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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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MAY 16 2008

STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff-Appellee,

-VS-

Robert Allen,

Defendant-Appellant,

) Supreme Ct. No. 20080025

) District Ct. No. 08-05-K-1626

) SA File No. F583-05-07

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM THE BURLEIGH COUNTY DISTRICT COURT
JANUARY 4, 2008, ORDER ON POST CONVICTION HEARING

Burleigh County District Court
South Central Judicial District
The Honorable Robert O. Wefald, Presiding

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STATEMENT OF THE ISSUES

- I. Statements made by a witness to rebut an allegation of recent fabrication are not hearsay.
- II. Providing speculative evidence as to impeachment evidence does not demonstrate an attorney fell below a reasonable standard of conduct in not conducting a more thorough investigation.
- III. Providing speculative evidence as to impeachment evidence does not demonstrate an attorney fell below a reasonable standard of conduct in not conducting a more thorough investigation.

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Allen's version of the facts of the case is for the most part correct and additional facts as they relate to each issue shall be brought out in the brief

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ARGUMENT

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. Sambursky v. State, 2006 ND 223, ¶ 13, 723 N.W.2d 524. In order to prevail on a post-conviction claim of ineffective assistance, the petitioner bears a heavy burden. Rümmer v. State, 2006 ND 216, ¶ 10, 722 N.W.2d 528. The petitioner must prove that (1) counsel's representation fell below an objective standard of reasonableness, and (2) the petitioner was prejudiced by counsel's deficient performance. Matthews v. State, 2005 ND 202, ¶ 10, 706 N.W.2d 74.

In order to meet the first prong, the petitioner must overcome the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance. Laib v. State, 2005 ND 187, ¶ 9, 705 N.W.2d 845. An attorney's performance is measured by the prevailing professional norms. Sambursky v. State, 2006 ND 223, ¶ 13, 723 N.W.2d 524. In assessing the reasonableness of counsel's performance, the district court must consciously attempt to limit the distorting effect of hindsight. Id. The district court must consider all the circumstances and decide whether there were errors so serious that the defendant was not accorded the "counsel" guaranteed by the Sixth Amendment. Klose v. State, 2005 ND 192, ¶ 10, 705 N.W.2d 809.

In order to meet the second prong, the petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result

1 of the proceeding would have been different. Roth v. State (Roth II), 2006
2 ND 106, ¶ 10, 713 N.W.2d 513. The petitioner must prove not only that
3 counsel's representation was ineffective, but must specify how and where
4 counsel was incompetent and the probable different result. Laib, 2005 ND
5 187, ¶ 10, 705 N.W.2d 845.

7 The burden of proving an ineffective assistance of counsel claim is on the
8 defendant. State v. McLain, 403 N.W.2d 16, 17 (N.D.1987). A defendant's
9 trial counsel in a criminal case is presumed to be competent and adequate in
10 the absence of contrary evidence. State v. Wolf, 347 N.W.2d 573, 575
11 (N.D.1984). Trial counsel, not appellate courts, is to determine trial strategy
12 and tactics to be used in a case. State v. Motsko, 261 N.W.2d 860, 864
13 (N.D.1978).

15 **I. Statements made by a witness to rebut an allegation of recent**
16 **fabrication are not hearsay.**

17 Allen contends his trial counsel was plainly ineffective for failing to object
18 to hearsay or to investigate potential impeachment evidence. Allen's
19 appellate counsel asserts that the juveniles' testimony in this case constitutes
20 hearsay; yet counsel provides no explanation for his assertion. Further,
21 Allen's counsel asserts, without any support, that the testimony should have
22 been excluded as it served no purpose other than to bolster the victim's
23 testimony.
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1 A statement is not hearsay under Rule 801(d)(1)(ii) of the North Dakota
2 Rules of Evidence if the declarant testifies at trial and is subject to cross-
3 examination concerning the statement, and the statement is consistent with the
4 declarant's testimony and is offered to rebut an express or implied charge
5 against the declarant of recent fabrication or improper influence or motive.
6

