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STATEMENT OF THE ISSUES

- I. Whether there was insufficient evidence to support the verdict finding Defendant guilty of Gross Sexual Imposition in violation of Section 12.1-20-03, N.D.C.C., a class A felony.

STATEMENT OF THE CASE

This is an appeal from a "CRIMINAL JUDGMENT AND COMMITMENT" based upon a jury verdict finding the Defendant guilty of Gross Sexual Imposition, a class A felony defined by section 12.1-20-03 of the North Dakota Century Code. (Appendix (App.) at 6, 7-8). Defendant was charged by Information dated March 17, 2003. (App. at 4 - "Information"). Defendant was tried on October 21-24, 2003. (Docket at 56-64). The jury found the Defendant guilty. (App. at 6). The "Criminal Judgment and Commitment" was filed on March 8, 2004. (Docket after entry # 76, App. at 7-8). Defendant filed his notice of appeal on April 5, 2004, appealing from the "judgment entered on March 8 2004[.]" (Docket # 77; App. at 9 - "notice of appeal").

STATEMENT OF THE FACTS

NOTE: To protect the alleged victim's anonymity, a pseudonym is used for her, while other witnesses are identified by first name only.

In May 2000, the alleged victim (hereinafter identified as Jane Doe, a pseudonym), was in Fargo from Grand Forks to visit her friends and family. (Transcript (Tr.) at 54-55). She had just had a fight with her live-in boyfriend in Grand Forks and had come to Fargo to visit and assist her sister who had broken her leg. (Tr. at 82).

On the night of May 19, 2000, Jane Doe left two of her two children with a babysitter, and the babysitter's boyfriend, at her friend Jenny's apartment and she and Jenny went drinking at a bar called The Rock in Fargo. (Tr. at 55). Jane Doe and Jenny left for the bar between 9:00 and 10:00 p.m. (Tr. at 55). When they got to the bar, they "started ordering a couple of drinks each." (Tr. at 56). A guy named Danny joined them at the bar. (Tr. at 56). Jane Doe described Danny as a black man, taller than her 5 feet, five inches, with braids in his hair. (Tr. at 56). Jenny's friend Jana, and other people, also came by the table. (Tr. at 57). Jane Doe also sometimes danced. (Tr. at 57).

Jenny talked to Defendant, Jimmie Bates, who was also at the bar. (Tr. at 57). Jane Doe remembers Jimmie as having been one of several people who danced on a "bar-type" table. (Tr. at 58). Jane Doe denied talking to Jimmie at the bar. (Tr. at 58). Shortly after Jenny talked to Defendant outside of the bar and rejoined Jane Doe, Jenny and Jane drank up and

left the bar. (Tr. at 58). While at the bar, Jane drank at least a couple of long island teas herself and also shared a couple of pitchers of beer with Jenny and Danny. (Tr. at 58-59). Long island teas are a potent drink. (Tr. at 76). Jenny testified that she and Jane Doe shared "2 to 3 pitchers of beer." (Tr. at 97). Jane Doe testified: "I was feeling it" and admitted that she was drunk. (Tr. at 59, 78).

Jenny had not met Jimmie prior to this night. (Tr. at 96). However, while talking with him outside, she gave him her address and planned to meet him. (Tr. at 98, 109). Jenny wanted to meet up with Jimmie later. (Tr. at 106). According to Jenny, when she returned to the bar, Jana had left, and she, Jane Doe, and Danny stayed awhile longer, then left. (Tr. at 98). Jane Doe did not remember if Danny had ridden with Jenny and her, and testified that Danny had stayed behind at the bar. (Tr. at 59).

Jane Doe and Jenny got back to Jenny's apartment around 12:30 or 1:00 a.m. (Tr. at 60). Jenny lived on an upper floor of a security building. (Tr. at 60). Jenny used her key to get into the security door and the apartment. (Tr. at 100). According to Jane Doe, when they arrived at the apartment, she Jenny, the babysitter, the babysitter's boyfriend, Jana, and Danny, who had also arrived from the bar, talked. (Tr. at 61). Jane Doe testified that she remembered

discussing that Jimmie had been to the apartment and left prior to their arrival. (Tr. at 61).

