

IN THE SUPREME COURT

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STATE OF NORTH DAKOTA

AUG 05 2010

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| State of North Dakota, ex.rel. |) | |
| Cynthia M. Feland in her capacity |) | STATE OF NORTH DAKOTA |
| as Assistant Burleigh County |) | |
| State's Attorney, |) | |
| |) | Supreme Ct. No. |
| Petitioner, |) | |
| |) | |
| -vs- |) | |
| |) | |
| Sonna M. Anderson, et. al, in her |) | |
| capacity as Judge of the District |) | |
| Court, South Central Judicial |) | |
| District , |) | |
| |) | |
| Respondent. |) | District Ct. No. 08-08-K-2527 |
| |) | SA File No. F912-08-12 |

PETITION FOR AND BRIEF IN SUPPORT OF SUPERVISORY WRIT

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STATEMENT OF THE ISSUES

- I. The trial court improperly granted the defendant's motion for a directed verdict of acquittal.

1 Gross called one witness, Dr. Robert Howard, who testified about the
2 effects of alcohol on the human body. Trans. of Trial, December 18, 2009,
3 pp. 179-236. Following Dr. Howard's testimony and prior to adjourning for
4 the day, the court addressed legal issues and the proposed jury instructions,
5 outside the hearing of the jury. Trans. of Trial, December 18, 2009, pp. 236-
6 237. One of the issues addressed was the Rule 29 motion previously made by
7 the defense.
8

9
10 "MS. LINDBO: Your Honor, the only thing I wanted to bring up with
11 the legal issues, that I didn't want to bring up specifically the Rule 29 motion.
12 I didn't know, Your Honor, has reserved ruling to hear if you wished to hear
13 more on it now or wait until all of the evidence and then perhaps hear some
14 more argument on it before it goes to the jury.

15
16 THE COURT: I would prefer to have more argument on it before it
17 goes to the jury.

18 MS. LINDBO: Okay. As in now or at the end of the case?

19 THE COURT: End of the case."

20 Trans. of Trial, December 18, 2009, pp. 237-38.

21 Following rebuttal witnesses, the trial court provided defense counsel
22 with another opportunity to address the Rule 29 issue. Trans. of Trial,
23 December 19, 2009, p. 70, lines 8-11. After lengthy argument by both sides,
24 the trial court stated the following:

25 " THE COURT: All right, I will take the matter under advisement and
26 we will meet here in the courtroom at 1:15 and the jury will be brought in
27 after we have completed the discussion on this matter."

Trans. of Trial, December 19, 2009, p. 79, lines 11-14.

1 Following noon recess, the trial court stated the following:
2

3 THE COURT: Thank you and please be seated. All right we are
4 meeting at 1:30 and the Court took a little longer than I intended to but
5 researching the matter before the Court. Which is we are meeting outside of
6 the presence of the jury, counsel and parties are present here.

7 And the issue the Court was asked to review over the lunch hour is
8 was the defendant's argument for a judgment of acquittal based under Rule
9 29, specifically that a review of the evidence at this time -- of the testimony
10 taken in the light most favorable to the prosecution would be for a reasonable
11 person to make a determination that they have proved that Mitch Gross knew
12 that DK was an unaware that a sex act was being committed at the time of the
13 commission. Which is one of the elements of the crime and that it's the
14 obligation of State to show that and to prove that beyond a reasonable doubt
15 that Mitch Gross had that knowledge at that time.

16 Under Rule 29 of the North Dakota Rules of Criminal Procedure on a
17 motion for judgment of acquittal, the Court can reserve a decision and decide
18 to submit the case to a jury and decide the motion either before the jury
19 returns a verdict or after it returns a verdict of guilty or I can discharge
20 without having returned a verdict.

21 If the Court reserves the decision it must decide the motion on the
22 basis of the evidence at the time the ruling was reserved. **That is what I am**
23 **going to do. I am going to reserve my decision** and I am going to state on
24 the record that this is the basis of the decision that I would make if I determine
25 this.

26 I understand the testimony taken in the light most favorable to the
27 prosecution at this time shows that, one, DK was inebriated. Two that DK for
the most part stopped drinking before 11:00 p.m. or shortly after 11:00 p.m..
Three, that although needing assistance to ambulate while at the bar DK
walked of her own accord at 1:45 a.m. when she to Ogden's house and at 2:00
a.m. when she arrived at the Gross house for the first time approximately.

