DEFENDANT'S ATTORNEY IN CONTEMPT IN THE PRESENCE OF THE JURY WHEN HE GAVE HIS OPINION TO THE JURY REGARDING THE SUFFICIENCY OF THE EVIDENCE DURING CLOSING ARGUMENT?

V. STATEMENT OF THE CASE

The Defendant, Alan Sevigny, was arrested on December 2, 2005, and charged at the Preliminary Hearing on January 14, 2005 with two counts of Gross Sexual Imposition. The alleged offenses for Count 1 occurred between the time of September 2003 to December 2004, and the alleged offenses for Count 2 occurred between August 2002 to November 2004. No motions were filed by the defendant in this case. The State filed a motion to allow hearsay evidence under North Dakota Rules of Evidence, Rule 803(24). A motions hearing was held on March 28, 2005. The Trial Court ruled in favor of the State and the hearsay evidence was allowed over objection by the Defendant.

A trial in the matter was held on April 25, 2005 through April 29, 2005. The Defendant, Alan Sevigny, was convicted by a jury on April 29, 2005 of both counts of Gross Sexual Imposition and the Trial Court entered Judgment accordingly on April 29, 2005. The Defendant was sentenced on April 10, 2005. The Defendant now appeals the judgments in both counts to the North Dakota Supreme Court.

VI. STATEMENT OF THE FACTS

The State of North Dakota arrested and brought a formal complaint against the defendant, Alan Sevigny (hereinafter Sevigny), on December 6, 2004. (Formal Compl. at 1-2). Specifically, the State charged Sevigny with two counts in violation of North Dakota Century Code § 12.1-20-03. Count 1 charged Sevigny with gross sexual imposition, alleging that he engaged in a sexual act, or caused another to engage in a sexual act, and the victim is less than 15 years of age, (Formal Compl. at 1, lines 9-12). Count 2 charged Sevigny with gross sexual imposition, alleging that he engaged in sexual

contact with another and the victim was less than 15 years of age. (Formal Compl. at 2, lines 4-7).

Furthermore, Count 1 charged Sevigny with engaging, on numerous occasions, in sex acts with a child, including contact between fingers of Sevigny and the vulva and anus of the child S.S., and sexual contact between the body and/or hands of S.S. and the penis of Sevigny. These acts allegedly occurred at Sevigny's residence at his parent's home at 4014 Euclid Street in Crystal, North Dakota. The State alleged that these acts occurred in various locations throughout the home; including, the bathroom, living room, and the bedroom of Sevigny. (Formal Compl. at 1). The State also alleged that Sevigny committed these acts for the purpose of arousing or satisfying sexual or aggressive desires. (Formal Compl. at 1). Sevigny was found guilty of a class A felony for Count 1, and sentenced to 20 years in the Department of Corrections, with 15 years suspended. (Crim. J., 10/11/05).

Count 2 charged Sevigny with engaging, on numerous occasions, in sexual contact with the minor child S.M., who at the time of the trial was eight-years-old. (Formal Compl. at 2). The sexual contact alleged by the State included contact between the penis of Sevigny and the crotch area of S.M., and contact between the fingers of Sevigny and the crotch and buttock area of S.M. (Formal Compl. at 2). The State again alleged that Sevigny committed these acts for the purpose of arousing or satisfying sexual or aggressive desires. (Formal Compl. at 2). The State also alleged that these incidents also occurred at various locations at Sevigny's residence in Crystal. (Formal Compl. at 2). Sevigny was found guilty of a Class B felony for Count 2, and sentenced to 10 years in the Department of Corrections, with 5 years suspended. (Crim. J., 10/11/05)

The violations for Count 1, in regards to the child S.S., allegedly occurred somewhere in the time frame of between September 2003 and December 2004. At that time S.S. was approximately five-years-old. (*See Am. Crim. Info.*, 3/23/05).

The violations for Count 2, in regards to the child S.M. allegedly occurred between August 2002 and November 2004. (*See Am. Crim. Info.*, 3/23/05). At the time of the alleged sexual contact between Sevigny and S.M., the child was between the ages of five and seven-years-old. Sevigny was found guilty on both counts by a jury on August 11, 2005.

In addition to being found guilty of both counts, Sevigny was required by the State of North Dakota to comply with the mandatory requirements of being a registered sexual offender pursuant to North Dakota Century Code § 12.1-32-15.

Prior to trial, the State made a motion on March 4, 2005 for the admittance of out-of-court child-hearsay statements under the North Dakota Rules of Evidence, Rule 803(24). (*Mot. Hr'g* at 3, lines 19-25). The State gave timely notice to both the trial court and the defendant. The State's motion was based on the premise that it would produce witnesses who would testify regarding the out-of-court statements made by the two children in the case (S.S. and S.M.). The motion also indicated that both children would be testifying at trial. (*See Mot. for Admis. of Out-of-Court Stat.*, 3/4/05). The motion supported by a recitation of Rule 803(24), an attached case synopsis of the case of State v. Messner, 583 N.W.2d 109 (N.D. 1998), and a one-paragraph explanation briefly describing why the court should find the normally excluded hearsay statements admissible in the prosecution of Sevigny. (*See Mot. for Admis. Of Out-Of-Court Stat.*, 3/4/05). Sevigny resisted the State's motion to allow the hearsay testimony and evidence.

A Motion Hearing was held on March 28 and 31, 2005. At the Hearing, the State presented seven witnesses, Roberta Carson, Patricia Barta, Claire Domres, Paula Condol, Brenda Martins, Kyann Schneider, and Elizabeth Suda. All seven witnesses testified at the Motion Hearing regarding statements allegedly made to them by both S.S. and S.M. At the time, the State's charging documents indicated that the time periods for alleged abuse ranged from September 2002 to August 2004 for Count 1, and September 2003 to August 2004 for Count 2. (Am. Crim. Info., 3/23/05). The interviews with all seven witnesses were conducted during the short time span between November 2004 and February 2005. Patricia Barta's interview was conducted on November 16, 2004, Paula Condol's on November 30, 2004, Brenda Martins' on December 11, 2004, Kyann Schneider's and Elizabeth Suda's on December 2 and 15, 2004, and, finally, Roberta Carson's first interview was conducted on February 9th, 2005 – only two months before trial. (See Mot. Hr'g, 3/28/05 at 6, 41, 85, 103); (Mot. Hr'g, 3/31/05, at 5, 40). The statements made by the children to the potential witnesses were statements based on events that had occurred months or even years prior to the children being interviewed by the witnesses.