7 State v. Leinen, 1999 ND 138, ¶¶ 8-15, 598 N.W.2d 102.

8 In *Leinen*, this Court explained the three requirements for nonhearsay
9 under N.D.R.Ev. 801(d)(1)(ii):
10

11 “First, the declarant must have testified and been subject to
12 cross-examination about the statement. Second, the statement
13 must be offered to rebut a charge of recent fabrication or
14 improper influence or motive. And finally, the statement must
15 be a prior consistent statement made before the charge of
16 recent fabrication or improper influence or motive arose.”
17

18 In the present case, the juvenile victim was the first person to testify.
19 Trans. of Trial, p. 24, lines 3-9. K.N. testified about the incident of sexual
20 contact and was subject to cross examination. Trans. of Trial, Pp. 24- 44.
21 Thus, the first requirement was met.

22 During Allen's opening statement to the jury, his counsel said that his
23 client never touched K.N.; that there was no sexual contact whatsoever.
24 Trans. of Trial, Pp. 21-23. Counsel went on in his cross examination of the
25 state's witnesses to infer that K.N. fabricated the incident. Trans. of trial, Pp.
26
27

1 21-22, 42-44, and 103-107. Any doubt about the inference was resolved
2 during Allen's trial counsel's closing when he stated:

3 "People don't tell the truth sometimes, sometimes because they
4 just can't afford to. If I tell the truth, I'm hosed, and I just
5 can't afford to. . . . Why, if this happened, would -- she say she
6 went right back to sleep. She said that. Why would she
7 acknowledge, or why would everybody say, Russ included,
8 that everything was great the next morning. I would submit to
9 you it wasn't really so. She made believe later it was. There's
10 nothing shows more than her imagination. Nothing to show
11 that it's really true."

12
13 Trans. of Trial, Pp. 104-107. Thus, the second requirement was met.

14
15 Even if the second requirement had not been met, contrary to Allen's
16 assertions, the two juveniles did not testify as to any specific statement made
17 by the juvenile victim. See, Trans. of Trial, Pp. 24-45, and 65-75. On direct
18 examination, J.B. testified the victim, K.N. and their respective fathers stayed
19 with her at the motel on the night of the incident and provided information as
20 to the locations J.B. saw each person sleeping. See, Trans. of Trial, Pp. 65-69.
21 J.B. did not testify as to any statement made to her by K.N. See, Trans. of
22 Trial, Pp. 65-70.

23
24 L.D. testified about being at the birthday party on the day the incident
25 occurred and that the day after, K.N. told her that K.N.'s dad had done
26 something wrong to K.N. See, Trans. of Trial, Pp. 74, Lines 2-11. During
27

1 her direct examination, L.D. did not elaborate as to what constituted
2 something wrong. See, Trans. of Trial, Pp. 74, Lines 2-11.

3
4 As to the third requirement, after K.N. testified about her telling L.D.
5 what had happened, L.D. testified that K.N. told her that K.N.'s dad had done
6 something bad to K.N. the night of the birthday party. L.D.'s testimony was
7 consistent with K.N.'s prior testimony that her dad had touched her in her
8 private parts and that she told her friend L.D.. Thus, trial counsel was not
9 ineffective as there was no hearsay testimony offered by L.D. upon which to
10 object.

11 **II. Providing speculative evidence as to impeachment evidence**
12 **does not demonstrate an attorney fell below a reasonable**
13 **standard of conduct in not conducting a more thorough**
14 **investigation.**

15 Next, Allen contends that his counsel failed to investigate potential
16 impeachment evidence. Allen again makes this assertion without any other
17 support. There was no evidence presented at the post-conviction hearing other
18 than Allen's own statement that any of the individuals alluded to by Allen had
19 any specific impeachment evidence. Trans. of Post Conviction Hearing. Pp.
20 3-10. In addition, Allen failed to provide evidence in the form of either
21 witness testimony or affidavits as to what information these individuals would
22 have been able to provide in the form of impeachment evidence. Trans. of
23 Post Conviction Hearing, Pp. 3-14. Further, Allen did not subpoena his trial
24 counsel to establish on the record what if any investigation trial counsel had or
25 had not conducted based on the information Allen alleges he provided or
26
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1 counsel's reasons for the same. Trans. of Post Conviction Hearing, Pp. 3-14.
2 Thus, Allen's assertions are only speculative.