Jenny's friend, Jana, testified that she was also at The Rock that night. (Tr. at 118). She remembered Jimmie doing the "Macarena" on the table, and Jimmie talking with Jenny outside about 12:20 a.m. (Tr. at 120). Jenny told Jana that Jimmie wanted to come to the apartment and that she was excited to have him over. (Tr. at 121, 126). Jana was unsure whether Jimmie was drunk that night, but she was quite sure she was not and that "everyone else was." (Tr. at 128). She testified that Jane Doe was "pretty drunk" back at the apartment and was too drunk to drive. (Tr. at 129).

When Jana left the bar, she went to Jenny's apartment to pick up her son from the babysitter. (Tr. at 122). The babysitter let her in. (Tr. at 123). While she was there, Jimmie buzzed from the security door and was let in by the babysitter. (Tr. at 123). According to Jimmie, someone in the apartment recognized who he was and let him in. (Tr. at 266). Jana agreed to stay with the babysitter and her boyfriend until Jimmie left or until Jenny came home. (Tr. at 123). Jimmie showed pictures of his children and was courteous. (Tr. at 127). According to Jana, Jimmie, who was there looking for Jenny, stayed for less than ten minutes. (Tr. at 124). Jimmie testified that he left because it was

late, Jenny was not there, and he would just give her a call some other time. (Tr. at 268).

Jana, the babysitter, and the babysitter's boyfriend left, leaving Jane Doe, Jenny, Danny, and the children at the apartment. (Tr. at 61, 66, 102). While Jane Doe talked on the telephone with her boyfriend, with whom she had had a big fight with that day, Jenny and Danny had sex at the apartment and then left. (Tr. at 61, 62, 102). According to the testimony of Jane Doe, Jenny told her she would be "right back". (Tr. at 61). Jenny testified she told Jane Doe she would be back, but that she stayed at Danny's until morning. (Tr. at 103).

Jane Doe had more beer after arriving back at the apartment. (Tr. at 81). She had brought a twelve-pack from The Rock. (Tr. at 111). She talked to her boyfriend on the telephone for a "good hour." (Tr. at 62). After talking to her boyfriend, Jane Doe was upset, tired, and drunk. (Tr. at 83). She stated that she hung up the phone and got into Jenny's bed. (Tr. at 63). She testified she was wearing a nightshirt and underwear. (Tr. at 63). She denied receiving a telephone call from Jimmie. (Tr. at 84).

Jane Doe testified that she did not bother checking to see if the door was locked when Jenny left. (Tr. at 89). Jenny had her own key to the apartment, so it would not "make

a lot of sense" to leave the door unlocked. (Tr. at 89). Jane Doe was alone with three young children in the apartment. (Tr. at 89-90). Jenny's apartment keys were on the same key ring as her car keys. (Tr. at 113). When she left, it was to drive Danny home. (Tr. at 114).

Jane Doe testified that she fell asleep on her stomach and woke up to someone whispering in her ear. (Tr. at 63). She testified that this someone was calling her a "bitch" and accusing her of leading him on. (Tr. at 64). She said that she resisted, stating that he was mistaking her for someone else. (Tr. at 64). She did not recognize the voice. (Tr. at 64). She stated the person had a knife, which he held against her throat. (Tr. at 64). She testified that when she got scared and started to move, he hit her on the top of the head with the bottom of the knife. (Tr. at 65). Although she had told investigators shortly after the alleged attack that when she awoke, her underwear was already off, (Tr. at 85), she testified at trial that after hitting her, he then got up and took off her underwear and got undressed and then forced himself on her. (Tr. at 66). She testified that he penetrated her vagina with his penis. (Tr. at 66).

She testified that it did not last long, just a "couple minutes", and then the person got up, threw the comforter over her and ran out, slamming the door. (Tr. at 67). She stated

that when she got dressed and went to use the telephone she had used earlier, the telephone cord had been cut. (Tr. at 68). She found another telephone and called 911. (Tr. at 68). She eventually was taken to the hospital for a rape kit. (Tr. at 70).