At the Motion Hearing, Judge Fontaine set a Pretrial Conference for April 11, 2005 and indicated that she would rule on the motion at that time. At the Pretrial Conference, Judge Fontaine issued her findings and order which stated that all but one of the State's proposed witnesses would be permitted to testify in regards to the hearsay statements made to them by both S.S. and S.M. (P. Conf., at 1). All the hearsay witnesses with the exception of Claire Domres would be allowed to testify at trial. Judge Fontaine admitted the witness testimony despite Sevigny's objections based on the

witnesses use of leading questions during their interviews of the children and fact that the witness testimony was tainted because many of the witnesses had at one time met with other witnesses to discuss the case and had therefore developed a preconceived idea of what the child should be disclosing prior to their interviews with S.S. and S.M.

Judge Fontaine's findings included no more than a one-paragraph description of why each witness' hearsay statements were admissible and a perfunctory recitation of Rule 803(24)'s mandate that all of her conclusions were based on "indicia of reliability and guarantees of trustworthiness." (*See P. Conf. at 2-4*). Thus, the out-of-court hearsay statements were admitted at trial.

Sevigny then made a motion to the Court to require the children to testify first in the trial, with the hearsay witnesses following. The State resisted Sevigny's motion and Judge Fontaine agreed with the State's contention that the children would not have to testify before the other six witnesses at trial and allowed the State to introduce their corroborative witness testimony regarding the out-of-court hearsay statements before calling the children as witnesses. (*See Order Denying Defendant's Mot., 4/13/05*). Judge Fontaine allowed the State to present their case in this fashion despite Sevigny's objection that the admittance of the out-of-court hearsay statements without requiring the children to testify before the six other witnesses was highly prejudicial to the him because the presentation of evidence would taint the jury. Sevigny argued that this presentation would create an impression in the jury members' minds that the hearsay statements were true before they even heard the testimony of the children. (*Pretrial Hr'g at 6,7*). Furthermore, Sevigny argued that the presentation of hearsay evidence prior to requiring the testimony of the children violated the purpose behind North Dakota Rule of Evidence,

Rule 803(24). Despite Sevigny's insistence of prejudice, Judge Fontaine denied the defendant's motion to require the children to testify first.

During trial, the State made a motion to amend the information to include additional time periods of alleged conduct. (Tr. at 702). The state wished to amend Count 2 to include an additional month, specifically asking to change the information from the dates of September, 2002 through November 2004 to new dates of August, 2002 through November, 2004. The Court granted that motion. At around the same time, the State then made a motion to exclude expected alibi evidence because Sevigny did not give notice of the alibi defense prior to trial. In response, Sevigny argued that the Defendant should not be held to the strict ruling of Rule 12.1 because the state did not include any specifics in the time period alleged in the charging document. (Tr. at 707, 710). Specifically, Sevigny intended to introduce evidence to show that the defendant was not in the area when the alleged incident occurred during a Christmas vacation. (Tr. at 708). Although there was indication that this alleged time frame was mentioned in some of the discovery, none of the dates alleged for the crime were not given in the charging documents. Judge Fontaine granted the State's motion to strike Sevigny's introduction of alibi evidence, finding that the alibi defense was precluded because Sevigny did not provide notice to the State prior to trial in accordance with North Dakota Rules of Criminal Procedure, Rule 12.1. (Tr. at 726). Judge Fontaine granted the State's motion despite Sevigny's insistence that he did not provide written notice to the court or the prosecution because he could not know the specific dates for which he would need to provide notice as a result of the State's failure to include specific dates within their

charging document. (Tr. at 710, lines 6-25). In the original charging document, the State did not include the dates for which Sevigny later wished to introduce alibi evidence.

The State argued on the motion that Sevigny's attorney, Neil Fleming, was given discovery that indicated certain events happened on certain dates and therefore he should have known that the State was alleging that an instance of abuse occurred on Christmas vacation of 2004. (Tr. at 710). Sevigny argued in response that this notice was insufficient because the charging documents included approximately 2 years worth of time and the Defendant should not be required to know every date listed. (Id.)

The State was allowed, via Rule 7 of the North Dakota Rules of Criminal Procedure, to amend the dates for Count 2 to include another month for when the offenses were alleged to have occurred. (Tr. at 725). Judge Fontaine granted the State's motion to exclude the alibi evidence because Sevigny did not comply with the requirements of Rule 12.1 of the North Dakota Rules of Criminal Procedure. Sevigny argued that he had "good cause" because of the huge amount of dates involved in the charging documents with no specific allegations and because his intention to introduce alibi evidence was only made in furtherance of his right to present a defense.

Further, Sevigny's attorney argued that he should be able to introduce evidence that Sevigny was not in the area at the time of the alleged offenses as rebuttal testimony to disprove the veracity of the children's testimony and therefore impeach the witnesses' credibility. (Tr. At 736.) This argument was also rejected by the Court. (Id.) Judge Fontaine ruled conclusively that no alibi evidence would be allowed. (Id.)

At closing argument, Sevigny's attorney, Neil Fleming, was held in contempt of court by Judge Fontaine for stating his opinion during his closing argument. (See Order

Finding Contempt, 6/2/05). Fleming was reprimanded and found in contempt in front of the jury while making his closing argument. Judge Fontaine later issued a written Order explaining the finding of contempt against Fleming. In the order, Fleming states that the finding of contempt was because Fleming repeatedly ignored sustained objections and for expressed his personal opinion in his closing argument before the jury on evidence that was not admitted at trial. Judge Fontaine fined Fleming \$500. Fleming filed a written response to the Judge Fontaine's finding of contempt citing numerous case law and statutes supporting his position. (See Response Letter, 7/1/05). Judge Fontaine did eventually lower the fine for the contempt from \$500 to \$250.

VII. LAW AND ARGUMENT

1. **DID THE TRIAL COURT ERR BY EXCLUDING DEFENDANT'S ALIBI EVIDENCE BECAUSE THE DEFENDANT DID NOT GIVE NOTICE OF AN ALIBI DEFENSE BEFORE TRIAL WHEN THE DATES OF THE ALLEGED OFFENSE ONLY CAME AFTER THE TRIAL HAD BEGUN AND WHEN THE STATE THEREBY AMENDED ITS COMPLAINT TO INCLUDE THE NEW DATES?**

The trial court erred by finding that Sevigny did not have "good cause" to be granted an exception from 12.1's general notice requirement and it violated Sevigny's Due Process rights under United States Constitution by not allowing Sevigny to testify in regards to his own alibi defense. This Court has explained that "[w]hen an issue arises as to admitting unrevealed alibi evidence, a court ought to take into account, among other particulars of the case, the actual prejudice that will redound . . . [if] the defendant's failure to inform was in good faith and for good cause." State v. Flohr, 301 N.W.2d 367, 372 (N.D. 1980). The trial court erred when it did not find that Sevigny had "good

cause” within the meaning of Rule 12.1 and when it did not grant his good faith request to present alibi evidence in his own defense. It also erred when it did not allow Sevigny to give his own testimony regarding his alibi.

