ORIGINAL (efiled)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA 20070027

State of North Dakota,	)	
	)	
Plaintiff/Appellee	)	
	)	
vs.	)	Supreme Court No. 20070027
	)	
James Eugene Wegley,	)	
	)	
Defendant/Appellant	)	

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT,
WILLIAMS COUNTY

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[¶6] STATEMENT OF THE CASE

[¶7] Appellant James Eugene Wegley hereinafter referred to as "Mr. Wegley". Appellee State of North Dakota hereinafter referred to as "State". The alleged victim in this case is still a juvenile and will be hereinafter referred to as "P.S."(Tr. Pg.98)

[¶8] Mr. Wegley was arrested on September 30, 2005 after leaving his daughter's home. (Tr. Pg 230, 334-337) Mr. Wegley was held on bond until the end of the trial. Trial in this matter was held on June 29 and 30 2006. (Tr. Pg. 1) After a trial in June 2006, the Honorable Robert W. Holte presiding, a jury found Mr. Wegley guilty of gross sexual imposition with P.S., his granddaughter.(Tr. Pg. 459) The allegations state that Mr. Wegley touched a seven year old girl on her vagina. (Tr. Pg. 34) At that time the crime was a Class A felony. Mr. Wegley was sentenced on December 29, 2006 to ten (10) years with the North Dakota Department of Corrections with all but 5 years suspended for a period of five years of supervised probation. (Sent.Tr. Page 62) This is a direct appeal from that conviction.

[¶9] STATEMENT OF THE FACTS

[¶10] Mr. Wegley is the father of Kandi Stearns, (hereinafter referred to as Kandi) and the grandfather of the alleged victim P.S. (Tr. Pg. 339-340) On the date in question Mr. Wegley was visiting his daughter. (Tr. Pg. 244) Mr. Wegley, Kandi and her two daughter's had spent the day together getting a bite to eat at Kentucky fried chicken and catching a parade. (Tr. Pg. 244) Mr. Wegley was and had been a welcome guest at Kandi's home on many other occasions. (Tr. Pg. 244,289) On this particular day after their outings Mr. Wegley, Kandi and Kandi's daughter's returned to his Kandi's home just outside of Williston. (Tr. Pg. 243-244) Mr. Wegley and Kandi had gone to the basement to discuss

improvements Kandi was to make in her new home. (Tr. Pg. 245) Mr. Wegley's granddaughter's were doing their own thing at this point with one off to her grandmother's nearby home to play and the other changing into pajama's to watch television in her parent's room. (Tr. Pg. 244) Mr. Wegley and Kandi came upstairs to the living room of the home at which time they could hear his daughter's husband entering the driveway. (Tr. Pg. 246) Kandi stepped out of the home to have a cigarette and speak with her husband about loaning Mr. Wegley some money to acquire a vehicle. (Tr. Pg. 246, 288, 341)

[¶11] According to her testimony Kandi stated that she was outside approximately five (5) minutes and then went back inside. (Tr. Pg. 247,342-344, 362) Also according to her testimony Kandi stated that when she entered the home she saw Mr. Wegley in the home near the kitchen and on his way to the master bedroom where P.S. was watching television.(Tr. Pg. 247, 347) Kandi followed Mr. Wegley to the room and from the door she saw Mr. Wegley leaning over the bed kissing P.S. (Tr. 364-368) Kandi testified that she walked over and removed the blanket from the bed that was covering P.S. and then saw Mr. Wegleys hand on P.S's private area over P.S's clothing. (Tr. Pg. 347-350, 369) Kandi testified that privates are anything under the underwear from the top of the waistband down. (Tr. Pg. 369) Kandi testified that she began screaming and hitting Mr. Wegley calling him a pervert. (Tr. Pg. 369-371) Kandi stated "he was touching you" to P.S. (Tr. Pg. 369-371) All off this happened in a matter of just a few minutes from the time Kandi stated she saw her father going toward the bedroom to her stating she began screaming and hitting. (Tr, Pg. 290-291, 350-351, 364-370) Mr. Wegley left the residence with Kandi following him screaming and hitting and telling her husband who met them at the door to hold him. (Tr. Pg. 290, 295-297, 350-351) Kandi's husband Wes testified that he said something to the effect

of just let him go. (Tr. Pg. 295-297) Mr. Wegley was arrested the same day after he left the residence. (Tr. Pg. 334-337) Upon the officer turning on his lights Mr. Wegley pulled his car over and cooperated with the police in his arrest.(Tr. Pg. 334-337)