Witnesses testified that through the evening she was quiet. She didn't
speak. She did speak and she said she wanted to go home. She said she
wanted to be left alone. She said she was fine, she just needed to sleep and
she smiled.

Five, she left Gross's home and returned again in the span of about an
hour putting her walking at 3:00 a.m. give or take.

1 Six, at some time she wet herself, probably after coming back to the
2 Gross's home the second time. Seven, she slept on the couch at the Gross
3 home. Eight, sometime after 3:00 a.m. Mitch the son and Kasey went to bed.
4 We don't know the time frame.

5 Nine, sometime after that when Mitch Senior went in to the house.
6 This appears to be at least 4 hours after DK stopped drinking.

7 Ten, sex occurred. Mitch Senior said she asked him to hold her and
8 asked him for sex and that it was consensual. There is no evidence refuting
9 that statement. When she woke up in the morning she used the phone. She
10 didn't speak. She left the Gross's home. She looked at the address. She went
11 home and took care of her business.

12 That is the Court's recollection understanding of the evidence as it
13 exists at this time.

14 Comment, Miss Feland?"

15 Trans. of Trial, December 19, 2009, pp. 79-82 (emphasis added).

16 The following discussion than occurred between the trial court and the
17 State:

18 "MS. FELAND: I would disagree with that Your Honor. If you listen
19 to the tape of Mitchell Gross specifically the statement that he provided it was
20 specifically stated by him on that tape he and his son helped her in to the
21 house. That it was hard to get her in to the house. His son helped. Those
22 statements were specifically made on the tape that the jury heard of Mitchell
23 Gross so she wasn't completely walking of her own accord.

24 We can make assumptions that she left out the front door. We have no
25 idea what she did or didn't do or how long she was gone. We know that she
26 came back in to the garage and when she did it was that second time that she
27 had to be helped.

28 We have the statement of Mitchell Gross junior who said she never
29 spoke, not evening the next morning. He thought maybe she would speak
30 then. She still didn't speak.

31 THE COURT: Yeah, well, we have a variety of witnesses who talk
32 about whether she spoke or didn't speak.

1 MS. FELAND: I understand, which are factual disputes and those
2 factual disputes, Your Honor, make it a question for the jury. So it's the
3 State's perspective that the defendant may have made some statements but his
4 statements, number one, are contradictory with statements that people made,
5 are also contradictory with other evidence that came in and while I grant you
6 that the victim in this case was not in a position to be able to testify as to what
happened other than the vague memories that she had and while one can argue
a black out. One can also argue passing in and out of consciousness because
there was discussion as she came in and was passed out on the couch.

7 Again. Your Honor, all factual issues are for the jury to decide and for
8 the jury to look at the credibility of each witness, decide who they believe in
9 whole or in part.

10 THE COURT: Right, and **I understand there maybe factual issues**
11 **that the jury might decide** but there is also the burden of beyond a
reasonable doubt and that one of the issues that I am going to continue to
struggle with, I decide whether or not to grant the Rule 29 motion.”

12 Trans. of Trial, December 19, 2009, pp. 82-83 (emphasis added).
13

14 Closing instructions were read and closing arguments were then made
15 to the jury. Trans. of Trial, December 19, 2009, p. 86, lines 20-21. The jury
16 was given the case at 3:10 p.m. and returned a verdict of guilty at 4:40 p.m.
17

18 Trans. of Trial, December 19, 2009, pp. 86-87.

19 Thereafter, the trial court advised Gross of his right to appeal and
20 requested a presentence investigation and prepared an order for pre-sentence
21 investigation and evaluation . Trans. of Trial, December 19, 2009, p. 88, lines
22 11-23; and Appendix, p. 4. The State then inquired as to the status of the legal
23 issue which remained open. Trans. of Trial. December 19, 2009, p. 89, lines
24 1-2. The trial court informed the parties that it had 10 days in which to issue
25
26
27

1 its ruling on the Rule 29 motion. Trans. of Trial, December 19, 2009, p. 89,
2 lines 5-6.
3