A denial of the defendant’s submission to introduce alibi evidence in violation of Rule 12.1 is reviewed by the North Dakota Supreme Court under the abuse of discretion standard. Id. at 370. “A trial court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably, or if it misinterprets the law.” State v. Christensen, 561 N.W.2d 631, 633 (N.D. 1997). In Sevigny’s case, the trial court misinterpreted the law by not granting a good cause exception, and abused its discretion by not allowing Sevigny to testify at trial in regards to his alibi defense. Finally, Rule 33 of the North Dakota Rule of Criminal Procedure authorizes this Court to grant a new trial “if required in the interests of justice.” State v. Flohr, 301 N.W.2d at 374 (Vandewalle, J. concurring).

Rule 12.1 of the North Dakota Rules of Criminal Procedure is the controlling rule for the alibi issue in this case. (*See* Appendix for Rule 12.1). The important aspects of the rule as it applies to Sevigny’s case are that: (1) a defendant is normally required to give notice of an alibi defense in the period for pretrial motions, (2) the decision of whether to grant an request to introduce an unnoticed alibi defense during trial is within the discretion of the trial court, (3) for “good cause” the trial court may grant an exception, and (4) the defendant must be allowed to testify at trial in regards to his alibi defense, regardless of Rule 12.1’s normal procedural constraints.

A. *The trial court erred when it did not allow alibi evidence as an exception to Rule 12.1 because Sevigny had good cause for not giving prior notice of an alibi defense.*

Rule 12.1(e) of the North Dakota Rules of Criminal Procedure provides the controlling rule for distinguishing whether or not a defendant has shown “good cause” for the trial judge to admit a defendant’s alibi defense:

(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of this rule.

Although the rule does not specifically define the term “good cause,” this Court explained in State v. Flohr, 301 N.W.2d 367, 370 (N.D. 1980) that “[t]he rule . . . seeks not to short-change a defendant of his rights but to insure, by means within the court’s discretion, that presentation of evidence at trial will be fair and reliable.” Furthermore, the trial court may use its discretion to waive Rule 12.1’s requirements, and admit non-noticed alibi testimony, if it is in the ‘interest of justice’ to do so. State v. Combs, 1987 Ohio App. LEXIS 8960. Finally, “[t]he purpose of pre-trial discovery rules such as the alibi notice requirement of [Criminal Rule] 12.1 is to insure a fair trial for both the state and the defendant.” Williams v. Florida, 399 U.S. 78, 80 (1970). Sevigny’s attempt to introduce alibi evidence was made only *after* the State made its motion to amend the dates of the charges and the Court granted that motion. Upon the granting of this motion, Sevigny indicated his intent to introduce evidence relating to an alibi. The State then made a motion to exclude this evidence because notice was not given pursuant to Rule 12.1 of the North Dakota Rules of Criminal Procedure and the Court ruled in favor of the State.

Although not controlling, an example of a case with very similar facts to Sevigny's was decided by the Ohio Court of Appeals in State v. Combs, 1987 Ohio App. LEXIS 8960. In Combs, the Ohio Court of Appeals reversed the trial court's judgment that the defendant could not admit another witnesses' corroborative alibi testimony because the defendant failed to provide notice via Ohio's Rule 12.1 to the prosecution prior to trial. Id. at 8. The Court of Appeals found that "if the alibi testimony does not surprise or otherwise prejudice the prosecution's case, . . . and if the defense operated in good faith when it failed to give proper notice of an alibi defense, then the 'interests of justice' may require admission of unfilled alibi testimony." Id. at 6. In Combs, the prosecution was allowed to amend one count of the indictment to include new dates which read "on or about September 20, 1985" to read "on or about September 20, to September 23, 1985." Id. at 1. The defendant was charged with armed robbery, and after the prosecution was allowed to amend the dates of the indictment, the defendant attempted to introduce alibi testimony at trial because the newly amended dates now corroborated his alibi that he had been on a camping trip during the new dates. Id. at 2.

Agreeing with the defendant, the Court of Appeals stated that "[Rule] 12.1 should be construed liberally and not be applied where no prejudice would accrue to the prosecution, where there is a demonstrable and excusable showing of mere negligence, or where there is good cause shown." Id. The Court of Appeals went on to explain that the introduction of the defendant's alibi testimony does not surprise or prejudice the prosecution's case because it was the prosecution who opened the door by amending the charges in the indictment. Id. Because it was the prosecution who amended the charge, and because there would be no prejudice to the prosecution if alibi testimony were now

admitted, the Court of Appeals reversed and remanded on the grounds that the defendant had shown good cause, and that the interests of justice would be best served by allowing the introduction of the alibi testimony. Id.

Much like the defendant in Combs, Sevigny had good cause to allow the trial court to grant an exception under 12.1(e) to the normal exclusionary mandates of the rule. During trial, the State asked to amend Count 2 of the information to include an entire month of new dates for the charge. Not even the State, who was alleging the incidents, knew the dates that would come out at trial. Fortunately for the State, it was allowed to amend its charging documents, specifically Count 2 to include new dates for the alleged abuse. (Tr. at 722). The information provided alleged dates which ranged between September 2003 to December 2004 for Count 1, and August 2002 to November 2004 for Count 2. Sevigny relied on the dates in the information when preparing his defense but no times frames were specific and so the Sevigny was not aware that during trial an incident would be alleged to have happened during Christmas vacation, 2004. It is unjust to allow the State leeway to amend its dates at any time but then not allow Sevigny to not even amend anything but to simply present alibi evidence. Essentially the State was allowed to pick dates during the trial in which they could attempt to prove the alleged offenses occurred. Judge Fontaine stated in her ruling on the State's motion to exclude Sevigny's alibi defense:

“The last motion and probably one of the more difficult ones is the prosecution's to deny defendant the right to put forth an alibi defense that he was not present during one period when one of the victims allege an incident occurred. Although the victim testified that [the alleged abuse] was during Christmas vacation which is a pretty general time frame. I mean there's not [a] specific date...”

Mr. Fleming acknowledged that he had been given reports, but that it was not charged in the complaint and on that basis, he felt that he should now be able to present testimony of an alibi defense.

(Tr. at 724).