[¶12] During the trial Defense Counsel made a number of objections that were not granted. (Tr. Pg. 118-207) Defense counsel made a motion for a mistrial when his Motion to remove jurors for cause was denied ultimately forcing him to use peremptory challenges to eliminate admittedly bias jurors. (Tr. Pg 201-205) This Motion was denied. The State made a Motion in Limine to allow hearsay evidence to which Defense Counsel objected.(Tr. Pg. 5-13, 98-107, 217-227, 252-254, 265-270) The State withdrew it's motion as to the Social worker. (Tr. Pg. 265-270) Defense counsel preserved his objection to the introduction of hearsay evidence from Kandi and the Social worker based on a lack of sufficient guarantees of trustworthiness and reliability.(Tr. Pg. 5-13, 98-107, 217-227, 252-254, 265-270) The Court allowed the testimony from Kandi. (Tr. Pg. 277-282) The Court allowed hearsay evidence from the Social Worker specifically to discuss a diagram she used in her forensic interview of the child. (Tr. Pg. 270-277)

[¶13] The state made a motion to allow the use of Mr. Wegley's prior conviction to explain why Kandi reacted the way she did when she saw her father go to the bedroom. (Tr. Pg. 5, 107-116, 282-284) The Court did not think this reasoning was probative enough to outweigh the prejudicial effect of the introduction of the prior conviction. (Tr. Pg. 282-284) Defense counsel made a motion to exclude any testimony regarding Mr. Wegley's prior conviction regardless of the testimony entered by the Defendant. (Tr. Pg. 390-397) The Court denied the motion to exclude the evidence. (Tr. Pg. 390-397) As a result of the Court's ruling on the Motion to exclude the prior conviction the defense rested. (Tr. Pg. 409) The

Defendant made a motion for acquittal based un insufficient evidence which was denied by the court. (Tr. Pg. 380-382) The parties each made their closing statements and then the jury was given instruction and charged with deliberating the matter. (Tr. Pg. 410-455) The Jury returned a verdict of guilty. (Tr. Pg. 459)

[¶14] Mr. Wegley asserted his innocence from the time he was being accused, stating to Wes, "I didn't do it Wes" (Tr. Pg. 298) as he was leaving the home, and throughout his trial and sentencing. During the trial there was testimony that showed that P.S. had been interviewed by a Social regarding the allegations. (Tr. Pg. 312) According to the Social Workers testimony P.S. answered "I don't know to many of the questions asked of her. (T.R. Pg. 315-331) P.S. had been informed by her mother that she was going to meet with a social worker and what the meeting was to be about. (Tr. Pg. 327) P.S. could not recall discussions or the Social Worker regarding the alleged events when questioned on cross examination. (Tr. Pg. 262-263) At his sentencing Mr. Wegley stated he was sorry for everything that happened and attempted to explain that his hand had become trapped in blankets. (Sent. Tr. Pg.)

[¶15] **ARGUMENT**

[¶16] **I.** Whether the District Court erred in allowing hearsay testimony of the minor child's mother (Kandi) and the Social Worker without sufficient guarantees of trustworthiness and reliability.

[¶17]This Court reviews a trial courts evidentiary rulings under an abuse of discretion standard. State v. Christiansen, 1997 ND 57 ¶5, 561 N.W.2d 631. A trial Court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably, or if it misinterprets or misapplies the law. Id. at ¶5.

