

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellee,)	
)	
vs.)	SUPREME COURT NO. 20200044
)	
Coby Edwards,)	
)	
Defendant-Appellant.)	

APPELLANT'S BRIEF

APPEAL FROM THE JANUARY 21, 2020 JUDGMENT
THE WARD COUNTY COURT IN MINOT, NORTH DAKOTA
THE HONORABLE DOUGLAS L. MATTSON PRESIDING

ORAL ARGUMENT REQUESTED

ATTORNEY FOR APPELLANT

RICHARD E. EDINGER
Attorney at Law
P.O. Box 1295
Fargo, ND 58107
(701) 298-0764
richard@edingerlaw.com
ND No. 05488

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NORTH DAKOTA CENTURY CODE

§ 12.1-20-03((1)(d)	¶ 6
§ 12.1-20-03(3)(a)	¶ 6
§ 12.1-32-01(1)	¶ 6

STATEMENT OF THE ISSUES PRESENTED

[¶ 3] I. Whether reversal is required where Defendant did not waive his due process right to have his retained expert witness testify at trial?

[¶ 4] II. Whether the State can prove the comment on Defendant's silence was harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

[¶ 5] Defendant-Appellant Coby Edwards appeals from the January 21, 2020 Judgment. (A 23)¹ Defendant seeks reversal on the grounds that he did not waive his due process right to have his expert witness testify at trial and the State commented on his right to remain silent.

[¶ 6] On September 14, 2018, the State filed an Information, charging Defendant with Gross Sexual Imposition, a Class AA Felony, in violation of N.D.C.C. § 12.1-20-03((1)(d), 12.1-20-03(3)(a), and 12.1-32-01(1). (A-10)

[¶ 7] After a three day jury trial, Defendant was found guilty. (Verdict, docket sheet, No. 132; T 238-239²)

On January 21, 2020, Defendant was sentenced to forty years imprisonment. Defendant was sentenced to first serve twenty five years with the balance of fifteen years suspended for a period of ten years of supervised probation. Defendant was ordered to complete sexual offender treatment while incarcerated and have no contact with Jane Doe. (A-13)

1 Appendix

2 Trial Transcript

[¶ 8] On February 13, 2020, Defendant filed his Notice of Appeal. (A-23)

STATEMENT OF THE FACTS

[¶ 9] The facts relevant to the issues are in dispute. At trial, Amanda Walhood testified for the State. She and Defendant have two children, one of which is Jane Doe, the six year old alleged victim. (T 25) Jane Doe testified she was 5 years old when she stopped living with Defendant. Jane Doe testified her dad touched her in her "lower part" with his hands. Jane Doe said her dad did not touch her lower part with any other part, including his penis. (T 35-36) Jane Doe did not recognize her dad in the courtroom. She did not identify Defendant as her dad. (T 39-40)

[¶ 10] Terrilynn Braasch, a family nurse practitioner, conducted a forensic medical exam on Jane Doe. (T 50) "[T]here were no abnormal genital findings." (T 51) Braasch said Jane Doe told her she had pain with urination after Defendant "wiggled" with her. (T 53)

[¶ 11] Keith Miller, a Detective for the Ward County Sheriff Department, set up and observed an interview of Jane Doe conducted by Kori Small. (T 63-64,77) On cross-examination, Detective Miller told the jury he tried to interview Defendant, but Defendant's attorney "refused." (T 66)

[¶ 12] Richard Arnold, a former cellmate of Defendant, testified. Arnold said Defendant said he was not guilty of

the charge, but he taught his daughter about sex. According to Arnold, Defendant asked Arnold to ask his girlfriend to go online and research if a doctor can tell if the head of a penis was put into a child. (T 92-93) On cross-examination, Arnold said he was hoping to get a lesser charge or less jail time for testifying against Defendant. (T 98,105) Arnold said Defendant never admitted to sexually molesting his children. (T 100) Arnold is a convicted drug dealer, a convicted liar, and a convicted drug user. (T 100)

[¶ 13] Justin Thorton, another former cellmate of Defendant, testified. Thorton said Defendant told him he taught Jane Doe about sex. (T 123) On cross-examination, Thorton admitted that Defendant never said him molested children. Nor, did Defendant admit to performing a sexual act on his children, including Jane Doe. (T 126)