Admittedly, the new dates included in the amended information were included in some of the discovery. This does not change the fact, however, that the State included over 2 years worth of time relating to two different counts and two different children in their charging documents. Despite this, Judge Fontaine stated in her ruling on the motion to strike that “the State is not required to plead the charge with any specificity.” (Tr. at 726, lines 5-6). The trial judge ruled against Sevigny’s motion despite the charging documents lack of specificity, despite allowing the prosecution to amend one of the charges mid-trial, and despite Rule 12.1’s mandate that, if shown, exceptions for “good cause” allow for a dispensing of the notice requirement. Therefore, the trial court abused its discretion when ruled that Sevigny would be excluded from offering any alibi evidence.

B. The trial court erred and it violated Sevigny’s Due Process rights when it did not allow Sevigny to testify at trial in regards to his own alibi defense.

Rule 12.1, subsection (c), of the North Dakota Rules of Criminal Procedure provides the controlling rule for this issue. It explains that regardless of whether a criminal defendant failed to provide alibi notice prior to trial, he is still entitled his constitutional right to testify in his own defense. Rule 12.1(c) states:

(c) Failure to comply. Upon failure of either party to comply with the requirements of this rule the court may exclude the testimony of any witness offered by that party as to the defendant’s absence from, or

presence at, the scene of the alleged offense. *This rule does not limit the right of the defendant to testify.*

(emphasis added). The language of 12.1(c) mandates that North Dakota courts are to adhere to the rule that, although a defendant may have failed to provide notice prior to trial, the Defendant is not limited in his right to testify.

Likewise, the United States Supreme Court has explained that there are certain inalienable rights which are basic to our system of justice, such as the Due Process Clause requirement that every defendant has the right to testify on his own behalf. See Harris v. New York, 401 U.S. 222, 225 (1971) (“[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so”); Brook v. Tennessee, 406 U.S. 605, 612 (1972) (“whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right”); Faretta v. California, 422 U.S. 806, 819 (indicating that the defendant’s right to testify in his own behalf is a right “essential to due process of the law in a fair adversary process”). Thus, it is also clear that the United States Supreme Court guarantees a defendant the right to testify in regards to his or her own alibi defense.

This guaranteed right to testify under the Constitution’s Due Process Clause was discussed by the Federal Court of Appeals for the Seventh Circuit in Alicia v. Gagnon, 675 F.2d 913 (7th Cir. 1982). In Alicia, the Seventh Circuit held that an inmate who was convicted of armed robbery was denied his Constitutional rights under the Due Process Clause of the Fifth, Sixth, and Fourteenth Amendments because the trial court failed to grant the inmate his right to testify in regards to his own alibi. Id. at 923. Despite the inmates’ insistence at trial that he be able to testify that he was at home on the telephone during the time of the alleged robbery, the trial court granted the prosecution’s motion to

strike the defendant's testimony because he had not provided the prosecution with notice of his alibi defense prior to trial under Federal Rule 12.1. Id. at 915. The Seventh Circuit overruled the trial court, stating:

These decisions, and the [rule] on which they are based, do not limit in any way the right of a defendant to testify truthfully in his own behalf. The condition of prior notice as to alibi testimony, like the test as to materiality and relevancy, does not invade the right of a defendant to testify in his defense.

Id. at 920 (citing Simos v Burke, 163 N.W.2d 177, 181 (Wis. 1968)). Further explaining its ruling, the Seventh Circuit stated that “[m]ost importantly, where constitutional rights directly affecting the ascertainment of guilt are implicated, a state evidentiary rule may not be applied mechanistically to defeat the ends of justice.” Alicia v. Gagnon, 675 F.2d at 923 (citing Parise v. Greer, 671 F.2d 1011, 1019 (7th Cir. 1982)).

North Dakota law is in agreement with the rulings of the United States Supreme Court and the various Federal Court decisions similar to the case of Alicia v. Gagnon. In State v. Flohr, 301 N.W.2d 367, 370 (N.D. 1980), the North Dakota Supreme Court interpreted Rule 12.1 to mean that all defendants are - at the very least - are guaranteed the right to testify as to their own alibi defense. Explaining the need for defendant's to be able to testify on their own behalf, this Court states that

The rule upholds in all cases an opportunity of the defendant himself to give alibi testimony. Subsection (c) does not make exclusion of the other evidence mandatory, and subsection (e) further indicates the discretionary nature of the court's power to fashion appropriate remedies. The rule, then, seeks not to short-change a defendant of his rights but to insure, by means within the court's discretion, that presentation of evidence at trial will be fair and reliable.

Id. at 372 (emphasis added).

During argument on the alibi motion, Sevigny's attorney Neil Fleming argued that regardless of the court's ruling on admission of alibi testimony, the Defendant himself still has the right to testify about that alibi defense:

... But, in order to put a guy on the alibi requirement, you got to have some specific date in the complaint to put him on notice. It's not fair. And besides, Court under Rule 12.1(c), has the discretion as to whether to include that testimony or not and it doesn't prohibit the defendant from testifying to that. And that's what Rule 12.1(c) says.

(Tr. at 711).

In response, the State's Attorney argued that Fleming's interpretation of 12.1(c) was not accurate. She argued that 12.1(c) does in fact say that the Defendant cannot testify as to his alibi. In a confusing way the State's Attorney made her argument:

What it says is this rule does not limit the right of the defendant to testify. It doesn't say that this doesn't mean that the defendant can't say he has an alibi. It means it doesn't limit his right to testify.

(Tr. at 712). To this, the Judge Fontaine agreed, "As to the case, yeah." (Id.)

Keeping in mind the foregoing exchange, Judge Fontaine's final ruling on the prosecution's motion essentially states that she would not allow any evidence relating to an alibi defense, not even the Defendant's own statement.. Judge Fontaine stated in her final ruling that:

"In Rule 12.1 the Rules of Criminal Procedure, notice of alibi must be provided at least 10 days prior to trial . . . notice of alibi needs to be provided at the time of making pretrial motions and then no less than 10 days before trial, the prosecution has to provide back witnesses that they would call to dispute the alibi. The reason quite obviously for the rule is that if someone is going to present an alibi defense, prosecution should have opportunity to contradict or see if there are witnesses that would be available to contact alibi witnesses. In this case, it is agreed that no notice of alibi was given . . . [f]or that reason, I am going to grant the State's motion to deny testimony as to specifically the defendant not being in – specifically an alibi defense for that allegation."

(Tr. at 724-726). Because of the ruling, during trial the Defense did not attempt to introduce any alibi evidence, not even the Defendant's own testimony as to his alibi.