4 On March 3, 2010, the trial court issued its order granting Gross'
5 motion for a directed verdict of acquittal. Appendix pp.5-27. The State
6 requested a copy of the transcript on March 4, 2010 and received the same up
7 to the point of closing instructions on May 13, 2010. Appendix pp. 2 and 28.
8

9 On May 19, 2010, the State filed a motion to vacate requesting that the
10 court reconsider its order directing a verdict of acquittal. Appendix pp. 47-
11 60. Gross filed a response on June 9, 2010. Appendix pp. 31-45 On June
12 24, 2010. the Court denied the State's motion to vacate. Appendix p. 61.
13

14 LAW AND ARGUMENT

15

16 The trial court issued an order directing a Rule 29 directed verdict of
17 acquittal reasoning:

18 "the State has failed to meet it[']s burden to prove,
19 beyond a reasonable doubt, that [the victim] was unaware that
20 a sexual act was being committed upon her and presented no
21 evidence whatsoever to disprove the Defendant's testimony
22 that he believed that Krahler was aware at the time of the
23 sexual act that the sexual act was consensual."

24 The State argues that the trial court incorrectly interpreted the essential
25 elements of the case and the State's burden of proof for the same. Further, the
26 trial court improperly made factual determinations resolving conflicts in the
27 evidence.

1 Rule 29, N.D.R.Crim.P., titled Motion for a Judgment of Acquittal,
2 provides in part:
3

4 *“(a) Before Submission to the Jury.* After the prosecution
5 closes its evidence or after the close of all the evidence, the
6 court on the defendant's motion must enter a judgment of
7 acquittal of any offense for which the evidence is insufficient
8 to sustain a conviction. The court may on its own consider
9 whether the evidence is insufficient to sustain a conviction. If
10 the court denies a motion for a judgment of acquittal at the
11 close of the prosecution's evidence, the defendant*448 may
12 offer evidence without having reserved the right to do so.

13 *(b) Reserving Decision.* The court may reserve decision on the
14 motion, proceed with the trial (where the motion is made
15 before the close of all the evidence), submit the case to the
16 jury, and decide the motion either before the jury returns a
17 verdict or after it returns a verdict of guilty or is discharged
18 without having returned a verdict. If the court reserves
19 decision, it must decide the motion on the basis of the evidence
20 at the time the ruling was reserved.

21 *(c) After Jury Verdict or Discharge.*

22 *(1) Time for a Motion.* A defendant may move for a judgment
23 of acquittal, or renew such a motion, within ten days after a
24 guilty verdict or after the court discharges the jury, whichever
25 is later.

26 *(2) Ruling on the Motion.* If the jury has returned a guilty
27 verdict, the court may set aside the verdict and enter an
acquittal. If the jury has failed to return a verdict, the court may
enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to
move for a judgment of acquittal before the court submits the
case to the jury as a prerequisite for making such a motion after
jury discharge.”

To grant a judgment of acquittal under Rule 29, “a trial court must find
the evidence is insufficient to sustain a conviction of the offenses charged.”

1 *State v. Maki*, 2009 ND 123, ¶ 7, 767 N.W.2d 852 quoting, *State v. Kautzman*,
2 2007 ND 133, ¶ 10, 738 N.W.2d 1. “When considering the sufficiency of the
3 evidence on appeal, this Court views the evidence and all reasonable
4 inferences in the light most favorable to the prosecution and then determines
5 whether a rational fact finder could have found guilt beyond a reasonable
6 doubt.” *Kautzman*, at ¶ 10. “In reviewing a question of sufficiency of
7 evidence under N.D.R.Crim.P. 29(a), the court does not resolve conflicts in
8 the evidence or reweigh the credibility of witnesses.” *State v. Weaver*, 2002
9 ND 4, ¶ 10, 638 N.W.2d 30. “The court’s role is only to determine whether
10 there is evidence which could have allowed the jury to draw an inference
11 reasonably tending to prove guilt and fairly warranting a conviction.” *Id.*

12
13
14 In the present case, Mitchell Gross was charged with one count of
15 gross sexual imposition in violation of N.D.C.C. § 12.1-20-03. The State
16 specifically alleged that Gross “willfully engaged in a sexual act with D.K. at
17 a time when he knew the victim was unaware that a sexual act was being
18 committed on her.” Appendix, p. 3.

