

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

State of North Dakota,)	
)	Supreme Court No. 20200044
Plaintiff-Appellee,)	
)	
vs.)	
)	Criminal No. 51-2018-CR-01504
)	
Coby Edwards,)	
)	
Defendant-Appellant.)	

APPELLEE’S BRIEF

**APPEAL FROM THE JANUARY 21, 2020 JUDGMENT IN 51-2018-CR-01504
THE WARD COUNTY DISTRICT COURT IN MINOT, NORTH DAKOTA
THE HONORABLE DOUGLAS L. MATTSON PRESIDING**

ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED

[¶1] I. Whether reversal is required where Defendant's expert did not testify.

II. Whether a State witness's defense counsel elicited testimony regarding Defendant's exercise of post-arrest right to silence constitutes reversible error.

STATEMENT OF THE CASE

[¶2] Defendant Coby John Edwards was charged by Complaint with Gross Sexual Imposition, a class AA felony, on August 6, 2018. Register of Actions, hereinafter "R.O.I.", 1. The Information was filed and Mr. Edwards arraigned on September 14, 2019. R.O.I. 32. Jury trial was held July 16-18, 2019. Mr. Edwards was convicted. R.O.I. 132. On January 21, 2020, Mr. Edwards was sentenced to 40 years, with 15 years suspended. R.O.I. 150. He filed Notice of Appeal on February 14, 2020. R.O.I. 152.

STATEMENT OF FACTS

[¶3] Mr. Edwards' children, including the victim in this matter, identified as Jane Doe, born in 2012, were taken into custody by Ward County Social Services in February, 2018. Trial transcript, hereinafter "Tr.", Page 30, lines 1-14. Jane Doe reported to her foster parent that Mr. Edwards "wiggled" his penis with her. Tr. 62:22-63:1. A forensic interview was conducted at the Northern Plains Children's Advocacy Center on February 20, 2018. Tr. 77:3-8. Jane Doe was five years old at the time. Tr. 77:9-10. A recording of the interview was received into evidence and played for the jury at trial. Tr. 79:7, 24. Jane Doe submitted to a forensic medical examination on February 22, 2018. Tr. 50:1-4. This matter was charged based on disclosures made by Jane Doe during the interview and during the medical examination.

[¶4] Mr. Edwards, through counsel, filed a Notice of Expert Witness and Curriculum Vitae of Deryn Strange, Ph.D. on December 28, 2018. R.O.I. 72, 73. The Notice provided that Dr. Strange would provide “expert testimony as to the child victim’s memories regarding this case herein...” Appendix, hereinafter “App.”, 12. No report was filed. At the end of the State’s case-in-chief, defense counsel advised the trial court that he had “a doctor [who] is planning to come and testify for us” the following day. App. 21. The following day, while discussing jury instructions, defense counsel advised the trial court the doctor would not be testifying as “[h]e could not make it today.” App. 22. No further discussion regarding the issue was had.

[¶5] During trial, Detective Keith Miller testified in behalf of the State. On cross examination, defense counsel questioned Miller about his investigation. Detective Miller’s testimony on cross examination, in its entirety, is as follows:

Q: Good morning, Detective Miller.

A: Good morning.

Q: Outside of what Ms. Dillon asked you about, did you have any further duties in this case?

A: Regarding this case, I went to a couple of medical exams that were completed. But other than that I don’t believe there was anything.

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 exams?

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.

Tr. 66:8-25. The State did not elicit any follow up testimony, nor did the State mention this line of questioning during closing arguments. Tr. 67:5-10, 192-202, 219:20-225:9. Mr. Edwards testified at trial. Tr. 169-188. The jury returned a guilty verdict after approximately one and one-half hours of deliberation.

ARGUMENT

[¶6] Mr. Edwards does not give a standard of review as required by Rule 28(b)(7)(B), N.D.R.App.P. Nor does he allege any error by the trial court or the State warranting reversal. The errors alleged, if they are errors, are more akin to allegations of ineffective assistance of counsel. In order to succeed on a claim of ineffective assistance of counsel, the petitioner must show counsel's performance was deficient and the deficient performance prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668, 694 (1984).

[¶7] This Court has often said that an ineffective assistance of counsel claim should not be brought on direct appeal. State v. Keener, 2008 ND 156, ¶13, 755 N.W.2d 462, *citations omitted*. Ineffective assistance of counsel claims are better brought in a post-conviction relief proceeding where the parties are better able to develop the record. Id. When a claim is brought on direct appeal, this Court reviews the record to determine whether counsel's performance was plainly defective. Id.

- I. Reversal is not required when defense counsel makes a strategic decision to not call a previously noticed expert.

