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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff/Appellee,	)	Supreme Court No. 20060328
	)	
vs.	)	District Court No. 09-05-K-4135
	)	
Andrew Brice Muhle,	)	
	)	
Defendant/Appellant.	)	
	)	

Brief of Defendant/Appellant Andrew Brice Muhle

Appeal from Criminal Judgment and Commitment entered November 13, 2006, in District Court, County of Cass, State of North Dakota, The Honorable Steven E. McCullough

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¶3 Statement of The Issues

Whether admission of the victims' out-of-court statements was an abuse of discretion, and violated of Mr. Muhle's constitutional right to confront his accusers?

Whether the State's failure to disclose a witness's pre-trial statement violated Mr. Muhle's right to a fair trial?

Whether the judgment should be reversed due to prosecutorial misconduct?

Whether the evidence was insufficient to sustain the conviction of Count 1 as a AA Felony?

¶4 Statement of the case

¶5 This is an appeal by Andrew Brice Muhle from the Criminal Judgment and Commitment entered by the Honorable Steven E. McCullough, East Central Judicial District Court, on November 13, 2006. (Appendix 42; Docket No. 88).[1] Appellant Andrew Brice Muhle (hereinafter Mr. Muhle) was charged by a three count Information dated October 31, 2005, in Count 1 with Gross Sexual Imposition in violation of **N.D.C.C. §12.1-20-03**, as a Class AA Felony, between 1 August 2005 to 31 August 2005. (The statute having been amended increasing the penalty to a AA felony, effective August 1, 2005). Count 2 charged Gross Sexual Imposition in violation of **N.D.C.C. §12.1-20-03**, as a Class A Felony, between 31 August 2004 and 31 August 2005. Count 3 charged Abuse or Neglect of a Child, in violation of

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[1] In the brief, the Docket will be abbreviated D, the Appendix App, and the Trial Transcript T.

N.D.C.C. §14-09-22, as a Class B Felony, between 31 August 2004 and 31 August 2005. (App. 4; D. 1)(Count 1 in the Information was amended at the close of the evidence to allege facts which constitute the AA Felony)(App. 40; D. 69). The case was tried to a jury of twelve from May 9 to 15, 2006. (Transcript of proceedings). The jury returned a verdict of guilty on all counts. (D 72, 73, 74) Sentencing occurred on November 8, 2006.

¶6 The Court sentenced Mr. Muhle on Count 1 to life imprisonment with an opportunity for parole, on Count 2 for a period of twenty years imprisonment, and on Count 3 to ten years imprisonment, and a period of five years of supervised probation following incarceration. (App. 42).

¶7 Mr. Muhle and his wife, Shannon Muhle, were tried together. The three alleged victims are the Muhle's children. The two boys, K.E. and G.E. are Shannon Muhle's children from a former relationship. S.M. is the child of both Mr. Muhle and Shannon. At the time of trial, G.E. was 9 years old, K.E. was 7 years old, and S.M. was 5 years old. (T 24; 276). The State made a pre-trial "Motion to Determine Admissibility of Child's Statement About Sexual Abuse." (D 33). The Court held a hearing on that motion on May 1, 2006. (Transcript of hearing, dated May 1, 2006, pages 25-48). The parties briefed the issue, and the Court issued a Memorandum Opinion and Order Regarding Admissibility of Child's Statement About Sexual Abuse, dated May 9, 2006. (D 49). The Court held a hearing to determine whether the children were competent to testify, and determined that they all were. (Competency hearing transcript, May 5, 2006, page 23).

¶8 Statement of the facts[2]

¶9 Mr. Muhle and his wife Shannon lived with the three children in West Fargo, North Dakota. (T 118; 276-277). An investigation started in August, 2005. (T 117). Detective Tim Runcorn of the West Fargo Police Department and Tammy Anderson from Cass County Social Services conducted interviews of the three children on August 31, 2005. (T118-119). S.M. was interviewed first. The interview was recorded with an audio recorder. (T118-119). The recording was received as State's Exhibit 6, over objection. (T 120). K.E. was interviewed second. The recording of that interview was received over objection as State's Exhibits 7 and 8, over objection. State's Exhibit 8 was a redacted version of the recording, in compliance with the Court's pretrial Order. (T 122-123). G.E. was also interviewed on the same day. (T 123). (The recording of that interview was not offered at trial).