19
20 In her order granting a Rule 29 directed verdict, Judge Anderson takes
21 the position that the State is required to “disprove the Defendant’s testimony
22 that he [Gross] believed that D.K. was aware at the time of the sexual act and
23 that the sexual act was consensual.” Appendix. p. 27. In support of her
24 ruling, Judge Anderson stated that:

25
26 “Mitch Gross provided direct evidence that [D.K.] was awake at
27 the time of the sexual act and the[y] was both aware and that
she consented to the sexual encounter. The State offered no

1 direct evidence that controverted the Defendant's version of
2 events."

3 Appendix p. 15. Judge Anderson goes on to state that "[t]he
4 defendant's statement that he believed that [D.K.] was awake and
5 aware and consenting to the sexual encounter is uncontroverted by any
6 other evidence." Appendix 20. The facts emphasized by Judge
7 Anderson in support of her position are inconsistent with the actual
8 evidence in the case.
9

10
11 At trial, the State called multiple witnesses to describe the victim's
12 condition before she ended up at Gross' residence. Most of these witnesses
13 had neither met nor had an encounter with D.K. before that night. Each of
14 the witnesses, even those that had met D.K. for the first time, described her as
15 being extremely intoxicated and that she didn't speak shortly after arriving at
16 O'Brian's. Appendix, pp. 63, 66-67, 70, 72-73, 76-80, 82-85, 87-93, 95-96.
17 Trans. of Trial, March 17, 2010, pp. 85-86, p. 88, lines 21-24, p. 100, lines 1-
18 12, p. 103, lines 4-10, and pp. 105-106. Trans. of Trial, March 18, 2010, pp.
19 7-11, pp 13-14, pp 22-23, pp 25-28, pp 33-35, pp. 37-38.
20

21 Mitchell Gross, the Defendant's son, testified that he had come home
22 to spend Thanksgiving with his dad. Appendix. p. 97. Trans. of Trial, March
23 18, 2010, p 41, lines 2-15. During the course of the evening, while drinking in
24 the garage with his dad and some other friends, a strange woman walked into
25 the house and laid on the couch. Appendix, pp. 99-101. Trans. of Trial,
26 March 18, 2010, pp. 43-45. The woman, later identified as D.K. , did not say
27

1 anything in response to questions. Appendix, pp. 101-102. Trans. of Trial,
2 March 18, 2010, p. 45, line 23; and p. 46, line 13. Later, when the son entered
3 the residence to use the bathroom D.K. was gone. Appendix, p. 103. Trans. of
4 Trial, March 18, 2010, p. 47, lines 9-17. A short time later, D.K. again
5 entered the house through the garage door, laid down on the couch a second
6 time, and went to sleep. Appendix, pp. 103-104. Trans. of Trial, March 18,
7 2010, pp. 47-48. The son described D.K. as drunk. Appendix, p. 104. Trans.
8 of Trial, March 18, 2010, p. 48, line 19.

11 The son eventually went to sleep on another couch in the same room
12 as D.K. and did not awaken until the next morning. Appendix, pp. 104-105.
13 Trans. of Trial, March 18, 2010, pp. 48-49. The next morning the son tried to
14 talk to D.K. as she was standing in the room and she still didn't say anything.
15 Appendix, p. 105. Trans. of Trial, March 18, 2010, p. 50, lines 10-14. During
16 the entire time D.K. was in the Gross residence, the son never heard her utter a
17 word and described her to the detective as being "fucked up". Appendix, p.
18 107. Trans. of Trial, March 18, 2010, p. 51, line 11.

20 Kasey Bell [Bell], a friend of Gross' son, testified that she saw D.K.
21 the second time she came to the Gross residence. Appendix, pp. 108-109.
22 Trans. of Trial, March 18, 2010, pp. 59-60. Bell described D.K. as looking
23 "completely zoned . . . has to be on one or something. . . . Like drugs or
24 something . . . she was out of it for sure." Appendix, p. 109. Trans. of Trial,
25 March 18, 2010, p. 60, lines 9-13. Like all of the other witnesses, Bell
26
27

1 testified that D.K. didn't say anything. Appendix, p. 109. Trans. of Trial,
2 March 18, 2010, p. 60, line 16.
3