This ruling was erroneous. The United States Supreme Court, the Federal Circuit Courts, and the North Dakota Supreme Court have all ruled that a Defendant has a right to testify as to his own alibi defense. In this case, Sevigny should have been granted the right to testify as to when he was or was not in the area when the alleged offenses occurred. Regardless of whether the trial court was within its discretion in granting the prosecution's motion to strike in regards to other defense witness's testimony regarding Sevigny's alibi, the Court erred when it did not ensure Sevigny his constitutionally protected Due Process right to testify on his own behalf.

2. DID THE TRIAL COURT ERR BY ALLOWING HEARSAY TESTIMONY UNDER NORTH DAKOTA RULES OF EVIDENCE, RULE 803(24), WHEN THERE WAS INSUFFICIENT INDICIA OF RELIABILITY AS FAR AS TIME, CONTENT, AND CIRCUMSTANCES OF THE STATEMENT AND WHEN IT DID NOT MAKE SUFFICIENT FINDINGS OF FACT IN REGARDS TO THE TIME, CONTENT, AND CIRCUMSTANCES OF THE STATEMENT THAT PROVIDE SUFFICIENT GUARANTEES OF TRUSTWORTHINESS?

The trial court abused its discretion by allowing into evidence the hearsay testimony of all six witnesses because, (1) the hearsay testimony was insufficient in reliability as to the time, content, and circumstances of the statements allegedly made to them by the children S.S. and S.M., and (2) at the motions hearing, Judge Fontaine did not make sufficient findings of fact in regards to the time, content, and circumstances of the children's statements made to each of the witnesses. Without an exception, hearsay statements are not to be admitted against a defendant at trial. In this case, the trial court relied on North Dakota Rule of Evidence 803(24). The text of Rule 803(24) explains the

reasoning behind why normally inadmissible hearsay is sometimes admissible as an exception to the rule:

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

- (24) Child's statement about sexual abuse. An out-of-court statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child is admissible as evidence (when not otherwise admissible under another hearsay exception) if:
 - (a) The trial court finds, after hearing upon notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness; and
 - (b) The child either:
 - (i) Testifies at the proceedings; or
 - (ii) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

When a trial court allows evidence to be admitted under Rule 803(24), the standard of judicial review for allegations of error brought by the adverse party on appeal is “abuse of discretion.” State v. Christensen, 561 N.W.2d 631, 632 (N.D. 1997). In Sevigny’s case, the trial court abused its discretion because it failed to exclude the evidence despite the prosecution’s failure to adequately explain why the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness.

The North Dakota Supreme Court in State v. Hirschhorn, 2002 ND 36, 640 N.W.2d 439 (2002), explained a situation in which the trial court abused its discretion by admitting statements without making “specific findings of facts relevant to reliability and trustworthiness” and by not explaining “how these facts support the conclusion of admissibility.” Id. at 446. The facts of Hirschhorn involved a mother coming home and

entering a bedroom where she found her five-year-old daughter with her pants down, and a Ken doll stuck between her legs. Id. at 441. When the mother asked the daughter what she was doing, the daughter told her “Uncle Lance told me not to tell.” Id. The mother contacted the Burleigh County Sheriff’s Department, and a forensic interviewer was brought to the home to interview the little girl. One week after the alleged incident, the little girl told the forensic interviewer that “Uncle Lance” had touched her “privates” in his bedroom at her grandmother’s ranch. Id.

Much like Sevigny’s case, the prosecution in Hirschhorn did not move to have the hearsay statements admitted under Rule 803(24) until one year after the alleged incident, and only a short time before trial. Id. at 442. At the motion hearing before trial, despite the lack of concrete reasons presented by the prosecution, the trial judge ruled that the child’s statements to the mother, and to the forensic interviewer, were admissible. Furthermore, the child did testify at trial, however, she could not remember anyone touching her in a “bad place.” Id.

The Supreme Court gave a lengthy discussion of what constituted reversible error when child hearsay statements are improperly admitted into evidence, stating that “[f]actors to consider include spontaneity and consistent repetition, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and a lack of motive to fabricate.” Id. at 44 (citing State v. Messner, 1998 N.D. 151, ¶13, 583 N.W.2d 109)). Furthermore, in Hirschhorn, this Court found that the State’s mere recital of the Messner case as prior precedent, and their failure to provide concrete findings as to why the hearsay statements should be admissible constituted obvious error, and the trial court’s decision was subject to reversal. Id. at 447. Explaining, the Court stated that the

trial court:

[D]id not even know the verbatim content of the out-of-court statements so an evaluation of their reliability could be made. No details were provided to the court concerning spontaneity and consistent repetition, the mental state of the child, the use of terminology of a child of similar age, and the lack of motive to fabricate. The prosecutor's analogy to Messner and general assurances to the court that "time . . . is in close proximity to when these occurred" and "the content is consistent with the information that was provided to the forensic interviewer" without providing the court with any of the underlying factual circumstances, were insufficient to support the admission of the child's hearsay statements.

Id. at 446.

In Sevigny's case, the prosecution failed, much like the prosecutors in Hirschhorn, to adequately brief and explain why the hearsay statements were admissible. The prosecution's motion for the admittance of the child-hearsay statements was supported only by a recitation of Rule 803(24), an attached case synopsis of the case of State v. Messner, 583 N.W.2d 109 (N.D. 1998), and a one-paragraph explanation regarding why the court should find the normally excluded hearsay statement admissible in Sevigny's case. (*See* Brief in Support of Motion for Admission of Out-Of-Court Statements, 3/4/05). Although a hearing was held on the motion to admit the hearsay witnesses. At the motions hearing, Sevigny stated his objections as to the State's use of leading questions, and to the fact that the witness's testimony was tainted because many of the witnesses had already met with other witnesses to discuss the case. Because of these facts, the hearsay witnesses had already developed a preconceived idea of what the children should be disclosing prior to their meetings with S.S. and S.M.

In addition to the prosecutions failure to adequately brief and show why the hearsay statements were admissible, Judge Fontaine erred by offering insufficient

findings of fact as to why she was admitting the evidence. In Hirschhorn, this Court stated that “[a] trial court must make explicit findings as to what evidence it relied upon regarding the factors and explain its reasons for either admitting or excluding the testimony so a defendant can be assured the required appraisal has been made, and so this Court can properly perform its appellate review function.” Id. (citing State v. Matsamas, 808 P.2d 1048, 1051 (Utah 1991)). Judge Fontaine’s findings include no more than a one-paragraph description of why each witness’ hearsay statements were admissible. (See Pretrial Conference at 2-4). Although Judge Fontaine made a perfunctory recitation of Rule 803(24)’s mandate that all of her conclusions were based on “indicia of reliability and guarantees of trustworthiness,” she failed to adequately explain several factors that were missing in all of the witnesses statements regarding their interviews with the children. Such errors included the court issuing no findings as to specific time frames for the alleged incidents, as to the possibility of potentially tainted interviews where interviewers had preconceived notions of what the children should be saying, or as to the fact that the children’s statements were or were not very similar in their descriptions and topics. For example, the Court stated the following in regards to the first hearsay witness that was allowed:

“The Court specifically finds in regards to Liz Suda that she’s a licensed social worker, that she was the first person who had contact with the minor child, S.S., that she has special training to interview children, and did not ask any leading questions that in the Court’s opinion would have led to any statements made alleging sexual contact. I find that that statement, based on those specific facts, hearsay statement, is credible.”

