

**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**

REPLY BRIEF FOR APPELLANT

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III. STATEMENT OF THE ISSUES

As noted in the State's response brief, the State took exception to issues number one, two, and four as set forth by Mr. Sevigny. The State contended that the "issues are [sic] presented contain factual inaccuracies that are not supported by the record." (Appellee's Brief at 5). Sevigny does agree that the issue presented in number 1 was misstated. The Issue Presented as number one in the Defendant's brief was mistakenly worded from a working copy of the Defendant's brief and was not corrected before it was filed. The rest of the brief however, including the statement of the facts and the law and argument, assumes the correct facts and proceeds accordingly. The Defendant asserts that the remaining statements of the issues presented in this case are correct and therefore the STATEMENT OF THE ISSUES should read as follows:

1. **Did the Trial Court err by excluding defendant's alibi evidence because the Defendant did not give notice of an alibi defense even though the defendant had good cause for failing to give the notice of alibi?**
 - 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?**

In addition, in response to the State's reply brief, the defendant raises the following:

Was Sevigny's trial lawyer's failure to provide notice of an alibi defense to the prosecution ineffective assistance of counsel?

- A. *Sevigny's trial lawyer's performance during the case was deficient.*
- B. *The deficient performance was prejudicial to Sevigny's defense.*

IV. 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 even though the defendant had good cause for failing to give the notice of alibi?

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*

Although the State cites State v. Vance, 537 N.W.2d 545 (N.D.1995), to insist that “time is not an element of the offenses of gross sexual imposition,” (Appellee’s Brief ¶57, at 35), the State still asked for permission to amend the dates for Count 2 to include another month for which Sevigny was alleged to have committed. Id. Furthermore, the legal issue brought on appeal in Vance is wholly different from the issue in the case at hand. In Vance, the defendant appealed his conviction of gross sexual imposition. Vance, 537 N.W.2d at 547. The defendant unsuccessfully argued that the trial court’s allowance of the State to amend the charges against the defendant to include a lesser offense under the charges against the defendant was prejudicial to his defense. Id. at 547-48. This Court held in that case that the State may amend the charges against a defendant during trial, if the amended offense charges the defendant with lesser included offenses. Id.

Unlike the Vance case, the issue here is not whether the state can amend the charge to include a lesser offense. Sevigny is not arguing that the State’s amendment to

include new dates was prejudicial to him. Sevigny does not object, as did the defendant in Vance, to the State amending the criminal charges. However, it is interesting that the State's attorney felt it necessary to make a motion before the court to amend the criminal charges to include new dates, yet she now argues that time is not an issue in this case. Sevigny simply maintains that he was prejudiced when he was not allowed to present rebuttal alibi testimony to prove that he was not present during an alleged incident of abuse that occurred at a defined time, or more specifically, over Christmas vacation of 2004. (Tr. at 711).

The State should not be allowed to hide behind the maxim that "time is not an element" of the offense and at the same time include over two-years worth of dates for both Counts, amend Count 2 to include an additional month's worth of dates, and then argue that the defendant is completely precluded from presenting evidence that he was working at his job as a long-haul trucker at exact time of one of the alleged incidents, thus creating an alibi for several weeks within the massive time span which the State alleged in the original criminal complaints.

Sevigny's alibi evidence, had it been allowed, would given Sevigny a chance to demonstrate to the jury that despite the wide swath of dates alleged by the State, at a very minimum, it was not possible for him to be guilty of abuse during Christmas vacation of 2004. Furthermore, Sevigny's evidence would have called into question the credibility of many of the State's hearsay witnesses, as well as the statements of S.S. and S.M. The evidence would also have bolstered Sevigny's argument that the health care-professionals

who interviewed the children used leading questions and impermissible tactics to elicit the children's statements regarding the alleged abuse. Sevigny's attempt to introduce alibi evidence at trial should have been admitted by the trial court because excluding the evidence was more prejudicial than including it, and such exclusion is not in the spirit of the rule which "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." State v. Flohr, 301 N.W.2d 367, 370 (N.D. 1980). Likewise, "[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).

Even though the alibi evidence that was excluded may not have proven exculpatory for Mr. Sevigny in regards to every date included in the charging document, the evidence would certainly have proven that at least one of the alleged incidents could not possibly have occurred. This evidence may or may not have been enough to change the verdict in the case, but we will never know because it was never presented to the ultimate fact finder in a trial: the jury.

