

## IN THE SUPREME COURT

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

STATE OF NORTH DAKOTA

NOV 15 2013

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff - Appellee,	)	
	)	
vs.	)	Supreme Court No. 20130179
	)	
Barry Lee Benson,	)	
	)	
Defendant - Appellant.	)	

## APPELLANT'S BRIEF

Appeal from a Criminal Judgment and Conviction  
dated March 6, 2013  
The Honorable Michael Sturdevant  
Bottineau County District Court  
Northeast Judicial District

Bottineau County Criminal No. 05-2012-CR-128

Ryan J. Thompson (N.D. ID#06621)  
THOMPSON & THOMPSON  
409 4<sup>th</sup> Avenue NE - PO Box 696  
Devils Lake, ND 58301-0696  
Telephone ((701) 662-2177  
Attorneys for Defendant/Appellant

## TABLE OF CONTENTS

TABLE OF CONTENTS	P. 2
TABLE OF AUTHORITIES	P. 3
STATEMENT OF THE ISSUES	¶ 1-2
STATEMENT OF THE CASE	¶ 3-5
STATEMENT OF THE FACTS	¶ 6-78
LAW AND ARGUMENT	¶ 79-122
CONCLUSION	¶ 123-124

## TABLE OF AUTHORITIES

<u>Statutes and Rules</u>	<u>Paragraph</u>
---------------------------	------------------

North Dakota Century Code 12.1-32.01	¶ 3, 11
North Dakota Century Code 29-28-03	¶ 81
North Dakota Century Code 29-28-06	¶ 82
North Dakota Rules of Evidence Rule 403	¶ 112

<u>Cases</u>	<u>Paragraph</u>
--------------	------------------

<u>State v. Chacano</u>	826 N.W.2d 294 (N.D.2013)	¶ 97
<u>State v. Kringstad</u>	353 N.W.2d 302 (N.D.1984)	¶ 89
<u>State v. Krull</u>	693 N.W.2d 631 (N.D.1963)	¶ 99, 100, 102
<u>State v. Manke</u>	328 N.W.2d 799 (N.D.1982)	¶ 95
<u>State v. Olmstead</u>	246 N.W.2d 888 (N.D. 1976)	¶ 90
<u>State v. Schill</u>	406 N.W.2d 660 (N.D.1987)	¶ 95
<u>State v. Smith</u>	508 N.W.2d 101 (Iowa App.1993)	¶ 104, 105
<u>State v. Tranby</u>	437 N.W.2d 817 (N.D.1989)	¶ 89

1 **ISSUES**

2 [¶1] Did the trial court abuse its discretion in denying the Defendant's motions for  
3 acquittal due to insufficient evidence?

4 [¶2] Did the trial court abuse its discretion in allowing contradictory and confusing  
5 testimony of the victim's childhood friend K.S. after objection from the Defendant?  
6

7 **STATEMENT OF THE CASE**

8 [¶3] This is an appeal from a conviction by jury finding the defendant guilty of Continual  
9 Sexual Abuse of a Minor in violation of N.D.C.C.12.1-32-01.

10 [¶4] The Defendant appeals based on insufficiency of evidence to sustain his conviction  
11 based on the evidence at trial being testimonial and nature of that testimony is contradictory.

12 [¶5] The Defendant also appeals from the denial of the Defendant's motion to exclude the  
13 testimony from one of the State's witnesses because of concern that the witness was going to  
14 contradict and effectively impeach the victim causing confusion and resulting in prejudice.  
15

16 **STATEMENT OF THE FACTS.**

17 [¶6] On March 6, 2013, the Defendant was convicted of Continual Sexual Abuse of a  
18 Minor. The victim was T.M. During the period of time that the offenses occurred, T.M. was  
19 between the ages of 8 and 14 years old. At the time of trial, T.M. was 19 years old.

20 [¶7] On September 10, 2011, a Bottineau County Sheriff's Deputy was approached by an  
21 individual who stated they wanted to file a report. Mr. C.D., approximately age 17 at the  
22 time of the initial contact, proceeded to inform the Deputy that his girlfriend, Ms. T.M., also  
23 age 17 at the time of the report, had at some time prior told him that the Defendant had  
24 sexually assaulted and/or raped her when she was younger. (Trial Transcript Volume 2 at  
25 page 297-298).  
26  
27

1 [¶8] On the same day, September 10, 2011, the initial case notes were received by a  
2 second and different Bottineau County Sheriff's Deputy and an interview was scheduled with  
3 T.M. to follow up on the initial lead received from her boyfriend C.D. The interview was  
4 conducted with T.M and recorded. The Deputy makes note that also present in the interview  
5 are T.M.'s mother, T.E., and her boyfriend C.D. (Trial Transcript Volume 2 at page 299-  
6 300).