3
4 Providing speculative evidence about what information might have been
5 available or what a witness might have said does not demonstrate an attorney
6 falls below a reasonable standard of conduct in not investigating the
7 information these witnesses could have provided. See, State v. Austin, 2007
8 ND 30, 727 N.W.2d 790. Absent testimony as to the specifics of the
9 impeachment information or the bases for trial counsel's alleged failure to act,
10 Allen cannot demonstrate prejudice.

11 For a plausible claim about ineffective assistance of counsel, Allen
12 would have to develop evidence in a post-conviction proceeding under NDCC
13 Chapter 29-32.1. See, State v. Wilson, 466 N.W.2d 101, 105 (N.D.1991)
14 ("Only evidentiary exploration of facts not recorded in the transcript of this
15 trial can determine the reasonableness of this defense attorney's
16 performance."). As Allen has not made a sufficient offer of proof; he has not
17 met his burden.
18

19 **IV. Providing speculative evidence as to impeachment evidence**
20 **does not demonstrate an attorney fell below a reasonable**
21 **standard of conduct in not conducting a more thorough**
22 **investigation.**

23 Allen's final issue stems from the trial court's admission of testimony by
24 Detective Gaddis concerning hearsay statements made by K.N. about the
25 sexual contact with Allen. At trial, trial counsel initially objected to
26 Detective Gaddis's testimony about information he received from as hearsay.
27 Trans. of Trial, Pp. 81-82. Counsel than objected the probative value of the

1 testimony was outweighed by its prejudicial effect under Rule 403 of the
2 North Dakota Rules of Evidence. Trans. of Trial, Pp. 83-84.

3
4 Initially the trial court overruled both objections. Trans. of Trial. p. 84,
5 lines 19-21. Later, the trial court stated that it had reviewed its decision on the
6 hearsay objection and found that the statements of K.N. would also be
7 admissible under Rule 803(24) of the North Dakota Rules of Evidence. Trans.
8 of Trial, Pp. 112-113. Appellate counsel argues that the court failed to satisfy
9 the requirements of Rule 803(24) of the North Dakota Rules of Evidence,
10 thus, the evidence was inadmissible.

11 Rule 803 of the North Dakota Rules of Evidence provides, in part:

12
13 The following are not excluded by the hearsay rule, even
14 though the declarant is available as a witness:

15

16 (24) Child's Statement About Sexual Abuse. An out-of-court
17 statement by a child under the age of 12 years about sexual
18 abuse of that child or witnessed by that child is admissible as
19 evidence (when not otherwise admissible under another
20 hearsay exception) if:

21 (a) The trial court finds, after hearing upon notice in advance
22 of the trial of the sexual abuse issue, that the time, content, and
23 circumstances of the statement provide sufficient guarantees of
24 trustworthiness; and

25 (b) The child either:

26 (i) Testifies at the proceedings; or

27 (ii) Is unavailable as a witness and there is corroborative
evidence of the act which is the subject of the statement.

The statements testified to at trial were statements made by a child under
the age of 12 years about the sexual contact she experienced with Allen.

1 Trans. of Trial, Pp. 80-85. K.N. was the first witness to testify at the trial.

2 Trans. of Trial, Pp. 24-40.

3
4 An abuse of discretion standard of review is applied to a district court's
5 evidentiary rulings under N.D.R.Ev. 803(24), and will not be reversed absent
6 a finding that the court's ruling was arbitrary, capricious, or unreasonable, or a
7 misinterpretation or misapplication of the law. State v. Hirsch Korn, 2002 ND
8 36, ¶ 7. 640 N.W.2d 439.