[¶18] N.D.R.Ev. 803(24) states specifically:

> An out-of-court statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child is admissible as evidence (when not otherwise admissible under another hearsay exception) if:
>
> (a) The trial court finds, after hearing upon notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness; and
>
> (b) The child either:
>
> (i) Testifies at the proceedings; or
>
> (ii) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

[¶19] The District Court erroneously allowed the testimony of the Social worker in this case. The Social Worker was allowed to testify to the statements made by P.S. particularly in regard to a diagram that she and P.S. discussed and labeled during their fourty five minute forensic interview. (Tr. Pg. 316-331) This ruling was made without reviewing the tape to ensure trustworthiness and reliability as required by this court under Hirschkorn v. State,202 ND 36,¶18, 640 N.W.2d 439 despite the fact the court had been informed of the rule under Hirschkorn. (Tr. Pg. 11-12, 117, 208-210, 252-254)"A trial Court should not as did the trial court here, merely quote the terms of the rule and order the testimony admitted, but should make specific findings of the facts relevant, to reliability and trustworthiness and explain how these facts support the conclusion of admissibility. Id.,¶18 "In Assessing the admissibility of a child's hearsay statement about sexual abuse under the Confrontation Clause, the United States Supreme Court has identified several factors to consider in deciding whether there are particularized guarantees of trustworthiness... N.D.R.Ev. 803(24)" State v. Messner, 1998 ND 151 ¶15,583 N.W.2d 109." The factors that need to be considered are as follows; spontaneity and consistent repetition, the mental state of

the declarant, the use of terminology unexpected of a child of similar age, and a lack of motive to fabricate.

[¶20] In this case there weren't spontaneous or consistent statements made by P.S. The Social Worker asked P.S. an number of times if she knew why she was there with her to which P.S. responded most consistently "I don't know". (Tr. Pg. 316-331) The Social Worker also asked P.S. if she knew why her mother would be worried that someone was hurting her, or touching her where she shouldn't be touched to which the most consistent response was "I don't know". (Tr. Pg. 316-331) P.S. provided little to know information to the Social Worker outside of pointing to a picture as a result of direct questioning. (Tr. Pg. 316-331)

[¶21] The mental state of the Declarant, (P.S.) is questionable to the degree that she is young child in a closed room with a stranger. It should be noted that there was testimony that stated that P.S. had been informed of the meeting with the Social Worker and purpose of the meeting by her mother prior to the meeting. Also it should be noted that P.S. witnessed her mother screaming and hitting her grandfather and stating "he was touching you". That violent behavior could be enough to scare P.S. into agreeing with her mothers statement.

[¶22] There was no mention of P.S. and her use of terminology. It appears that P.S. spoke very little of any happenings in regard to what allegedly took place. P.S. as through the testimony of the Social Worker labeled body parts in a seemingly appropriate manner for her age. For example she labeled the female genitalia as the peepee and stated its function was to go potty. (Tr. Pg. 316-331)

[¶23] The Motive to fabricate should be seriously considered in this case.

P.S. as stated earlier witnessed her mother enter the family bedroom and start screaming and hitting her grandfather. In this extremely emotional, violent and chaotic moment it is obvious that P.S.'s mother is enraged about something she believes she has witnessed happening between P.S. and Mr. Wegley. That stress alone may be enough motivation for P.S. to simply agree with whatever her mother asserts. Also there is s\testimony that P.S. discussed her appointment with the Social Worker with her mother. As previously stated, Kandi informed P.S. of the meeting and what it was about. It could be a possibility that P.S. simply states what has already been stated to her from her mother both in her enraged fury and her talk with the girl prior to the meeting wit the Social Worker.

[¶24] Kandi stated that she was screaming and repeatedly hitting Mr. Wegley and in the midst of this highly volatile situation she stated to the child, "he was touching you" and the child nodded her head in the affirmative. Because of the extreme situation in which this took place the child's head nod should have been disallowed.

[¶25] **II.** Whether the District Court erred in it's denial of Defense Counsel's Motion to exclude evidence of a previous conviction.

[¶26] N.D.R.Evid. 404 limits the evidentiary use of a defendant's prior bad acts and creates a procedural mechanism for reviewing their admission. Specifically Rule 404(b) indicates that evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith. The rule states, that it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident, provided that the prosecution shall provide reasonable notice in advance of trial, or during trial if good cause is shown.