[¶8] Mr. Edwards' trial attorney filed a Notice of Expert Witness, setting forth his intent to offer the testimony of Deryn Strange, Ph.D., "as to the child victim's memories regarding this case herein..." App. 12. No report of expert was filed with the court or served on the State. At trial, defense counsel advised the court that Dr. Strange was not available to testify. App. 22. There was no offer of proof as to what her testimony would have been.

[¶9] This Court does not second guess matters of trial tactics, such as the decision to call certain witnesses, hire private investigators, or how to question certain witnesses. State v.

Austin, 2007 ND 30, ¶ 32, 727 N.W.2d 790; Rummer v. State, 2006 ND 216, 12, 722 N.W.2d 528. “Strategic choices by trial counsel ‘made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable’.” Rummer, at ¶ 12 (quoting State v. Schlickemayer, 364 N.W.2d 108, 112 (N.D. 1985)). As to matters of trial strategy, courts do not impose their collective judgment upon trial counsel, or apply the distorting effect of hindsight. Rummer, at ¶¶ 10, 13. Merely because a defendant does not prevail in a criminal prosecution that involves strategic choices by trial counsel does not mean those choices constitute ineffective assistance of counsel.

[¶10] A criminal defendant’s right to compulsory process is not absolute, and does not guarantee the right to secure the attendance of any and all witnesses at trial. State v. Curtis, 2008 ND 108, ¶ 12, 750 N.W.2d 438. The defendant has the burden of showing that the testimony would have been both favorable and material to his defense. Id.

[¶11] Nothing in the record reflects the substance of Dr. Strange’s testimony or why defense counsel elected not to take measures to secure her attendance. Nothing in the record supports Mr. Edwards’ contention in his brief that Dr. Strange’s testimony would have “led to a different jury verdict.” It is just as feasible, based on the limited record, that Dr. Strange’s testimony would have supported the verdict.

[¶12] The strategic decision of defense counsel to not call a particular witness is not reversible error, particularly when the record is silent as to the nature of the abandoned testimony.

- II. Testimony regarding defendant’s exercise of his right to remain silent, elicited by defense counsel, does not constitute reversible error.

[¶13] Edwards claims the testimony of Detective Keith Miller on cross examination constitutes reversible error despite no objection being made at trial. Edwards argues this was an unconstitutional comment about his post-arrest silence. Nothing regarding Edwards' silence during the investigation was mentioned by the State in its direct examination of Detective Miller. Tr. 62:15-66:3. Edwards testified at trial. Tr. 169-188. This Court has outlined five factors to determine whether these types of comments are 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.

State v. Hill, 1999 ND 26, ¶ 17, 590 N.W.2d 187.

[¶14] Applying these factors to the testimony at issue demonstrates this line of questioning was not reversible error. Edwards' silence during the investigation was not used by the State against Edwards at all. It was not mentioned again in the entirety of the proceedings. The State did not ask the questions of Detective Miller, did not follow-up on the questions, and did not mention the questions at any point in the trial. State v. Anderson, 2016 ND 28, ¶ 15, 875 N.W.2d 496.

[¶15] The third factor requires the Court to look at the amount of evidence of guilt. The child testified that her father touched her "lower part" with his hands. Tr. 35:12-36:1. The jury saw the interview of the child conducted at the NPCAC. The nurse practitioner who examined the child testified that a "normal" exam "doesn't mean that the disclosure isn't

true,” and went on to explain how that could happen. Tr. 49:12-23. She testified that the child disclosed painful urination after her father “wiggled” with her and what the child meant by “wiggled.” Tr. 52:16-53:6. She testified that laboratory testing, conducted as a result of the child’s disclosures, revealed no evidence of infection, which would tend to corroborate the child’s report. Tr. 53:17-54:15. Two cellmates of Mr. Edwards testified to statements made by Mr. Edwards while incarcerated, including that he was guilty of incest, and that he taught his five-year-old daughter about sex. 93:19-20, 95:1-11, 123:1-6. This Court has repeatedly held that the testimony of a child victim of sexual assault is sufficient to sustain a verdict of guilty. State v. Grant, 2009 ND 210, ¶ 24, 776 N.W.2d 209. Further demonstration of this quantum of evidence against Mr. Edwards is the fact that Edwards did not challenge the sufficiency of the evidence against him in this appeal. State v. Anderson, 2016 ND 28, ¶ 16.

[¶16] The fourth factor to be analyzed is the intensity and frequency of the reference. The testimony at issue here was elicited by defense counsel. This issue was not mentioned once more throughout the trial. It was not mentioned at all by the State. Lastly, is the opportunity to grant a mistrial or to give curative instructions. No request for mistrial was made. No objection was made, and no curative instruction was sought.