¶10 Mr. Muhle was also interviewed on August 31, 2005. (T 124). In that interview, Mr. Muhle denied any sexual abuse of the children by him or Shannon Muhle. (T 124-125).

¶11 All three children testified at trial. S.M. testified first. (T 55-79). The State used drawings of people to have the child identify body parts. The drawings were introduced as exhibits 2-5. (T 65). S.M. explained a "private game" that she and her mom and dad would play naked in bed or in the bathroom. (T 67-68). Her dad would start the game. The game was played with "their privates" and her dad would put his penis into her vagina, and it hurt. (T 69). It hurt when she went to the

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The record appears to support the proposition that the facts are not so much disputed by the parties, but the parties certainly have a different interpretation of the facts.

bathroom. (T 70). She would cry when it hurt. (T 70). She testified at trial that the game never involved her butt, and she never saw blood after she played the private game. (T 71). S.M. also testified at trial that G.E. and K.E. also played the game with her. They would put their private into her private, after her daddy had done it. (T 71-72). They did this while her daddy was there, and he did not do anything about it. (T 71-72). S.M. could not remember her daddy doing anything with his penis after he put it into her private. (T 72). S.M. also testified that her daddy would touch her all over and kiss her. (T 73). She would get owies on her pee pee after her dad put his private into hers. (T 74). S.M. did not identify Mr. Muhle or Shannon Muhle in the courtroom. (T 77-79).

¶12 Information from S.M. was introduced through two other means during the trial. After the children testified, the recordings of the interviews of S.M. and K.E. were played for the jury; the jury members were given copies of transcripts of the recordings to follow while the recording was played, but the transcripts were not introduced as exhibits for use by the jury during deliberation. (T 134; 139). S.M. stated on the recording that she is daddy's baby girl and he is there when monsters come in her room. (App. 7). She said her dad loves her. He shows he loves her when he gives her things and tells her she is a good girl. (App. 8). She called where a girl goes potty a "pussy." (App. 10). She has seen her brothers' penises and her daddy's penis. (App. 10). She said she had seen her daddy's penis in his room when she plays with him. (App. 11). When they play he takes off his pants. (App. 12). She calls it a secret game she plays with her mom and her dad. (App. 12). She stated that her grandma knows about the secret game. (App. 14). She

said her brothers do not play the secret game because "they don't like disgusting games." (App. 15). She says the secret game is good, and it makes her happy. (App. 16). She giggled and said her daddy kisses her. (App. 16). She said he kisses her tummy, and it tickles. (App. 17). She then says that her clothes come off during the game. (App.17). She then states her daddy takes her clothes off, and he touches her pussy with his penis. (App. 18). She says that mommy watches the secret game. (App. 19).

¶13 The third way information from S.M. came into evidence was through the testimony and medical report of Dr. Alonna Norberg, a pediatrician. (T 192-256). The medical report, State's Exhibit 12, was received over objection. (T 214; App. 32). The doctor conducted an extensive interrogation of S.M. and related the entire conversation in the body of the report in a question and answer format. S.M. goes into great detail about what she calls the sex game. (App. 33). There is much greater detail than in the recorded interview and her testimony. (App. 33-35). She does not indicate that her brothers were involved with the game, but her mother is there and is involved. (App._33). The doctor testified that she found a superficial laceration that appeared to be healing in the entrance to the vagina, which was red and sore. (T 232-234). The doctor also found some abrasions in the area around her anus. (T 236). The injuries themselves were "non-specific" for sexual abuse, and a diagnosis of sexual abuse would not be made based upon the injuries alone, without the history. (T 239). The doctor said that the injuries appeared recent. (T 244).

¶14 K.E. testified that he saw S.M. "do really unnatural stuff." (T 85). K.E.

saw them downstairs on the couch, and they were both naked. (T 90). His dad's weewee was touching S.M.'s vagina. He only saw this once. (T 92). He never saw his mom or G.E. play games with anyone. (T 92). K.E. denied playing games with anyone. (T 93). The recording of the August 31, 2005 interview of K.E. was played for the jury. Again, the jury members were given transcripts of the recording, which they used to follow along. (T 139)(App. 21). K.E. stated that he spied on his dad and his sister on the stairs. (App. 25). He said "They are doing lots of sex." And, "Putting their balls together and putting their penis in their vagina and that other stuff." They do this in the living room when mom is at work, and did not know about them ding sex. (App. 26). He stated he had seen this happen "lots of times." (App. 27). He has seen his sister touch his dad's balls with her fingers. (App. 28). K.E. denied that anyone had sex with him. (App. 29). He stated that he had seen G.E. have sex with his sister, the same as his dad does with is sister. (App. 29). He stated that his brother learned to do sex from his mother. (App. 30).