[¶27] The state gave notice to use 404(b) evidence to show the witness's state of mind and for rebuttal and or impeachment purposes. The Defense objected to the use of the evidence stating that the notice to use the evidence was not timely under the rule as it was given only one week prior to trial. (App.) The Defense then asserted that Rule 609 governs the use of such evidence for impeachment purposes. Defense counsel asserted that under rule 609 the probative value of the evidence would need to outweigh its prejudicial affect to the accused and in this case the prejudicial effect was too great. Defense counsel further asserted that rule 609(b) of the N.D.R.Ev. indicates that evidence of a conviction is not admissible if a period of ten years has passed since the date if the conviction or of the release from any confinement imposed for the conviction, whichever is the later date. The Court held the state would not be allowed to use the evidence to show a witnesses state of mind. Defense Counsel then made a Motion to exclude the evidence of Mr. Wegely's prior conviction regardless of the testimony as the conviction was over thirty years prior to the current charge.

[¶28] This Court has stated that the admission of prior bad act evidence is governed by Rule 404(b), N.D.R.Ev, and that under this rule, evidence of prior bad acts or crimes is generally not admissible "unless it is substantially relevant for some purpose other than to point out the Defendant's criminal character and thus to show the probability that he acted in conformity therewith. State v. Osier, 1997 ND 170 ¶4, 569 N.W2d 441; citing State v. Biby, 366 N.W.2d 460, 463 (N.D. 1985) This

Court ruled that the trial court in State v. Osier erred in allowing testimony regarding the defendant's prior sexual misconduct. Id. ¶10. In Osier the prior conduct was similar in nature 8 years prior to the crime he was being tried on. In the present case the prior conviction was thirty (30) years prior to the current charges. In Osier this court stated, "It is fundamentally unfair to tempt a jury to convict a Defendant circumstantially on the basis of prior misconduct or character propensity rather than upon the evidence of the criminal acts charged." Id. ¶10.

[¶29] The Court erroneously denied the Motion to exclude the evidence of the 30 year old conviction. As a result of the Courts ruling the Defendant chose not to testify and then rested their case. Had the court granted the motion to exclude the conviction the verdict may have been different as the Defense would have proceeded differently.

[¶30] **III.** Whether the District Court erred in denying defense counsel's Motion of acquittal based on insufficient evidence to prove the elements of the crime charged.

[¶31] In cases where the Defendant challenges the sufficiency of the evidence to support a criminal conviction, the Defendant bears the burden of showing the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt. State v. Igou, 2005 ND 16,¶5, 691 N.W.2d 213, citing State v. Wilson, 2004 Nd 51, ¶6,676 N.W.2d 98.

[¶32] The State did not meet its burden of proof of beyond a reasonable doubt in this case. N.D.C.C. § 12.1-20-03(2)(a) states: A person who engages in sexual contact with another or who causes another to engage in sexual contact is guilty of

an offense if: a. The victim is less than fifteen years old. Sexual contact is defined as touching whether or not through the clothing or other covering of the sexual or other intimate parts of the person for the purpose of arousing or satisfying sexual or aggressive desires. (Tr. Page 411). When reviewing the evidence in light most favorable to the verdict there is simply not enough to support a conviction that Mr. Wegley willfully engaged in sexual contact with P.S.

[¶33] The state asserts that in a few minutes time while one parent was present in the home and the other parent was just out the front door of the home Mr. Wegley went to the bedroom were P.S. was in order to wilfully engage in sexual contact with P.S. This is simply not believable, nor is it supported by the evidence. Mr. Wegley's explanation makes so much more sense. He checked on his granddaughter and bent over to giver her a kiss and as such his hand was on the bed to brace himself, when he felt that his hand was stuck or tangled in blankets. Mr. Wegley states he was trying to remove his hand from the blankets. Even if his hand was near the area of private parts which is disputable as the definitions used throughout trial seemed to vary as to who was testifying, it was an accidental situation not one in which there was a purpose to satisfy any sexual or aggressive desires. If in fact Mr. Wegley was attempting to engage in sexual contact to satisfy a sexual or aggressive desire would he really do so in the presence of P.S.'s parents? It is highly unlikely.

[¶34] CONCLUSION

[¶35] For the reasons set forth above, Mr. Wegley asks that his verdict be overturned for a for a lack of sufficient evidence to uphold the verdict, as such the

Court should overturn the verdict and order the case dismissed with prejudice. In the alternative that his verdict be vacated and he be granted a new trial.

Respectfully submitted this 17th day of May, 2007.

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[¶36] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by electronic means on this 17th day of May, 2007, to:

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