(Pretrial Conference at 2).

Sevigny further objected to the use of the unsubstantiated hearsay testimony

because it violated his Sixth Amendment right to confront his accuser. This Court, in Hirschhorn explained that “[w]hile the child-hearsay rule permits the admission of otherwise inadmissible hearsay evidence in order to facilitate prosecution, the rule’s requirements are also intended to safeguard the accused’s right to confront the witnesses testifying against him” Id. at 443 (citing People v. Juvenile Court, 937 P.2d 758, 760 (Colo. 1997)). Furthermore, “[i]ndicia of reliability and guarantees of trustworthiness are constitutionally required before admission of hearsay statements to preserve the Sixth Amendment’s basic interest in requiring “confrontation,” even though an accused cannot directly confront the hearsay declarant.” Id. (citing Idaho v. Wright, 497 U.S. 805, 814-16 (1990)).

Finally, in the recently decided case of State v. Krull, 2005 ND 63, 693 N.W.2d 631, this Court discussed a similar situation to that of Hirschhorn regarding the trial court’s admittance of hearsay statements:

Although Hirschhorn does reference a situation where “nondetailed findings might suffice when there is an adequate factual basis in the offer of proof to support the trial court’s determination,” here it was nonetheless plain error for the district court to disregard the more numerous and explicit terms of Hirschhorn, including the admonition against “*merely quoting the terms of the rule and ordering the testimony admitted.*” While there is evidence in the record that supports the admissibility of these statements, it is by no means apparent or self-evident that admissibility is the only proper choice. This fact is precisely why detailed findings and explanations are so vital to ensuring the defendant’s rights and proper appellate review.

Id. at 633 (emphasis added).

The Hirschhorn and Krull cases explain what is needed for the admittance of child hearsay statements under N.D. R. EVID. 803(24). If the prosecution fails to prove the factors behind why the statements should be admitted, the trial court is bound by the

United States Constitution and the North Dakota Constitution to not allow hearsay statements into evidence which will violate the defendant's right to confront his accuser. In this case, the State did not show sufficient indicia of reliability and the Court did not make sufficient findings as to the guarantees of trustworthiness and indicia of reliability of each witness's statements. Therefore, the hearsay witnesses should have been excluded.

3. DID THE TRIAL COURT ERR WHEN IT ALLOWED THE TESTIMONY OF HEARSAY WITNESSES UNDER NORTH DAKOTA RULES OF EVIDENCE, RULE 803(24), BEFORE THE TESTIMONY OF THE ACTUAL CHILDREN WITNESSES DURING THE TRIAL?

The trial court's allowance of the prosecution to present the six witness's hearsay testimony before the children's testimony was highly prejudicial to Sevigny and constituted an abuse of discretion because the jury was prejudiced by the testimony of the hearsay witnesses. It was prejudiced by testimony that was only admitted as an exception to the general rule that hearsay statements are inadmissible. See N.D. R. EVID. 802.

Admittedly, Rule 803(24) mandates that a child witness must testify during the trial, but the rule does not clearly state when the child must testify at trial. Even though Rule 803(24) does not state when the child witnesses must testify during the trial, courts must be wary of the prejudicial presentation of evidence, and they must exercise control over the presentation and interrogation of witnesses so that the evidence is presented in a manner which effectuates a fair ascertainment of the truth. See N.D. R. EVID. 611. Rule 611 of the North Dakota Rules of Evidence reads:

Rule 611. Mode and order of interrogation and presentation.

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as

to (1) *make the interrogation and presentation effective for the ascertainment of the truth*, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(emphasis added). In Sevigny's case the trial court erred because it did not ensure that the presentation of the testimony in the case was effective for the ascertainment of the truth. The order of the testimony and presentation of the case, in particular the testimony of the six hearsay witness's testimony before the testimony of the actual child witnesses, was not the effective way to ascertain the truth but rather in fact was highly prejudicial to Sevigny. This Court has already explained that "[t]he rule gives the trial court wide discretion over the mode and order of interrogating witnesses and presenting evidence, and the trial court's rulings in that respect will not be disturbed on appeal unless the record establishes that the discretion was abused to the prejudice of the complainant." Graber v. Engstrom, 384 N.W.2d 307, 310 (N.D. 1986).

In the case at hand, the jury heard hearsay testimony from several witnesses before it heard even a bit of testimony from the actual children. The basis for all this hearsay testimony was interviews done with the children in the past. Sevigny was extremely prejudiced because the trial court allowed the state to present all its hearsay testimony before the jury heard a word of the actual child witnesses' testimony. In fact, when the children eventually did take the stand, they had very little to say about the alleged incidents. For example, at trial, S.M. could not testify clearly as to whether Sevigny had abused her, stating at one point that:

- Q. When he rubbed his thingy up against you, what part of your body did his thingy touch?
- A. (No audible response)

- Q. Okay. I can't really tell when you pointed like that. Would you come down here and point to me?
- A. Huh-uh.
- Q. If I asked you , would you tell me?
- A. (No audible response).
- Q. Okay. Did his thingy touch you on the back of you or the front of you?
- A. Front.
- Q. Did his thingy touch your head?
- A. Huh-uh
- Q. Did it touch you on your breast?
- A. Huh-uh.
- Q. Did it touch you on your belly button?
- A. No.
- Q. Okay. Did it touch you on your private parts?
- A. (No audible response).
- Q. Did it touch you on your leg?
- A. No.

(Tr. at 391, lines 2-23). This type of question and answer continued throughout much of the testimony of both S.M. and S.S. In S.S. testimony at trial, she was unable to clearly say whether Sevigny had abused her. For example:

- Q. Okay. Do you remember how it felt when you had a private touch?
- A. Huh-uh.
- Q. Okay. Have you ever touch a part of the boy's body?
- A. Huh-uh.
- Q. Did you touch part of your – any part of your dad's body? . . .
- A. (Indiscernible)
- Q. Only the pants. Okay. Do you remember when that happened?
- A. (No audible response).