[¶17] The prosecutor in the murder trial of Dennis Gaede questioned a correctional officer about a post-arrest interview of Gaede. State v. Gaede, 2007 ND 125 ¶ 17, 736 N.W.2d 418. Gaede’s response to several questions from the officer was that he did not commit the crime. Id. at ¶ 17. The prosecutor then asked several questions about Gaede’s post arrest silence and this Court found that the officers’ testimony did not unequivocally demonstrate an improper comment about Gaede’s post arrest silence. Id. at ¶ 18. The Court also noted in finding no error that the trial court had given the jury an instruction about out

of court statements by the defendant. Id. at ¶ 19. The Court in upholding Gaede's conviction went on to say, "we do not believe the testimony about Gaede's effective denial of involvement in the murder was prejudicial to him or could have affected the outcome of the proceeding." Id. at ¶ 19. The amount of attention drawn to Edwards' silence during the investigation in this case is far less than the focus put on it in the Gaede trial.

[¶18] Edwards relies on State v. Hill, 1999 ND 26, 590 N.W.2d 187. Hill is remarkably similar to this case. Hill's trial attorney questioned a detective about his investigation. The detective answered "I tried to talk to your client, but you told me I couldn't talk to him." To which defense counsel replied, "Doesn't he have the right not to talk to you, though?"

The following exchange occurred later during cross examination:

Q: ...I said you couldn't talk to my client?

A: Yeah, you did.

Q: I did?

A: Yeah, I called you on the phone, I don't remember the date, but I asked you if I could talk to your client, and you said no.

Hill, 1999 ND 26, ¶ 15. This Court noted that the questions were "invited during questioning by Hill's attorney, not the prosecutor." Id. at ¶ 18. The Court further observed that the answers to the questions "were a direct comment upon the attorney's instructions, but constituted, at most, an oblique and indirect reference to Hill's right to remain silent." Id. Finally, the Court noted that the prosecutor neither solicited the detective's comments nor used them during trial; and the line of questioning was pursued solely by defense counsel, and the comments were very brief. Id. at ¶ 19. The Court concluded the detective's comments did not constitute reversible error. Id. at ¶ 21.

[¶19] The short testimony about Edwards' silence during the investigation was elicited by defense counsel and was not pursued or mentioned by the State. The answers to defense counsel's questions do not constitute reversible error.

CONCLUSION

[¶20] For the foregoing reasons, the State requests the judgment be affirmed.

Respectfully submitted this 9th day of June, 2020.

State of North Dakota
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vs.)	
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Coby Edwards,)	
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Defendant-Appellant.)	

REQUEST FOR ORAL ARGUMENT

[1] The State requests oral argument to clarify arguments and address questions regarding facts that may not be apparent from the record.

Dated this 9th day of June, 2020.

/s/Kelly A. Dillon
Kelly A. Dillon (05296)

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vs.)	
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Coby Edwards,)	
)	
Defendant-Appellant.)	

CERTIFICATE OF COMPLIANCE

[1] The undersigned hereby certifies that the Brief of Plaintiff-Appellee, is in compliance with Rule 32 of North Dakota Rules of Appellate Procedure and the brief contains 11 pages.

Dated this 9th day of June, 2020.

/s/Kelly A. Dillon
Kelly A. Dillon (05296)

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,)	
)	Supreme Court No. 20200044
Plaintiff-Appellee,)	
)	Criminal No.. 51-2018-CR-01540
)	
vs.)	
)	
)	
Coby Edwards,)	
)	
Defendant-Appellant.)	

AFFIDAVIT OF SERVICE

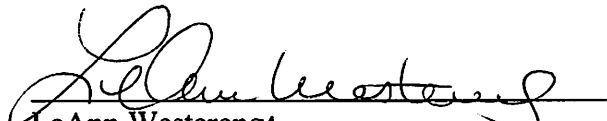
LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 9th day of June, 2020, this Affiant provided a true and correct copy of the following documents in the above entitled action:

**APPELLEE'S BRIEF with REQUEST FOR ORAL ARGUMENT AND
CERTIFICATE OF COMPLIANCE**

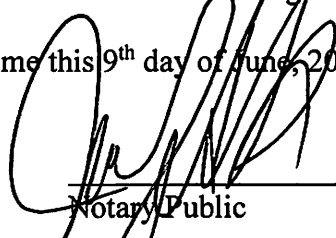
By electronic service to the following:

RICHARD E. EDINGER
richard@edingerlaw.com



LeAnn Westereng

Subscribed and sworn to before me this 9th day of June, 2020, by LeAnn Westereng



Notary Public