4 Up to this point in the trial, each and every witness stated that D.K.
5 never uttered a word from the time she left O'Brian's until sometime after she
6 left the Gross residence the next day. Thus, it was crystal clear to perfect
7 strangers that D.K. had no idea what was going on around her. Appendix, pp.
8 77-80, 87-88, 95-96, 108-109. Trans. of Trial, March 18, 2010, pp. 8-11; pp
9 25-27; pp. 37-38; pp. 45-49; and pp. 59-61.
10

11 Gross testified by way of a videotaped interview with Detective
12 Gaddis. Appendix, pp. 111-113. Trans. of Trial, March 18, 2010, pp. 92-94.
13 Gross' statement to law enforcement contained several different versions of
14 events for the evening and early morning hours in question. Appendix, pp.
15 111-144. Trans. of Trial, March 18, 2010, pp. 92-125. These "versions of
16 events" contradict each other and the other witnesses that testified at trial.
17

18 In his first version, Gross describes D.K. as all of a sudden coming
19 out of nowhere, pushing past him and his son's friends, and wandering into
20 the house "like she'd lived there her whole life". Appendix, pp. 117-118.
21 Trans. of Trial, March 18, 2010, pp. 98-99. Gross stated they "talked to her,
22 do you have an ID. do you have a name, anything, is there someone we should
23 call. No, she just wanted to lay down." Appendix, p. 118. Trans. of Trial.
24 March 18, 2010, p. 99, lines 3-5. After D.K. laid down, "a couple of gals
25 came over to visit." Appendix, p. 118. Trans. of Trial, March 18, 2010, p. 99,
26 lines 5-8. Gross was telling the gals the story of D.K. wandering in; after
27

1 which they went to see D.K. and found she was gone. Appendix, p. 118.

2
3 Trans. of Trial, March 18, 2010, p. 99. lines 8-11.

4 The gals didn't believe the story until D.K. wandered in a second
5 time. Appendix, p. 118. Trans. of Trial, March 18, 2010, p. 99, lines 11-15.

6 When the victim returned, Gross stated,

7 "I stopped her, you know, what are you doing? What's going
8 on? 'I just need place to lay down.' Okay. That's fine."

9 Appendix, p. 118. Trans. of Trial, March 18, 2010, p. 99, lines 15-17. Gross
10 went on to say that he "kind of held her, she was shaking, cold, scared, you
11 know, whatever." Appendix, p. 118. Trans. of Trial, March 18, 2010, p. 99,
12 lines 17-18. Gross stated he then "took her back in, laid her on the couch" and
13 then went back out into the garage and partied. Appendix, p. 118. Trans. of
14 Trial, March 18, 2010, p. 99, lines 18-20.

15
16 About 1:00 a.m.. Gross stated that his son went to bed. Appendix, p.
17 118. Trans. of Trial, March 18, 2010, p. 99, lines 20-22. Gross stated that
18 when he went in the house, "the gal [D.K.] was laying on the couch . . . she
19 had wet herself and she had no blankets on." Appendix, p. 118. Trans. of
20 Trial, March 18, 2010, p. 99, lines 23-24. Gross told D.K. , "I tell you what, I
21 said, I've got some pajamas I said I'll give you some pajamas and I'll throw
22 your clothes in the dryer." Appendix, pp. 118-119. Trans. of Trial, March 18,
23 2010, pp. 99-100. Gross stated:

24
25 So I put her pants in the dryer and she put them on and I come
26 back up and I covered her up. And she says to me "Will you
27 lay with me?" "Well, sure." Then she asked me to have sex

1 with her. It was kind of a flattering thing and I had been
2 drinking and I'm not a young man, it just wasn't going to work.
3 I wasn't going to have an erection to be able to have sex. I
4 mean, I did try, she wanted me to, and there was nothing,
5 nothing to the effect of intercourse, you know.

6 Appendix, p. 119. Trans. of Trial, March 18, 2010, p. 100, lines 2-11.

7 When questioned further by Detective Gaddis about D.K.,

8 Gross stated:

9 She was a young gal **she said** she was 20, is what she said
10 She was well tanned. She was not real talkative and she was --
11 the first time she came she was very drunk and **she told us** she
12 had been at the concert. I should have just used my better
13 instincts, I know that now. But **we talked** about it, you know,
14 and when she came back, it was like, I didn't want to turn her
15 in and have her put in detox and maybe she had some drugs in
16 her. somebody slipped her something she didn't, you know.
17 But later on when I woke her up, or when I woke her up, when
18 I went in and U had her put her pants in the dryer she seemed
19 fine.