(Tr. at 625, lines 17-25, 626, lines 12-15). Much of the question and answer between the prosecution and the children was confusing and hardly incriminating, and the prosecution's questioning was very leading, even with the additional latitude granted because of the witnesses being children.

Nevertheless, the State had already set the foundation for its case with all the hearsay witnesses long before the children were called to testify. If the children were

called to testify first, the jury would have been presented with a much different picture of the events that allegedly occurred. Therefore, the State's presentation of evidence was highly prejudicial to Sevigny and not the proper presentation to ascertain the truth behind the case.

Again, Rule 803(24) admittedly does not mandate when the child witnesses should testify even if hearsay evidence is allowed. Even the trial court, in its ruling on the Defendant's motion to require the children to testify first stated that: "The rule itself does not require the child to testify as the first witness in the case. This clearly could have been required by the rule if that had been the intent." (Order Denying Defendant's Motion to Require Children to Testify First.)

Nevertheless, Rule 611 requires that the trial court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth. It is this rule in conjunction with Rule 803(24) that should specifically require, especially in cases such as this one, that the children should have testified first. The mode and order of interrogating witnesses and presenting evidence in this case was not done in such a way to make the interrogation and presentation effective for the ascertainment of the truth and therefore was error.

4. DID THE TRIAL COURT ERR IN HOLDING THE DEFENDANT'S ATTORNEY IN CONTEMPT IN THE PRESENCE OF THE JURY WHEN HE GAVE HIS OPINION TO THE JURY REGARDING THE SUFFICIENCY OF THE EVIDENCE DURING CLOSING ARGUMENT?

The trial court's holding of Sevigny's attorney, Neil Fleming, in contempt of court during his closing argument was erroneous. The standard of review for the Court in

regards to the trial courts finding of contempt is the abuse of discretion. See Giese v. Giese, 2004 ND 58, ¶8, 676 N.W.2d 794 (indicating that the ultimate determination of whether or not contempt has been committed is within the trial court’s sound discretion). An abuse of discretion occurs when the trial court acts in an arbitrary, unreasonable, or unconscionable manner or when it misinterprets or misapplies the law. Id.

For appellate review, the North Dakota Supreme Court, when imposing contempt under North Dakota Century Code § 27-10, must first consider whether a remedial or punitive sanction is applicable and then apply the appropriate procedures for imposing the sanction. Peters-Riemers v. Riemers, 2003 ND 96, ¶20, 663 N.W.2d 657.

The grounds for holding a lawyer in contempt of court are discussed in Chapter 27, section 10, of the North Dakota Century Code. The excerpted sections discussed below, explain the relevant portion of the code as they pertain to Sevigny’s case. Sevigny’s trial attorney, Neil Fleming, was charged with contempt of court for repeatedly expressing his opinion in his closing argument before the jury on evidence that was and was not admitted at trial. (*See Order Finding Contempt, 6/2/05*). Judge Fontaine initially fined Fleming \$500. This sanction ultimately was a punitive sanction under North Dakota Century Code § 27-10-01.1-1.4.

In regards to the whether Fleming committed contempt of court during his closing argument, the pertinent parts of the statute explains the controlling rules:

27-10-01.1. Definitions.

1. “Contempt of court” means:
 - a. Intentional misconduct in the presence of the court which interferes with the court proceeding or with the administration of justice, or which impairs the respect due

the court; . . .

- c. Intentional disobedience, resistance, or obstruction of the authority, process, or order of a court or other officer including a referee or magistrate; . . .
- g. Any other act or omission specified in the court rules or by law as a ground for contempt of court. . . .

- 3. “Punitive sanction” includes a sanction of imprisonment if the sentence is for a definite period of time. *A sanction requiring payment of a sum of money is punitive if the sanction is not conditioned upon performance or nonperformance of an act, and if the sanction’s purpose is to uphold the authority of the court.*

(emphasis added).

The finding of contempt and the sanction in this case is punitive, and not remedial, because a remedial sanction can only occur when a party is held in contempt of court for the non-payment of sums owed to a complaint who is *not* the court.

The next section of the Code discusses when a judge should issue a punitive sanction. Furthermore, Section 3 discusses when an appeal may be taken. The pertinent parts of the statute read:

27-10-01.3. Nonsummary procedure for remedial and punitive sanctions - Joint hearing and trial - Summary procedure – Appeal. . .

- 2. The judge presiding in an action or proceeding may impose a punitive sanction upon a person who commits contempt of court in the actual presence of the court. The judge shall impose the punitive sanction immediately after the contempt of court and only for the purpose of preserving order in the court and protecting the authority and dignity of the court.
- 3. An appeal may be taken to the supreme court from any order or judgment finding a person guilty of contempt. An order or judgment finding a person guilty of contempt is a final order or judgment for purposes of appeal.

N.D. CENT. CODE § 27-10-01.3.

Finally, the Code discusses the proper remedy for a punitive contempt of court.

The pertinent parts of the statute reads:

27-10-01.4. Remedial sanctions - Punitive sanctions for nonsummary and summary procedure - Past conduct. . . .

2. b. A court, after a finding of contempt of court in the summary procedure under subsection 2 of section 27-10-01.3, may impose for each separate contempt of court a fine of not more than five hundred dollars, imprisonment in the county jail for not more than thirty days, or both.
3. A punitive sanction may be imposed for past conduct that was a contempt of court even though similar present conduct is a continuing contempt of court.

The trial court did not have reasonable grounds to find Fleming in punitive contempt of court for allegedly discussing his opinion as to certain kinds of evidence before the jury at closing argument. The North Dakota Supreme Court in City of Grand Forks v. Dohman, 552 N.W.2d 69 (N.D. 1996), warned that, “as a narrow exception to due process requirements, the exercise of summary contempt power exists “only where there is compelling reason for an immediate remedy and, where there is no such need, its use is inappropriate.” Id. at 70 (citing State v. Goeller, 263 N.W.2d 135, 137 (N.D. 1978)).

In Hoffer v. Burd, 49 N.W.2d 282 (N.D. 1951), this Court explained a situation where finding an attorney in contempt for stating his opinion about evidence and witness credibility was unnecessary, and that it was not per se unlawful. In Burd, the plaintiff’s counsel “argued that witnesses who had been subpoenaed were more likely to tell the truth than those who appeared and testified without having been subpoenaed.” Id. at 284. The attorney made many statements such as: “In my experience a witness testifying

under subpoena is more likely to tell the real truth,” “beware of a volunteer,” and “remember he is disinterested.” Id. Finally, at closing argument, the plaintiff’s attorney stated that the defense had a chance to “sandpaper” the non-subpoenaed witnesses. Id. at 289. Despite finding that these statements may have been improper, the North Dakota Supreme Court held that the statements did not prejudice to defendant’s case, and that the trial court was not obligated to correct the attorney’s impropriety. Id. Clearly, North Dakota courts should be leery of imposing serious contempt sanctions against attorneys, like Neil Fleming in this case, who may have only stretched but not broken the proper bounds for stating opinions regarding witness testimony.