[¶ 14] Exhibit 1, the DVD interview of Jane Doe, was admitted into evidence, without objection, and played for the jury. (T 78-79) On the DVD, Jane Doe said she hurt after urination after her dad "wiggled" with her. (Exhibit, docket sheet, No. 123 (11:42:30 on DVD))

[¶ 15] Defendant testified that Jane Doe walked in on him a couple of times when he was having sex. (T 177-178) Defendant emphatically denied having a sexual encounter with Jane Doe. (T 178,183) Defendant admitted to talking to Jane Doe about sex after the first time she walked in on him having sex. (T 129)

[¶ 16] On October 23, 2018, at the motion hearing, the court was informed that an expert for Defendant had been paid, but had not been formally hired. (MH 62³) On December 28, 2018, Defendant filed a Notice of Expert Witness, disclosing that Deryn Strange, Ph.D., would be testifying at trial about the alleged victim's memory.

[¶ 17] After the State rested at trial, Defendant's attorney, Chad McCabe, said Dr. Strange would be testifying. (T 135; A-21) However, Dr. Strange never testified. McCabe said "our doctor is not coming to testify. He could not make it today." (T 144; A-22) McCabe never requested a continuance, nor did Defendant agree to waive Dr. Strange's testimony.

ARGUMENT

[¶ 18] I. Reversal is required where Defendant did not waive his due process right to have his retained expert witness testify at trial.

[¶ 19] In Ake v. Oklahoma, 470 US 68 (1986), the United States Supreme Court held that an indigent criminal defendant has a due process right to have an expert assist in his defense if he makes a preliminary showing that mental capacity is likely to be a significant factor at trial. Due process of law requires expert assistance to ensure "an adequate opportunity to present their claims fairly within the adversary system." Id. at 77.

[¶ 20] Due to the allegations and Defendant was facing the possibility of life imprisonment, an expert was approved for Defendant. The expert was paid back in October 2018. (MH 62) The expert witness was going to create reasonable doubt about the five year old Jane Doe's memory. See Notice of Expert Witness. (A-12)

[¶ 21] Based on Ake, the payment to Deryn Strange, Ph.d., and the retainment of Deryn Strange, Ph.D., Defendant had a constitutional due process right to have his expert witness testify at trial.

[¶ 22] Here, Defendant never waived his constitutional due process right to have his expert witness testify. Inexplicably, Defendant's trial attorney never asked for a short continuance so the expert witness could testify. McCabe abrogated his duty to protect his client's rights.

He simply decided on his own to forgo the expert testimony because Dr. Strange failed to show up at trial to honor his contractual and professional duty:

"Mr. McCabe: Your Honor, just for the Court's . . . and I already let Ms. Dillon know -- our doctor is not coming to testify. He could not make it today."

[Trial Transcript page 144; A-22]

[¶ 23] What is incredible is that a day earlier McCabe said the expert would be testifying. (A 21) Moreover, it is worth noting that McCabe made a record of Defendant's waiver of his privilege against self-incrimination when Defendant decided to testify. (T 168)

[¶ 24] Defendant's due process right in his expert witness is his own personal, individual right. His due process right cannot be waived by his attorney's impassiveness or incompetence. Defendant did not knowingly, intelligently, and voluntarily waive his due process right in his expert witness testifying at trial. No waiver occurred!

[¶ 25] When a constitutional right is violated, it is subject to the harmless error standard for constitutional errors--"harmless beyond a reasonable doubt." Chapman v. California, 386 US 18, 24 (1967); City of Mandan v. Baer, 1998 ND 101, ¶ 10, 578 N.W.2d 559. It must be determined that substantial rights of the defendant were not affected. "In most cases, the substantial rights of the defendant are affected if the error is prejudicial. United States v.

Olano, 507 U.S. 725, 734, 113 S.Ct. 1770, 1778 (1993)." Baer, at ¶ 19.

[¶ 26] Here, substantial rights of the Defendant were affected by not having his expert testify. Defendant's due process right was usurped. The doctor's testimony would have created reasonable doubt with the State's weak case. There was no physical evidence. At trial, Jane Doe testified the crime alleged in the Information did not happen! (T 35-36) She said her dad did not touch her with his penis. The only evidence the State had was the DVD of the interview. Defendant's expert would have created reasonable doubt for the jury because he would have explained why a five year old could have fabricated or exaggerated the allegations in order to please the interviewer. Dr. Strange would have explained the flaws in the forensic interview and the inherent problems with interviewing a five year old child.