20 Appendix, pp. 119-120. Trans. of Trial, March 18, 2010, pp. 100-101.

21 (emphasis added)

22 Contrary to any of Gross' assertion that D.K. made any statements
23 while at his residence, both Gross' son and Bell testified that D.K. never said
24 anything. Appendix, pp. 101-102, 106-107, and 109. Trans. of Trial, March
25 18, 2010, p. 45, line 23; and p. 46, line 13; p. 50, lines 10-14; p. 51, line 11;
26 and p. 60. lines 9-16. D.K. never uttered a peep. Appendix, pp. 101-102,
27 106-107, and 109. Trans. of Trial, March 18, 2010. p. 45. line 23; and p. 46,
line 13; p. 50, lines 10-14; p. 51, line 11; and p. 60. lines 9-16. Gross' son

1 even commented that when he saw D.K. The next morning she still didn't say
2 anything. Appendix, p. 106. Trans. of Trial, March 18, 2010, p. 50, lines 10-
3 14.
4

5 In his original version of events, Gross gives facts about D.K. which
6 directly contradict the evidence established at trial. Concerning her age, D.K.
7 and others testified that she was 22 years of age, not 20. Appendix, pp. 87 and
8 105. Trans. of Trial, March 17, 2010, p. 25, line 18; and p. 49, line 9. There
9 was also no mention by D.K. or any of the other witnesses that D.K. had been
10 to a concert. Trans. of Trial, March 17, 2010, pp. 25-114; and Trans. of Trial,
11 March 18, 2010, pp. 3-49. The testimony of all the other witnesses
12 established that D.K. had been drinking at several local bars, not at a concert.
13 Trans. of Trial, March 17, 2010, pp. 25-114; and Trans. of Trial, March 18,
14 2010, pp. 3-49.
15

16 In his second version of events, Gross stated:
17

18 [D.K.] just come pushing by us like this was her house and we
19 were in her way. And all she would tell us is that she was 20
20 years old and we didn't need to contact nobody because she
21 was fine.

22 Appendix, p. 123. Trans. of Trial, March 18, 2010, p. 104, line 2-5.

23 Again, Gross' claim that D.K. answered questions is completely contradictory
24 to both Gross' son and Bell's testimony that D.K. never said a word.

25 Appendix. p. 101-102, 106-107, and 109. Trans.. of Trial, March 18, 2010, p.
26 45, line 23; and p. 46, line 13; p. 50, lines 10-14; p. 51, line 11; and p. 60,
27 lines 9-16.

1 Gross goes on to claim that when D.K. came back the second time, "I
2 take her back in the house. She was hard to get in. My son helped me."
3 Appendix, p. 126. Trans. of Trial, March 18, 2010, p. 107, lines 6-7. This
4 contradicts Gross' first version that **she walked** in the second time, laid down
5 on the couch and covered herself up. Appendix, p. 123. Trans. of Trial,
6 March 18, 2010, p. 104, lines 2-5 and 14-15 (emphasis added). It also
7 contradicts the testimony of his son. Appendix, pp. 104-105. Trans. of Trial,
8 March 18, 2010, pp. 47-48.

9
10
11 When asked again by Detective Gaddis to describe how D.K.'s pants
12 came to be in the dryer, Gross stated:

13 When everybody finally settled down and I go in there she is
14 laying on the couch, you know, with no blanket on at the time.
15 You could just see that her pants were wet so I asked her if she
16 me to dry her clothes for her and I said I would give her some
17 pajamas. . . . we kind of [took off her pants] together. She was
18 laying on the couch. I just helped her off with them and I took
19 them and I threw them in the drier for her. I didn't watch her
20 put the pajamas back on because I took the pants down while
21 she put herself back together.

22 Appendix, p. 127. Trans. of Trial, March 18, 2010, p 108, lines 6-21. When
23 Gross came back up from putting the victim's pants in the dryer, he states:

24 I asked her are you fine? Is everything okay? Yeah, she said,
25 "will you lay with me?" So I laid down on the couch with her.
26 I put my arm over her trying to comfort her. Then she asked if
27 I would like to have sex with her. And like I said, it was
flattering and I did try but between my age and the alcohol .