Furthermore, in State v. Schimmel, 409 N.W.2d 335 (N.D. 1987), the North Dakota Supreme Court held that a prosecutor who, in a DUI case, commented that the defendant’s blood-alcohol level was above the legal limit, stating that “I don’t think there’s much doubt about that at all,” should not have been held in contempt because “the prosecutor’s argument did not impermissibly express his personal beliefs and conclusions about evidence regarding the results of a blood-alcohol test.” Id. at 343. This Court further explained that “[the prosecutor] merely offered his opinion that the evidence revealed the defendant was guilty of driving with a blood-alcohol concentration greater than the legal limit.” Id. Again, we see that North Dakota courts protecting the rights of attorney to have an opportunity in their closing arguments to summarize all evidence presented, and to comment on the conduct and demeanor of all testifying witnesses. This is what Fleming did in his closing argument.

In a similar vein, Wayne R. Johnson in his law review article, *North Dakota’s New Contempt Law: Will it Mean Order in the Court?*, 70 N.D. L.REV. 1027 (1994)

explains that:

That definition [of contempt] generally requires that the contemnor's conduct be intentional, indicating that the ability of the contemnor to refrain from the contempt is essential . . . [B]y requiring intentional conduct on the part of the contemnor, it appears that the legislature intended that the defenses for mistaken or inadvertently committed acts would remain vital under the new law.

Id. at 1044. Mr. Fleming's comments were based on the belief that he *could* offer his opinion of evidence and he therefore did so, despite Judge Fontaine's warnings that he should not state his opinion about evidence not before the jury. In the case of Raszler v. Raszler, 80 N.W.2d 535, 537 (N.D. 1956), this Court found that an action based on mistake was not a contemptuous act. This Court held that the defendant's conduct was not contemptuous since he was mistaken as to the amount of money he owed his former spouse under their divorce decree. Id. at 539. Thus, because he did not act with deliberate intent, he could not be found in contempt. Id. Fleming in this case, like the attorneys in Burd and Schimmel, was merely stating his opinion about witness testimony presented at trial, and he was within his rights to do so within his closing argument.

An analysis of Fleming's conduct shows that Judge Fontaine abused her discretion by holding Fleming in contempt in front of the jury. As previously stated, an abuse of discretion occurs when the trial court acts in an arbitrary, unreasonable, or unconscionable manner or when it misinterprets or misapplies the law. Giese v. Giese, 2004 ND 58, ¶8, 676 N.W.2d 794. An attorney may state his opinion about witness testimony during closing argument. Judge Fontaine's Order Finding Contempt included a synopsis of what she believed constituted contempt on the part of Fleming for repeatedly stating his opinion as to certain evidence, and to the credibility of the

defendant. Judge Fontaine stated that:

“Mr. Fleming (at Page 7 line 22-23 of the transcript) argued facts not in evidence and attempted give his personal opinion of videotaped interview based on his experience as follows: “I have watched several videos of people being interviewed, even children in situation like this. I have never seen –“

(Order Finding Contempt, at 1, 6/2/05). Judge Fontaine continued, finding that Mr. Fleming impermissibly stated his opinion as to the credibility of the defendant, when he stated that “[a]nd Alan (the defendant) gave the expected answer, no. But I think it was sincere, I think it was sincerity.” (Order at 2, lines 22-25). Finally, after Mr. Fleming made the statement that “[t]he conduct of Social Services towards Cheryl, and towards S.S. I believe borders on abuse,” the following exchange took place:

THE COURT: -Mr. Flemin-

MR. FLEMING: -I asked-

THE COURT: -did you just say that you believed that it borders on abuse?

MR. FLEMING: *Yes, judge, that's my belief, that's my belief.*

THE COURT: Then I find you in contempt and fine you Five Hundred Dollars for that comment because I warned you that you would be in contempt if you expressed your personal belief, you can submit argument to the jury, *you are not to express your personal belief.* You can continue your closing argument.

(Order For Contempt, at 5, lines 11-25) (emphasis added).

Admittedly, the Court had previously indicated to Mr. Fleming that he was not to issue his own personal opinions to the Jury in the closing argument. Fleming, nevertheless continued and stated his opinions as to the evidence. However, as pointed out in Burd and Schimmel, attorneys may state their opinion on certain aspects of

evidence when it will not impermissibly prejudice the jury. Fleming gave an interpretation of the evidence as he saw it to be while discussing the credibility of various witnesses.

In addition, Judge Fontaine's finding of Mr. Fleming in contempt occurred in front of the jury during closing argument. This no doubt had a prejudicial effect on the jury. Even if Judge Fontaine was within her discretion to find Mr. Fleming in contempt of court and fine him, it should have been done at a sidebar or at the conclusion of the trial. In any event, it should have been done out of the presence of the jury so as to have the smallest possible prejudicial effect.

Therefore, because a finding of contempt during closing argument in front of the jury is prejudicial to Sevigny's defense, and because the jury's findings were likely tainted by such a finding, this Court should find that the trial court erred in its finding of contempt.

VIII. CONCLUSION

For the above stated reasons, Mr. Sevigny respectfully requests that the North Dakota Supreme Court reverse his conviction of both counts of Gross Sexual Imposition dated August 11, 2005.

Dated this 23 day of March, 2006.



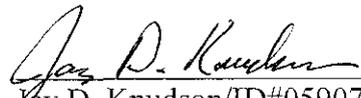
Jay D. Knudson/ID#05907
218 South 3rd Street
Grand Forks, ND 58201
701-787-8802 (phone)
701-787-8460 (fax)
Attorney for Defendant/Appellant

IX. CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of March, 2006, a copy of the foregoing Brief for Appellant was electronically filed with the North Dakota Supreme Court Administrator according to N.D. Sup. Admin. Order 14 at:

supclerkofcourt@ndcourts.com

I hereby certify that on the 23 day of March, 2006, a copy of the foregoing Brief for Appellee was served electronically upon Stuart Askew, Pembina County State's Attorney according to N.D. Sup. Ct. Admin. Order 14 at: saskew@state.nd.us


Jay D. Knudson/ID#05907
218 South 3rd Street
Grand Forks, ND 58201
701-787-8802 (phone)
701-787-8460 (fax)
Attorney for Defendant/Appellant