9 In Hirsch Korn, this Court explained the purpose of N.D.R.Ev. 803(24) and
10 its application:

11 “Enactment of child-hearsay rules is intended to ensure that
12 child abusers do not go free merely because the prosecutor is
13 unable to obtain witnesses to the abuse other than the child,
14 who is unable to testify about the abuse. While the child-
15 hearsay rule permits the admission of otherwise inadmissible
16 hearsay evidence in order to facilitate prosecution, the rule's
17 requirements are also intended to safeguard the accused's right
18 to confront the witnesses testifying against him. The child-
19 hearsay rule is intended to balance the interests of the accused
20 and the interests of the truth-seeking process. Indicia of
21 reliability and guarantees of trustworthiness are constitutionally
22 required before admission of hearsay statements to preserve the
23 Sixth Amendment's basic interest in requiring “confrontation,”
24 even though an accused cannot directly confront the hearsay
25 declarant. Because of the importance of the accused's
26 confrontation rights, the safeguards built into the child-hearsay
27 rule must be strictly observed. . . .

Under N.D.R.Ev. 803(24)(a), the child's hearsay statements
are not admissible unless the trial court finds that “the time,

1 content, and circumstances of the statement provide sufficient
2 guarantees of trustworthiness.” Factors to consider include
3 spontaneity and consistent repetition, the mental state of the
4 declarant, the use of terminology unexpected of a child of
5 similar age, and a lack of a motive to fabricate. A trial court
6 must make explicit findings as to what evidence it relied upon
7 regarding the factors and explain its reasons for either
8 admitting or excluding the testimony so a defendant can be
9 assured the required appraisal has been made, and so this Court
10 can properly perform its appellate review function. Although
11 written findings are preferred, duly recorded oral findings
12 satisfy the requirements of the child-hearsay rule. . . .

13 A trial court must make an in-depth evaluation of the
14 proposed testimony. A trial court should not ... merely quote
15 the terms of the rule and order the testimony admitted, but
16 should make specific findings of the facts relevant to reliability
17 and trustworthiness and explain how these facts support the
18 conclusion of admissibility.... [N]ondetailed findings might
19 suffice when there is an adequate factual basis in the offer of
20 proof to support the trial court's determination.... Moreover, in
21 reviewing a trial court's evidentiary ruling under N.D.R.Ev.
22 803(24), we are limited to reviewing the proponent's offer of
23 proof made at the pretrial hearing and may not consider the
24 entire evidence admitted during the trial to support the earlier
25 ruling.

26 In the present case, the State did not bring a pretrial motion for the
27 admission of hearsay as contemplated by Rule 803(24)(a) of the North Dakota
Rules of Evidence. Rather, the trial court made the decision at trial, after the
case had been given to the jury, without making specific findings as to the
facts relevant to reliability and trustworthiness and without explaining how

1 these facts support the conclusion of admissibility. Trans. of Trial, Pp. 112-
2 114.

3
4 To establish obvious error, a defendant must show (1) error, (2) that is
5 plain, and (3) that affects substantial rights. State v. Krull, 2005 ND 63, ¶ 6,
6 693 N.W.2d 631; State v. Ramsey, 2005 ND 42, ¶ 12, 692 N.W.2d 498; State
7 v. Hirsch Korn, 2002 ND 36, ¶ 6, 640 N.W.2d 439; and State v. Wiest, 2001
8 ND 150, ¶ 6, 632 N.W.2d 812. An alleged error does not constitute obvious
9 error unless it is a clear deviation from an applicable legal rule under current
10 law. Krull, at ¶ 6; Ramsey, at ¶ 12; Hirsch Korn, at ¶ 6. To affect substantial
11 rights, a plain error must have been prejudicial, or have affected the outcome
12 of the proceeding. Hirsch Korn, at ¶ 20. Analyzing obvious error requires
13 examination of the entire record and the probable effect of the alleged error in
14 light of all the evidence. Id. Even if a defendant establishes obvious error
15 affecting substantial rights, the decision to correct the error lies within our
16 discretion, and we will exercise that discretion only if the error seriously
17 affects the fairness, integrity, or public reputation of judicial proceedings. Id.
18 at ¶ 22.

19
20 While the trial court committed plain error in admitting the statements
21 under Rule 803(24)(a) of the North Dakota Rules of Evidence, this error did
22 not affect Allen's substantial rights.