While at the hospital, she identified Danny as the likely perpetrator. (Tr. at 71). She indicated to the doctor that the person was someone "known to her." (Tr. at 217). When offered an oral birth control, Jane Doe initially resisted, but then asked for it. (Tr. at 193). She was pregnant at the time, (Tr. at 193), but did not notify the attending doctor that she was. (Tr. at 221). The only injury documented by the doctor was the head trauma, which the doctor indicated resulted in an "abrasion", something less significant than a "laceration." (Tr. at 220). It did not need suturing. (Tr. at 211). No other injuries to the body were reported, nor any bruises, abrasions, fingernail scrapes, tearing, or redness. (Tr. at 195-96).

Evidence indicated that sperm taken from Jane Doe's vaginal swabs matched Jimmie Bates's DNA profile. (Tr. at 247). Counsel for Mr. Bates did not contest the DNA evidence or its admissibility. (Tr. at 228). The DNA expert testified that she could not say from her evaluation of the evidence that Jane Doe was a victim of a sexual assault. (Tr. at 248-

49).

At trial, Jimmie Bates did not deny having sex with Jane Doe on the night in question, but indicated that the sex was consensual. (Tr. at 273-275). He testified after he had gone home and argued with his girlfriend, with whom he was breaking up, he went for a walk and called Jenny's number. (Tr. at 269). Jane Doe told him that Jenny was not home, but that he was welcome to come over. (Tr. at 269-270). When Jimmie Bates got to the apartment, Jane Doe let him in, wearing a long, see-through T-shirt, and underwear. (Tr. at 271). While Jimmie was asking about Jenny, Jane Doe was rubbing against him, coming on to him. (Tr. at 272). She led him into the bedroom, a room which he had never been in before, and took off her own shirt. (Tr. at 273-74). They performed mutual oral sex with each other and then conventional sex. (Tr. at 274). When the sex ended in "a minute or so" and Mr. Bates got up to put on his clothes, Jane Doe "blew up", and belittled him with sarcasm and rudeness. (Tr. at 274). She asked him, "Is that all you got?" (Tr. at 274). During the heated conversation, Mr. Bates "lost it" and pushed Ms. Doe with an open hand, causing her to fall. (Tr. at 274). When he saw her grab her body and reach for her head, he panicked and "walked out the door." (Tr. at 275).

He did not cut the telephone cord. (Tr. at 275). He did

not even know where the telephones were in the apartment. (Tr. at 275). There was never any knife. (Tr. at 276). Jane Doe had removed her underwear "herself". (Tr. at 277).

During the investigation, Jimmie Bates denied having a sexual encounter with Jane Doe, or with anyone else that night. (Tr. at 256-57, 276). When the detectives interviewed him, they did not specifically ask him whether he had sex with Jane Doe. (Tr. at 295-96). He denied having sex with anyone that night. (Tr. at 296). He was afraid of the media and thought the investigation would go away. (Tr. at 276). When confronted with the DNA evidence, and the persistence of the investigation, he regretted lying to law enforcement. (Tr. at 276).

ARGUMENT

- I. Whether there was insufficient evidence to support the verdict finding Defendant guilty of Gross Sexual Imposition in violation of Section 12.1-20-03, N.D.C.C., a class A felony.

"It is a well-settled rule of statutory construction that criminal statutes are strictly construed in favor of the defendant and against the government." *State v. Plentychief*, 464 N.W.2d 373, 375 (N.D. 1990). The state must prove each element of the offense beyond a reasonable doubt. *Id.* at 376.

In reviewing the sufficiency of the evidence to support

a criminal conviction, this court will not weigh conflicting evidence or judge the credibility of the testimony, but will "look for competent and substantial evidence from which the jury could reasonably conclude" the defendant was guilty. *E.g., State v. Treis*, 1999 ND 136, ¶ 9, 597 N.W.2d 664, 668. If, when viewing the evidence in the light most favorable to the verdict, this court is unable to find evidence that supports proof of the elements of the crime beyond a reasonable doubt, it will reverse the conviction. *Id.*

Even viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of reasonable inferences to be drawn from that evidence, no rational fact finder could have found him guilty beyond a reasonable doubt. Therefore, the conviction rests on insufficient evidence. *E.g., State v. Kunkel*, 548 N.W.2d 773 (N.D. 1996).