¶15 G.E. testified at trial that his dad explained a game called sex to him. (T 106). His dad would tell him to go peek over the stairs when his mom's boyfriend would come over. (T 106). His dad would have him and his brother practice a game called sex with S.M. (T 107). When a person has sex, a boy's wiener touches a girl's vagina. His dad showed him how to do that. (T 109). G.E. thought it was O.K. because his dad said it was. (T 109). G.E. said that K.E. did the same thing with S.M. that he did. (T 111). G.E. testified that his mom told him he could practice with her if he asked his dad. (T 111). His dad said, yeah, so he practiced with his mom; he touched his wiener to her vagina. This happened only one time.

(T 112). G.E. identified Mr. Muhle and Shannon Muhle in the courtroom. (T 113).

¶16 G.E.'s testimony at trial was a complete surprise to the defense. During the interview on August 31, 2005, G.E. said nothing about having sex with his mother. (T 126). In that interview, G.E. was "closed off" and indicated that there were things he was not supposed to talk about. (T 128). About one year before, there was a prior investigation involving G.E. acting out sexually with a neighbor girl. (T 146). G.E. did not make any specific disclosures during the interview on August 31, 2005. (T 150). He did say something about his dad teaching him what to do when he got married. (T 144). Tammy Anderson had conversations with the prosecutor about the content of S.M. and K.E.'s testimony during the trial. (T 149).

¶17 The defense made a motion for a mistrial based upon the State's failure to disclose G.E.'s pre-trial statements. The State had disclosed the audio recording of the interview of G.E. conducted on August 31, 2005, as well as a second videotaped interview. (T 172-173). G.E. had made no specific accusations against his parents in those interviews. (T 173). Mr. Boening had disclosed to the defense that K.E. had retracted statements he had made to Tammy Anderson. (T 173). Mr. Boening knew in advance what G.E. was going to testify to at trial, and that his testimony would be inconsistent with the disclosed statements. (T 174). Mr. Boening did not disclose this to the defense before trial. (T 175-176; 184). Mr. Mottinger's form letter and discovery request, which are on file with the State's Attorney's Office, was received as Defense Exhibit 1. (T 265). Marlene Sorum, a Cass County Case Worker, testified that she was present when Mr. Boening interviewed G.E. and K.E., and G.E. made statements inconsistent with his prior

statements. (T 267). She said noone was taking notes. (T 268).

¶18 Mr. Muhle testified in his own defense. (T 273-310). Mr. Muhle denied all aspects of the children's testimony. (T 281-282). Social services had done an investigation in September, 2004, when G.E. had been acting out sexually with a neighbor girl. (T 278-279). He had seen G.E. and S.M. playing naked together in a bedroom. (T 279). He and Shannon sat down with all three kids and explained good touches and bad touches. (T 280-281). He became aware that G.E. may have seen he and Shannon having sex, but he was unaware of it at the time. (T 289). When asked to explain the children's testimony, Mr. Muhle thought they may have been confused by what they explained to them about what was appropriate and inappropriate, and what happened between G.E. and the neighbor girl. (T 291-292). G.E. had disclosed that he had seen an adult film, of which Mr. Muhle was not aware. (T 292). On cross, Mr. Muhle was confronted with the medical report, State's Exhibit 12. (T 301). He had explained that he told the children that a child may get hurt by sexual activity. (T 302).

¶19 Shannon Muhle testified she never had a boyfriend. (T 314). She testified consistently with Mr. Muhle's testimony, denying all aspects of the children's testimony. (T 316-317). Shannon stated that S.M. was occasionally constipated, and had some bloody stool. (T 319). Shannon could not explain why all three children would accuse her and Mr. Muhle of serious misconduct. (T 329). Joie Muhle, Mr. Muhle 's mother, testified that she would see the children not less than three days a week. (T 331). The children never told her about any sexual activity or abuse and she reacted with disbelief when she learned of the allegations.