This Court, in Vance, explained that victims have the responsibility when testifying about dates or time periods when abuse is alleged to have occurred, to at least:

[D]escribe the kind of act or acts committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct . . . Finally, the victim must be able to describe the general time period in which these acts occurred . . . to assure that acts were committed within the applicable limitation period.

Vance, 537 N.W.2d at 549-50 (citing People v. Jones, 792 P.2d 643, 655-56 (Cal. 1990)). Keeping in mind this Court’s language in the above passage, in their Brief, the State admits that “[the children] were unable to give specific dates of when the incidents occurred.” (Appellee’s Brief ¶ 57, at 35). Despite the fact that the children could not even testify as to dates, and despite the fact that the State alleges incidents occurred within a time period of two years, the State insists that Sevigny’s trial attorney had the absolute duty to provide the State with specific dates and notice of an alibi defense during pretrial proceedings. (Appellee’s Brief at 11, 34). Indeed, the State chose to include a wide-array of dates in the charging documents, and move to amend the dates during trial, yet the State still relies on the argument that “time is not an element” of the offense.

Regardless of whether this Court should find that the Trial Court did or did not have good cause to grant an exception to Rule 12.1 to allow the alibi evidence, this Court must recognize that Sevigny’s constitutional right to testify on his own behalf was most certainly violated. The issue of Sevigny’s constitutional right to testify on his own behalf regarding his alibi was addressed in Sevigny’s appeal brief, yet the State’s Reply Brief fails to address this matter. Rule 12.1 of the North Dakota Rules of Criminal Procedure specifically provides that: “[t]his rule does not limit the right of the defendant to testify.” Every defendant has a constitutional right, under the Due Process Clause, to be able 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”). When it failed to allow this testimony, the Trial Court erred.

The trial judge's failure to find that there was good cause to allow Sevigny's alibi evidence to be presented despite the lack of pre-trial notice, and the trial court's further disallowance of Sevigny to testify in regards to his own alibi, was an abuse of discretion. The trial court erred and this case should be reversed or remanded for a new trial.

2. Was Sevigny's trial lawyer's failure to provide notice of an alibi defense to the prosecution ineffective assistance of counsel?

- A. *Sevigny's trial lawyer's performance during the case was deficient.*
- B. *The deficient performance was prejudicial to Sevigny's defense.*

The State argues adamantly in its reply brief that the Trial Court did not err when it excluded all evidence relating to Mr. Sevigny's alibi defense. The State argues that it was undeniably the Defense Counsel's responsibility to provide notice of an alibi defense before trial. Assuming for a moment that this Court agrees with the State, then the failure by Sevigny's trial attorney Neil Fleming to provide this alibi notice was error that amounts to ineffective assistance of counsel.

Although it is true that in Hendrickson v. Hendrickson, 2000 ND 1, ¶ 20, 603 N.W.2d 896, this Court held that appellants cannot raise new issues for the first time in their reply brief because "a reply brief must be confined to new matter raised in the appellee's brief," in the case at hand the State argues extensively that Sevigny's trial court counsel had the obligation to raise alibi issues and to provide notice to the prosecution of that intent. (See Appellee's Brief at 11, 34). Therefore, the ineffective assistance of counsel issue is brought before this Court in response to the State's

argument in its reply brief.

Additionally, all defendants are guaranteed by the Sixth Amendment of the United States Constitution to the right to effective assistance of counsel. U.S. CONST. amend. VI (providing that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense”); see Gideon v. Wainwright, 372 U.S. 335 (1963) (applying the right to all states). Therefore, this Court may raise issues of a defendant’s constitutional rights *sua sponte*. Silber v. United States, 370 U.S. 717, 717-18 (1962); DeRoo v. United States, 223 F.3d 919, 926 (8th Cir. 2000). Finally, defendants may bring post-conviction ineffective assistance of counsel claims on direct appeal via a habeas corpus proceeding. State v. Bengson, 541 N.W.2d 702, 703 (N.D. 1996). No doubt, the State will argue that this matter was not raised in the Defendant’s original appeal brief. Nevertheless, for the reasons just presented, this Court does have the ability to address this issue.