Again, Gross' version of events is contradictory to the testimony of all
of the other witnesses who indicated that the victim never spoke at the Gross

1 residence. Appendix, pp. 101-102, 106-107, and 109. Trans. of Trial, March
2 18, 2010, p. 45, line 23; and p. 46, line 13; p. 50, lines 10-14; p. 51, line 11;
3 and p. 60, lines 9-16. Gross' statement that he had a lucid conversation with
4 the victim contradicts the testimony of his son. Appendix, pp. 101-102, 106-
5 107, and 109. Trans. of Trial, March 18, 2010, p. 45, line 23; p. 46, line 13; p.
6 50, lines 10-14; p. 51, line 11; and p. 60, lines 9-16.

8 Gross' statement is also inconsistent with his earlier comments about
9 the victim's condition. "In the beginning she was real out of it. When we
10 went to bed she didn't seem that out of it at all. She seemed pretty well within
11 her being." Appendix, p. 131. Trans. of Trial, March 18, 2010, p 112, lines
12 16-18. "She was drunk, yes. We all knew that." Appendix, p. 140. Trans. of
13 Trial, March 18, 2010, p 121, lines 4-5. "When she first came, she was very
14 intoxicated. Yes, I agree and when I went in there that's hours later."
15 Appendix, p. 137. Trans. of Trial, March 18, 2010, p 118, lines 6-7.

17 Further, D.K. testified that when she woke up, she found her pants
18 laying next to her on the floor and that they were wet. Appendix, pp. 91-92.
19 Trans. of Trial, March 18, 2010, pp. 33-34. The fact that the pants were still
20 wet contradicts Gross' statements that he dried them.

22 A court is to view the evidence most favorable to the verdict and all
23 reasonable inferences drawn from such evidence. *State v. Wilson*, 2004 ND
24 51, ¶ 6, 676 N.W.2d 98. Here the jury found Gross guilty. In order for Gross
25 to succeed on a Rule 29 motion, he must show the evidence, when viewed in
26 the light most favorable to the verdict, reveals no reasonable inference of
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1 guilt: that there is insufficient evidence to sustain a conviction. *State v. Maki*,
2 2009 ND 123, ¶ 8, 767 N.W.2d 874. Courts must not weigh conflicting
3 evidence or judge the credibility of witnesses; rather, a conviction should be
4 reversed only if no rational fact-finder could have found the defendant guilty
5 beyond a reasonable doubt. *Id.* “The existence of conflicting testimony or
6 other explanations of the evidence does not prevent the jury from reaching a
7 conclusion the evidence is clear beyond a reasonable doubt.” *State v. Krull*,
8 2005 ND 63, ¶ 14, 693 N.W.2d 631.
9
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11 A person is guilty of gross sexual imposition under N.D.C.C. Section
12 12.1-20-03(1)(c) if he engages in a sexual act with the victim when he knows
13 she is unaware that a sexual act is being committed upon her. As shown
14 above, every witness, even Gross, testified that D.K. was “completely
15 zoned”, “out of it for sure”, “real out of it”, “very intoxicated”, when she came
16 to the Gross residence. Appendix, pp. 109, 131, and 137. Trans. of Trial,
17 March 18, 2010, p. 60, lines 9-13; p 112, lines 16-18; and p 118, lines 6-7.
18 D.K. was unable to speak during the entire time she was there. Appendix, pp.
19 1001-102, 106-107, and 109. Trans. of Trial, March 18, 2010, p. 45, line 23;
20 p. 46, line 13; p. 50, lines 10-14; p. 51, line 11; and p. 60, lines 9-16. Gross
21 relays conversations that he alleged had with D.K. in the presence of others,
22 yet the other witnesses contradict rather than confirm his story. Appendix,
23 pp. 1001-102, 106-107, and 109. Trans. of Trial, March 18, 2010, p. 45, line
24 23; p. 46, line 13; p. 50, lines 10-14; p. 51, line 11; and p. 60, lines 9-16.
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1 As to D.K. suddenly sobering up and having a lucid conversation as
2 proposed by Gross, the testimony of his son contradicts this proposition. The
3 son was very unambiguous in his statements that D.K. still didn't say a word
4 when he tried to talk to her the next morning. Appendix, pp. 106-107. Trans.
5 of Trial, March 18, 2010, pp. 50-51.
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7 In reviewing the transcript of the testimony presented in this case, it is
8 clear that the only inconsistent statements offered were those provided by
9 Gross, himself. Trans. of Trial, March 17, 2010, pp. 25-114; and Trans. of
10 Trial, March 18, 2010 pp. 3-125. Thus, to believe Gross' testimony is to
11 discredit every other witness that testified. It is equally clear that in reviewing
12 the testimony presented a rational fact finder, the jury, could and in fact did
13 determine that Gross committed the act of gross sexual imposition beyond a
14 reasonable doubt.
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17 This Court has identified the elements of N.D.C.C. Section 12.1-20-
18 03(1)(c) as: (1) engaging in a sexual act with another; and (2) the defendant
19 knew the victim was unaware that a sexual act was being committed upon
20 them. *State v. Frankfurth*, 2005 ND 167, ¶ 3, 704 N.W.2d 564. In issuing its
21 order, the trial court appears to be adding an additional element; requiring an
22 eye witness to the crime or a confession by the accused. Neither the plain
23 language of N.D.C.C. Section 12.1-20-03(1)(c) nor the legislative history of
24 the statute support this requirement.
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1 Pattern jury instruction K-5.38 directly addresses the issue of proof of
2 knowledge or intent. Specifically, pattern jury instruction K-5.38 provides
3 that
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5 Intent may be proved by circumstantial evidence. Indeed, it can rarely
6 be established by any other means. We simply cannot look into the
7 head or mind of another person. But you may infer the Defendant's
8 intent from all of the surrounding circumstances.