(T 333). She never saw anything out of the ordinary when she was with the family. (T 334). Michelle Muhle, the children's aunt, testified that her daughter spent time at the Muhle's home, spending the night on occasion. She never saw any of the children acting out sexually, or doing anything inappropriate. (T 345). Shannon Muhle's mother, Kathryn Flint, also testified that she never anything unusual in the interactions between the Muhles and the children. (T 353).

¶20 Argument

¶21 Admission of the victims' out-of-court statements was an abuse of discretion, and violated of Mr. Muhle's constitutional right to confront his accusers.

¶22 Out-of-court statements made by the children were admitted into evidence, despite the fact that they all three testified at trial. ***Crawford v. Washington*, 541 U.S. 36 (2004)** changed the law on admissibility of out-of-court statements. This Court has recently applied ***Crawford*** to child sexual abuse cases. ***State v. Sevigny*, 2006 ND 211, 722 N.W.2d 515; *State v. Blue*, 2006 ND 134, 717 N.W.2d 558.** In ***Blue***, the child victim was deemed unavailable, and a video-taped statement was played for the jury. This Court reversed the conviction because the defendant never had the chance to cross-examine the child. **2006 ND 134 at ¶27.** In ***Sevigny***, the children testified, and a number of pre-trial statements made to various people were admitted. This Court, based upon its analysis of ***Crawford***, ruled, that because the children were present at trial and cross-examined, the defendant's right to confrontation was not violated. **2006 ND 211 at ¶29.**

¶23 Here the State offered, over objection, and the court admitted, the recordings of the interviews of two of the children and the medical report and testimony of the Doctor. (App. 6, 21 32). These are all out-of-court statements where there was no opportunity to cross-examine. All of these statements, including the doctor's reports, are testimonial in nature. All of these statements were made for the purpose of prosecution. The doctor's report contains a supposedly verbatim transcript of an interrogation of the child S.M. by the doctor; that interrogation, and in fact, the entire examination was done for the investigation and prosecution. The doctor is the medical director of the Red River Valley Children's Advocacy Center. (T 194). There is no evidence she had never been S.M.'s doctor at any time prior to the investigation. (T 210). **N.D.R.Ev. 803(4)** should not apply to the interrogation portion of the report; that interrogation was for prosecution and nothing more. ***State v. Blue*, 2006 ND 134, ¶13, ¶14, & ¶15 717 N.W.2d 558.** After ***Crawford,*** out-of-court testimonial statements are not admissible unless there has been an opportunity to cross-examine the witness. ***State v. Sevigny*, 2006 ND 211, ¶29, 722 N.W.2d 515.** In a footnote in ***Crawford***, the Court stated that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." ***Crawford v. Washington*, 541 U.S. 36, 59-60 n. 9 (2004).** This language and the holding in ***Sevigny*** would seem to lead to the conclusion that the out-of-court testimonial statements were properly admitted in this case. However, this Court should reconsider its holding in ***Sevigny***. When an adult witness testifies, and has made prior statements of any kind, the witness can be confronted

with inconsistencies between the prior statements and their trial testimony. The jury can observe the demeanor of the witness during this exercise. With small children, this is virtually impossible. Cross examination of a small child is nearly impossible. All of the prior out-of-court testimonial statements were done ex-parte. These statements, which are often made months before trial, come in, as is, with no real right to cross-examine. When cross-examining an adult about a prior inconsistent statement, the witness is asked whether they remember making the statement and what they said at the time. The statement itself is rarely received into evidence. It would be absurd to argue that the footnote in ***Crawford*** means that all out-of-court statements of a witness will be read or played for the jury, and introduced into evidence, when the witness has testified at trial. The State has to prove its case with trial testimony, in open court, subject to cross-examination. It seems that what is happening in child sexual abuse cases, is if the child takes the stand and says anything at all, then all of the child's prior out-of-court statement come in, because supposedly the defense had a chance to cross examine the child during the trial. Again, the child cannot be effectively cross-examined on the prior statements. It is Mr. Muhle's position that, concerning child witnesses, out-of-court testimonial statements which were not subject to effective cross-examination at the time they are given should **never** be admitted as substantive evidence. Mr. Muhle asserts that the admission of the statements in his case was an abuse of discretion, and violated his constitutional right to confront his accusers. These errors cannot be considered harmless beyond a reasonable doubt.

¶24 The State's failure to disclose a witness's pre-trial statement violated Mr. Muhle's right to a fair trial.