Jane Doe was in Fargo because she had just fought with her live-in boyfriend in Grand Forks. She was at The Rock after planning a late night out with her friend. Her friend, Jenny, was apparently prowling for men, considering her quick attachment to Mr. Bates and her behavior with Danny when Mr. Bates did not arrive at the apartment while she was there. Having gone to The Rock with Jenny, Jane Doe must have known what, at least, Jenny's plan was for the night.

It is incredible to believe that left alone in the apartment, this single mother, away from her home town and staying with her own young children and her friend's child, would not make sure the door was locked. The testimony surrounding the drinking, the conversations at the apartment, and the behavior of the individuals involved supports only Mr. Bate's version of events. Ms. Doe voluntarily let him into the apartment after he called. She had consensual sex with him and was eventually injured in the quarrel she had precipitated. When she sobered up and her pride was hurt, and her anger toward Mr. Bates, and possibly men in general boiled over, she decided to persist in her trumped up story in order to get her revenge. Maybe she felt that Mr. Bates would get away with his simple assault because of her sexual behavior, so she needed to push the rape allegations.

In any case, the inconsistency of Ms. Doe's versions of the events, her hedging testimony as to her drinking, her unsureness of how her underwear was removed, along with the inability of Defendant to gain access to the apartment without consent, makes her version of events unbelievable. By all indications, Mr. Bates was courteous, likable, and conversational. He showed pictures of his children to individuals in that same apartment earlier in the night he supposedly perpetrated this terrible crime. No matter how one

looks at the evidence, Mr. Bate's story fits it more likely than does Ms. Doe's story.


Mr. Bates damaged his credibility by not telling the truth about the consensual sex earlier. But thinking that the whole thing would blow over, that Ms. Doe's anger would cool, this only makes sense. Why would he want to damage himself or Ms. Doe and her friends by giving details of a one-night stand gone bad amongst an environment of sought-after one-night stands when he did not imagine that he was the subject of such false allegations. After all, during the investigation when he was asked about whether he had had sex on the night in question, he was never specifically informed that Jane Doe was the person being asked about.

CONCLUSION

In conclusion, the judgment and verdict of the trial court should be reversed. The verdict was not supported by the evidence. This court should reverse the decision of the trial court and order a dismissal with prejudice.

Respectfully submitted this 13th day of September, 2004.

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State of North Dakota,

Plaintiff and
Appellee,

vs.

Jimmie Lee Bates,

Defendant and
Appellant.**AFFIDAVIT OF SERVICE BY MAIL**

Sup. Ct. No.: 20040095

Cass Co. No.: 03-K-00931

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

SEP 13 2004

STATE OF NORTH DAKOTA)

) ss.

COUNTY OF CASS.....)

STATE OF NORTH DAKOTA

Jenny McLeod, being first duly sworn, deposes and says that she is over the age of 18 years, a citizen of the United States and is not a party to nor interested in the above-entitled matter.

That on September 13, 2004, she deposited in the United States mail, Fargo, North Dakota, a true and correct copy of the following documents in the above-entitled action:

1. **APPELLANT'S BRIEF; and**
2. **APPELLANT'S APPENDIX**

That said envelope was addressed as follows:

**BIRCH P. BURDICK
CASS COUNTY STATE'S ATTORNEY
P.O. BOX 2806
FARGO, ND 58108-2806**

To the best of your affiant's knowledge, information and belief, such address as given above was the actual post office address of the party intended to be so served.

That the above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Jenny McLeod
Jenny McLeod

Subscribed and sworn to before me on September 13, 2004.

Pamela J. Johnson
Notary Public

PAMELA J JOHNSON
Notary Public
State of North Dakota
My Commission Expires May 2, 2009