[¶ 27] The absence of Dr. Strange from the trial cannot survive the harmless error standard. The error was glaring and highly prejudicial. Dr. Strange's testimony coupled with Jane Doe's trial testimony would have led to a different jury verdict.

[¶ 28] Appellant believes oral argument would be beneficial to the Court as this issue is of great importance to indigent criminal defendants.

[¶ 29] II. The State cannot prove the testimony on Defendant's silence was harmless beyond a reasonable doubt.

[¶ 30] "When a defendant invokes his Fifth Amendment right against self-incrimination by choosing to remain silent, it is a violation of the defendant's due process rights to use his silence for impeachment." State v. Hill, 1999 ND 26, ¶ 16, 590 N.W.2d 187. "[An] [i]mproper comment about a defendant's invocation of the right to remain silent is a constitutional error that may be reviewed on appeal even though not raised at trial." State v. Gaede, 2007 ND 125, ¶ 18, 736 N.W.2d 418.

[¶ 31] Under Gaede, harmless error analysis is appropriate. "However, when the State is the beneficiary of a constitutional error it must prove beyond a reasonable doubt" the post-arrest silence did not contribute to the verdict. State v. Anderson, 2016 ND 28, ¶ 14, 875 N.W.2d 496. In Gaede, this Court created five factors to decide whether the improper comment about the defendant's post-arrest silence was harmless error:

- "1. The use to which the prosecution puts the post arrest silence.
2. Who elected to pursue the line of questioning.
3. The quantum of other evidence indicative of guilt.
4. The intensity and frequency of the reference.
5. The availability to the trial judge of an opportunity to grant a motion for mistrial or to

give curative instructions."

Gaede at ¶ 18.

[¶ 32] At the trial, during cross-examination of Detective Miller, the following colloquy occurred:

"Q. So what you are telling us is you got the report, you went and watched the forensic interview, and you maybe observed the medical exam?

A. Yes. I tried interviewing the defendant but he refused to be interviewed.

Q. And he refused through his attorney, correct?

A. Yes.

Q. And his attorney at the time?

A. His attorney at the time, yes.

Q. Correct. And he has got every right to do that, correct?

A. Yes, he does." [Trial transcript page 66]

No objection was made by Defendant's attorney. Nor was any curative instruction given.

[¶ 33] The application of the Gaede factors illustrates the comment was not harmless error. Justice requires that both sides play by the rules. The State should not intentionally violate the United States Constitution to get a conviction. Detective Miller intentionally brought up Defendant's invocation of his right to remain silent for the sole purpose to prejudice the jury. As previously indicated,

supra in ¶ 26, the State had a weak case. At trial, Jane Doe testified the crime in the Information did not occur! (T 35-36) Detective Miller was aware of the State's weak case. Hence, it makes his comment even more egregious. This was a very close case. The jury decided Defendant was guilty because his attorney would not let him be interviewed by Detective Miller. The State did not mention Defendant's silence in closing argument, nor did any other witnesses. However, the fourth factor favors Defendant because of the egregious nature of the comment. The comment was not made by a lay witness or even a rookie patrol officer. The comment was made by an experienced, law enforcement investigator. Detective Miller knows his way around a courtroom and what he can and cannot say in a courtroom. He intentionally went beyond the scope of the question to volunteer testimony he knew was illegal and unconstitutional.

CONCLUSION

[¶ 34] WHEREFORE, the reasons stated herein, Appellant respectfully requests that this Honorable Court reverse the January 21, 2020 Judgment and order another jury trial.

Dated this 15th day of May, 2020.

/s/ Richard E. Edinger

Richard E. Edinger
P.O. Box 1295
Fargo, North Dakota 58107
(701) 298-0764
richard@edingerlaw.com
ND No. 05488
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

[¶ 35] The undersigned certifies that the principal brief complies with the page limitations set forth in Rule 32(a)(8)(B). The brief is only 14 pages in length.

Dated this 15th day of May, 2020.

/s/ Richard E. Edinger

Richard E. Edinger
P.O. Box 1295
Fargo, North Dakota 58107
(701) 298-0764
richard@edingerlaw.com
ND No. 05488
Attorney for Defendant-Appellant