North Dakota recognizes the ineffective assistance of counsel claim under the United States Supreme Court holding in Strickland v. Washington, 466 U.S. 668 (1984). State v. Touche, 549 N.W.2d 193, 194-196 (N.D. 1996). In Strickland, the United States Supreme Court set the standard for ineffective assistance of counsel under a two-prong test:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

Strickland, 466 U.S. at 687. The North Dakota Supreme Court reviews the entire record on appeal, and “if [it] can say that the defendant has been denied the effective assistance of counsel, [it] will reverse and remand for a new trial.” State v. Woehlhoff, 473 N.W.2d 446, 449 (N.D. 1991).

A. *Sevigny’s trial lawyer’s performance during the case was deficient.*

Sevigny’s trial attorney, Neil Fleming, failed to provide notice to the State that Sevigny had an alibi for an incident of alleged abuse occurring of Christmas vacation of 2004. The State provided Fleming with an array of dates that included several reports indicating that one of the children had alleged that an incident of abuse had occurred during Christmas vacation. (Tr. at 711-15). Fleming’s failure to use this notice and to formulate Sevigny’s alibi defense renders his performance ineffective, as it fell below the professional standards of his peers. As the United State Supreme Court mandates in Strickland v. Washington, 466 U.S. 668, 688 (1984), attorneys must not fail “to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” Fleming’s failure to provide notice of Sevigny’s alibi defense violated Sevigny’s right to a “reliable adversarial testing process.”

The failure to recognize that Sevigny had an alibi for certain dates included within the original and amended charging documents, leading to the failure to provide pretrial notice to the State, constitutes an unreasonably deficient performance on the part of Fleming. Attorneys are expected to know the North Dakota Rules of Criminal Procedure, and to be able to competently follow them. “The essence of an ineffective-assistance

claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986). Fleming's performance fell below the professional norm, and his errors did indeed upset the adversarial balance in favor of the prosecution.

B. *The deficient performance was prejudicial to Sevigny's defense.*

But for Fleming's failure to provide the State with pretrial notice of Sevigny's alibi defense, the presentation of evidence against Sevigny, the flow of the trial, and the jury's view of Sevigny's guilt would have been substantially different. Sevigny was denied his right to present exculpatory alibi evidence that would put him at an entirely different place during one of the alleged criminal acts in this case. The procedural mistakes that led to the exclusion of this evidence severely restricted Sevigny's right to present a persuasive and valid defense.

In Kimmelman v. Morrison, 477 U.S. 365 (1986), the United States Supreme Court held that a defense attorney's failure to find out in pretrial discovery that the police had searched his client's house without a search warrant, and to bring motions to suppress the evidence, constituted ineffective assistance of counsel under the Strickland v. Washington test. In Kimmelman, the defendant's attorney explained to the trial court that he thought the State was obligated to provide the defense with all inculpatory information. Id. at 389. The Supreme Court did not find this explanation persuasive. Because the defense counsel could offer only "implausible," non-strategic explanations

for his lack of preparation, the Supreme Court found his explanation and performance “unreasonable.” Id. at 388. Despite the State’s argument that the error “was just one small phase in the whole case,” the Supreme Court was not persuaded that such an error could be overlooked to the detriment of the defendant. Id. The Supreme Court found the defense counsel’s performance met the Strickland test of ineffective assistance of counsel, and the Court thus remanded the case for retrial so that the trial court could determine what affect the inclusion of the search warrant evidence had on the outcome of the trial. Id. at 390.

The facts of Kimmelman are very similar to Sevigny’s case. Sevigny’s trial attorney Neil Fleming failed to determine whether or not there was a possible alibi defense for one or many different dates listed in the complaint. Ultimately, no notice of an alibi defense was provided. Such a failure was unreasonable and affected the ultimate outcome of Sevigny’s case. If the court were to agree with the State’s argument that it was solely the responsibility of the Defense to provide alibi notice and without that notice no alibi was admissible, much like the defense attorney in Kimmelman Fleming should have acted more diligently in determining more specific dates regarding the alleged criminal acts.

If this Court decides that the Trial Court did not err by excluding all evidence of an alibi defense in this case, then Fleming’s failure to provide pretrial notice to the State in regards to Sevigny’s alibi defense, his performance or lack thereof in regards to this case, met the standard for ineffective assistance of counsel under the United States

Supreme Court test in Strickland v. Washington.

V. 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 10, 2005, or alternatively remand the case to the District Court.

Dated this 6th day of June, 2006.

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VI. CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 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 6th day of June, 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 and also Barb Whelen, Special Assistant Pembina County State's Attorney at: bwhelanlaw@yahoo.com.

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