¶25 The child G.E. testified at trial inconsistently with his prior statements. He had made no specific allegations of sexual abuse. (T 150). At trial, he testified in some detail about sexual abuse. The prosecutor, Mark Boening, had interviewed K.E. and G.E. about five days before the trial. He disclosed to the defense attorneys that K.E. had retracted some earlier statements. However, he said nothing whatsoever about the dramatic change in G.E.'s testimony. Mr. Boening claimed that he did not take notes during the interview, and that **N.D.R.Crim.P. 16** applies only to written statements. The defense made a motion for a mistrial based upon the failure to disclose the statement. (T 176). The trial court ruled that **Rule 16** applies to only recorded or written statements, and denied the motion for a mistrial. (T 271).

¶26 In ***State v. Thorson*, 2003 ND 76, 660 N.W.2d 581**, this Court stated:

> **¶10** Under **N.D.R.Crim.P. 16**, the prosecution must disclose, upon the defendant's request, names and statements of witnesses the prosecution intends to call and also the relevant statements within the prosecution's possession or control of other persons. **Rule 16** is a discovery rule designed to further the interests of fairness. ***State v. Ensminger*, 542 N.W.2d 722, 723 (N.D. 1996)**. The trial court may impose sanctions for a failure to comply with **Rule 16**, and this Court reviews decisions on the sanction issue under the abuse-of-discretion standard. **Id.** If the defendant fails to show prejudice from a violation of **Rule 16**, it is not an abuse of discretion for the trial court to refuse to admit evidence as a sanction for the violation. **Id.**

Defense counsel strenuously argued that the failure to disclose G.E.'s inconsistent statements was prejudicial and that a mistrial was the appropriate remedy. (T 172-176). In ***State v. Ebach*, 1999ND 5, ¶20, 589 N.W.2d 566**, the Court found that

Rule 16 does not apply to oral statements other than the statements of the accused. However, the Court went on to decide whether the state had violated the spirit of **Rule 16**, and whether the defendant had been prejudiced. **Id.**

¶27 The State should not be able to argue that it had no duty to disclose the statements of G.E. in this case because they were "oral" statements. Several people in authority were present at the interview where G.E. made his new disclosures. The claim was that no one wrote anything down. (T 268). So, the State could avoid disclosure of a critical witness's statement simply by not reducing it to writing, and then surprise the Defense. The State chose to disclose the fact that K.E. had recanted prior statements made to social services, during the same visit when G.E. was interviewed and gave dramatically new and different information to the State. (T 173-174). The defense would have no way to anticipate this new information. The failure to disclose G.E.'s statement is also a ***Brady*** violation.

> ¶13 Thorson also asserts his discovery rights under the ***Brady*** decision were violated. In ***Brady v. Maryland*, 373 U.S. 83, 87 (1963)**, the United States Supreme Court held that the prosecution's suppression of evidence that is favorable to the accused violates due process when the evidence is material to either guilt or punishment. To establish a ***Brady*** discovery violation, the defendant must show: (1) the government possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the evidence; and (4) a reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed. ***State v. Goulet*, 1999 ND 80, 15, 593 N.W.2d 345.** The ***Brady*** rule does not apply to evidence the defendant could have obtained with reasonable diligence, and the defendant's failure to discover evidence from a lack of diligence defeats a ***Brady*** claim the prosecution withheld that evidence. ***State v. Sievers*, 543 N.W.2d 491, 495-96 (N.D. 1996).**

***State v. Thorson*, 2003 ND 76, 660 N.W.2d 581**. The new statements by G.E.

were favorable to the defense in the sense that they were completely inconsistent with his prior interviews. The defense should have had the opportunity to prepare for trial based upon this new information. The defense would, at a minimum, been able to better prepare for cross-examination and the testimony of their clients. The defense had no way to anticipate this new evidence. It was withheld by the State. Given the combination of the discovery violation and the ***Brady*** violation, Mr. Muhle was deprived of a fair trial.

¶28 The Judgment should be reversed due to prosecutorial misconduct.

¶29 The failure to disclose the statements of G.E. covered in the preceding section of this brief amounts to prosecutorial misconduct. In addition, during the trial the prosecutor discussed the testimony of the children with two of the state's other witnesses, in violation of the court's sequestration order. The trial court gave a curative instruction. (D 70). And, during closing argument, the prosecutor stated:

> We submit that the State certainly has not overcharged the defendant in this case. We haven't charged the defendant with every occasion on which these acts took place partly because we can't be more specific about the date. To that extent it seems to me that in charging this case we've been more than fair to the defendants.