9 You may consider any statement made or act done or omitted by the
10 Defendant and all the facts and circumstances in evidence which
11 indicate the Defendant's state of mind.

12 The recitation of facts above establishes that there was more than
13 sufficient circumstantial evidence upon which a jury could, and in fact did,
14 find that the defendant "knew" D.K. was unaware that a sexual act was being
15 committed upon her. To hold the state to a higher burden than that which the
16 statute authorizes is to give license to perpetrators to be untouchable. The trial
17 court is supporting the premise that if no one else saw it, it never happened.
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CONCLUSION

Therefore, based upon the above and foregoing, the State argues that the district court improperly granted the defendant's Rule 29 motion for a judgment of acquittal and requests this Court issue a supervisory writ directing the South Central District Court to reinstate the jury's verdict.

Dated this 4th day of August, 2010.



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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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|-----------------------------------|---|-------------------------------|
| State of North Dakota, ex.rel. |) | |
| Cynthia M. Feland in her capacity |) | |
| as Assistant Burleigh County |) | |
| State's Attorney, |) | |
| |) | Supreme Ct. No. |
| Petitioner, |) | |
| |) | |
| -vs- |) | |
| |) | |
| Sonna M. Anderson, et. al, in her |) | |
| capacity as Judge of the District |) | |
| Court, South Central Judicial |) | |
| District , |) | |
| |) | |
| Respondent. |) | District Ct. No. 08-08-K-2527 |
| |) | SA File No. F912-08-12 |

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 5th day of August 2010, I deposited in a sealed envelope a true copy of the attached:

- 1. Supervisory Writ
- 2. Appendix
- 3. Affidavit of Mailing

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

| | |
|--------------------------------|---------------------------|
| Judge Sonna Anderson | Tatum O. Lindbo |
| Burleigh County District Court | Attorney at Law |
| PO Box 1055 | Kennelly & O'Keeffe, Ltd. |
| Bismarck, ND 58502-1055 | PO Box 2105 |
| | Fargo, ND 58107-2105 |

1 Which address are the last known addresses of the addressees.

2 Kim Bless

3 Kim Bless

4 Subscribed and sworn to before me this 5th day of August, 2010.

5 Michelle Dresser-Ternes

6 MICHELLE DRESSER-TERNES

7 Notary Public

8 State of North Dakota

9 My Commission Expires Sept. 8, 2010

Michelle Dresser-Ternes, Notary Public

Burleigh County, North Dakota

My Commission Expires: 9-8-2010.