23
24 Like in Hirsch Korn, credibility was a crucial issue. State v. Hirsch Korn,
25 2002 ND 36, ¶ 21, 640 N.W.2d 439 Id. at ¶ 21. However, in Hirsch Korn, the
26 child victim took the stand, but she could not remember anyone touching her
27 inappropriately. Id. The victim's hearsay statements were the only way she

1 directly implicated Hirsch Korn. Here, K.N. took the stand and proceeded to
2 reiterate her allegations. Trans. of Trial, Pp. 34-35. The hearsay statements in
3 this case merely served a corroborative role, rather than being of primary
4 importance. See, State v. Hirsch Korn. 2002 ND 36, 640 N.W.2d 439.
5 Further, the statements would have been admissible under Rule 801(d)(1)(ii)
6 of the North Dakota Rules of Evidence as stated above.
7

8 Allen argues that Rule 801(d)(1)(ii) of the North Dakota Rules of Evidence
9 is not applicable because it could only be used when the testimony was
10 offered to rebut an express or implied charge against the declarant of recent
11 fabrication and he did not put forth evidence that this was a recent fabrication.
12 Allen's argument is flawed in that while he may not have specifically used the
13 terms "recent fabrication or improper influence of motive", he clearly inferred
14 it through his trial counsel's statements and questioning of witnesses. Trans.
15 of trial, Pp. 21-22, 42-44, and 103-107. A fact made clear by Allen's trial
16 counsel's closing argument. Trans. of Trial, Pp. 104-107.
17

18 Allen's argument that absence the trial court's negative ruling the outcome
19 might have been different is purely speculative and is not supported by any
20 offer of proof contained in the record.
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CONCLUSION

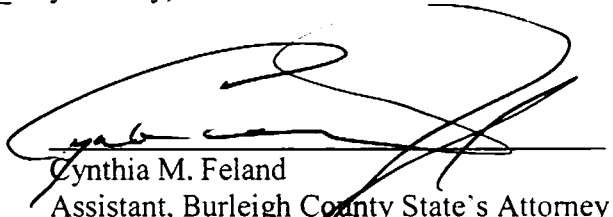
The defendant's right to effective counsel does not mean a right to errorless counsel nor to counsel judged effective by hindsight, but rather to counsel rendering reasonably effective assistance. State v. Mehralian, 301 N.W.2d 409 (N.D.1981). Defense counsel in a criminal case is presumed to be competent and the party alleging inadequacy of defense counsel has the burden of overcoming the presumption. Id. In State v. Motsko, 261 N.W.2d 860 (N.D.1978), this court stated:

“It is easy for new counsel on appeal (or for an appellate judge, for that matter) to go through a transcript and find matters that could have been explored further, questions that could have been asked but were not, questions that were asked that should not have been asked, objections that could have been made that were not, and witnesses who could have been called but were not or witnesses who would have been better left uncalled. Hindsight is perfect and criticism is easy. But the lawyer engaged in a trial, who has made an investigation of the facts and has talked to the witnesses, may have his own reasons and they may be very good reasons for not asking a question or making an objection or calling a witness.”

There is nothing in the record to support an allegation of ineffective assistance of counsel. Allen's trial counsel was a seasoned attorney whose trial strategy ensured that Allen got a fair trial.

1 Based upon the foregoing, the State requests that the judgment of
2 conviction be affirmed.
3

4 Dated this 15th day of May, 2008.

5
6 
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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State of North Dakota,)
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Plaintiff-Appellee,)
)
-vs-)
)
Robert Allen.) Supreme Ct. No. 20080025
)
Defendant-Appellant,) District Ct. No. 08-05-K-1626
) SA File No. F583-05-07
.....)
STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Kim Bless, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 15th day of May, 2008, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

TODD A. SCHWARZ
ATTORNEY AT LAW
515 1/2 E. BROADWAY AVENUE, SUITE 103
BISMARCK, ND 58501

which address is the last known address of the addressee.

Kim Bless
Kim Bless

Subscribed and sworn to before me this 15th day of May, 2008.

JEANIE NAGEL
Notary Public
State of North Dakota
My Commission Expires Feb. 15, 2013

Jeanie Nagel
Jeanie Nagel, Notary Public
Burleigh County, North Dakota
My Commission Expires: 2-15-2013.