(T 371, lines 14-20). This is a completely inappropriate argument. It does not comment on the evidence or the law to be applied. The only purpose for these statements was to influence the jury improperly as to what they could consider. It is saying, "we've already been so easy on the defendants that you need not worry much about convicting them of these few charges."

¶30 In combination, the actions of the State in this case deprived Mr. Muhle of a fair trial. Admittedly, the defense did not object to the quoted argument.

However, the defense objected to the discovery violation and the violation of the sequestration order. **See *State v. Clark*, 2004 ND 85, 678 N.W.2d 765** (when not preserved by objection, obvious error must be shown). The prosecutor's misconduct denied Mr. Muhle a fair trial. Given the entire record, the result may very well have been different absent these errors. ***State v. Burke*, 2000 ND 25, ¶27, 606 N.W.2d 108**.

¶31 The evidence was insufficient to sustain the conviction of Count 1 as a AA Felony.

¶32 Trial Counsel for Mr. Muhle made a Motion for a Judgment of Acquittal pursuant to **N.D.R.Crim. P. 29(a)** at the close of the State's case. (T 258).

¶33 This Court discussed the legal issue of the sufficiency of the evidence in ***State v. Yineman*, 2002 ND 145, 651 N.W.2d 648**. Mr. Muhle preserved this issue on appeal when he made his Motion for a Judgment of Acquittal pursuant to **N.D.R.Crim. P. 29(a)** at the close of the State's case. ***Id. at* ¶14.** In ***Yineman***, this Court stated the standard of review as follows:

> [¶8] Evidentiary sufficiency and evidentiary weight are distinct concepts. In ***State v. Kringstad***, we explained: A conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. When a court, be it an appellate court or a trial court on motion for entry of a judgment of acquittal, concludes that evidence is legally insufficient to support a guilty verdict, it concludes that the prosecution has failed to produce sufficient evidence to prove its case. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial in such a case.

353 N.W.2d 302, 306 (N.D. 1984) (citations omitted).

¶34 Based upon this standard, Mr. Muhle believes that the State did not

prove ***when*** he committed the offense charged in Count 1. In Count 1 he was charged with Gross Sexual Imposition in violation of **N.D.C.C. §12.1-20-03**, as a Class AA Felony, between 1 August 2005 to 31 August 2005. The statute was amended increasing the penalty to a AA felony, effective August 1, 2005. The children were interviewed on August 31, 2005. The doctor interviewed S.M. as part of her examination on September 1, 2005. The only evidence that anything happened after August 1, 2005, was S.M.'s statements to the doctor, which came in over objection, and the doctor's claim that the small lacerations found on S.M.'s bottom were "recent." (T 24). When considering the difference between a Class A Felony and a Class AA felony, there had to be proof beyond a reasonable doubt that S.M. was abused on or after August 1, 2005. The date is normally not an element unless there would be no crime if the crime occurred on the date alleged, such as a charge of being a minor consuming alcohol, alleged after the person's twenty-first birthday. ***City of West Fargo v. Hawkins*, 2000 ND 168, ¶12, n. 2, 616 N.W.2d 856.** That concept does not apply directly, but given the consequences to Mr. Muhle of the date in this situation, the evidence was insufficient to support a conviction of Count 1, as to the date. The result would be that Mr. Muhle would be subject to an Class A Felony, not a Class AA Felony.

¶35 Conclusion

¶36 The judgment of the trial court should be reversed, and this Court should order a new trial, or that Mr. Muhle should be re-sentenced on Count 1 for a Class A Felony.

Respectfully submitted this 25th day of April, 2007.

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IN RE RE: State v. Andrew Muhle
Supreme Court No. 20060328
Cass County No. 09-05-K-04135

CERTIFICATE OF SERVICE
BY ELECTRONIC MEANS AND BY FACSIMILE

I, Monty G. Mertz, do hereby certify that, on the 25TH day of April, 2007, I served the **Brief of Defendant/Appellant Andrew Brice Muhle** and the **Appendix to the Brief of Defendant/Appellant Andrew Brice Muhle** upon the following:

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by sending an E mail to boeningm@co.cass.nd.us with the brief attached in Word Perfect format, and by faxing the Appendix to 241-5838. To the best of my knowledge, these are the E mail address and the facsimile number for Mr. Boening.

Dated this 25th day of April, 2007.

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