7  
8 [¶9] While being interviewed in the company of the her mother, and her boyfriend, T.M.  
9 proceeds to answer questions presented by the Deputy regarding the allegations that had been  
10 presented by C.D. accusing the Defendant of sexually assaulting T.M between the years of  
11 2003 and 2008.

12 [¶10] T.M. was also interviewed by a forensic interviewer on September 29, 2011 at the  
13 UND Advocacy Center in Minot ( Defense Exhibit "A").  
14

15 [¶11] The interviews create a baseline of preliminary facts that elaborate on the specifics of  
16 the conduct that leads to the Defendant being charged with Continual Sexual Abuse of a  
17 Minor, pursuant to NDCC 12.1-32-01.

18 [¶12] At trial the interviews, as well as the testimony at the preliminary hearing, are  
19 referenced at length during cross examination.

20 [¶13] The State had testimony from a number of witnesses including the victim (T.M.); the  
21 mother of the victim ( T.E); the victims boyfriend/fiance ( C.D.); a childhood friend of the  
22 victim (K.S.); a neighbor of the Defendant during the years the acts were described to have  
23 occurred ( James Lessman, Sr); and the investigating officer Deputy Klabo. In the interest  
24 of efficiency given the length of time between when the acts were stated to have occurred  
25  
26  
27

1 and the time of actual investigation the specific facts will be illustrated by referencing the  
2 testimony from the trial and supplemented as needed later on in analysis.

3 [¶14] The backdrop of facts and details are presented at the beginning of trial by T.M.

4 There was very minimal physical evidence and the physical evidence that was available was  
5 circumstantial and had not been gathered until after the initial report was received. There  
6 was no DNA or evidence from transfer, or any medical records, or medical reports or  
7 opinions presented. The evidence at trial was almost entirely testimonial.  
8

9 [¶15] At trial T.M. testified that T.M. and her mother, T.E., moved to Maxbass, ND from  
10 Wisconsin sometime around when T.M. was eight (8) years old. This move occurred because  
11 the relationship between T.M.'s mother T.E., and another individual by the name of R.B. who  
12 is the Defendant's cousin and this facilitates the initial introduction of the Defendant to the  
13 family. (Trial Transcript Volume 1 at page 88). The family lived in Maxbass, as did the  
14 Defendant, for a short time and then moved to Newberg, ND. (Trial Transcript Volume 1 at  
15 page 96).  
16

17 [¶16] During the time the family lived in Maxbass, ND, T.M. Testified that the Defendant  
18 was welcome at the home and commonly spent time with the family. Often the Defendant  
19 would spend time at the house sharing meals with the family and just hanging out. (Trial  
20 Transcript Volume 1 at Page 91).  
21

22 [¶17] T.M. goes on testify that after the family moved to Newberg, ND is when the sexual  
23 acts began. This was also around the time she was eight (8) years of age. (Trial Transcript  
24 Volume 1 at pages 93-94) .

25 [¶18] T.M. agrees at trial that the distance from Maxbass to Newberg is far enough that she  
26 would need some sort of transportation. It is not a distance that she could walk or ride her  
27

1 bike. (Trial Transcript Volume 1 at page 120). At the very roots of the scenario presented by  
2 T.M. is the reality that she, as an eight (8) year girl, must make the 10 mile trip to Maxbass,  
3 ND to the home of the Defendant, the location of the repeated incidents described.

4 [¶19] T.M. testified at trial that her mother would sometimes drop her off in Maxbass or  
5 that her mom would call the Defendant to see if T.M. could go to the Defendant's home so  
6 that she could play with the neighbor kids. (Trial Transcript Volume 1 at pages 92-93 &  
7 pages 122-124).

8 [¶20] T.M. testified that the Defendant would also call and explain to T.E. that he was  
9 coming to get T.M. so that she could visit friends in Maxbass and that he would be the mode  
10 of transportation. It is also stated that the Defendant would often call T.E. and explain that  
11 he needed T.M. to do chores around his house in Maxbass such as mowing the lawn, or  
12 doing the dishes. T.M. testifies that this went on for four (4) or five (5) years.

13 [¶21] T.M. said that these visits would happen weekly "every Saturday of every week" at  
14 minimum and "every weekend" but sometimes more often if the T.M.'s school schedule and  
15 the Defendant's work schedule allowed it. ( Trial Transcript Volume 1 at pages 91-92 & page  
16 182) but also describes the frequency as "everyday, or every weekend or every two days"  
17 (Defendant's Exhibit "A", Forensic Interview at Time 2:02)

18 [¶22] This description of frequency becomes less clear during cross examination when  
19 T.M. realizes that she didn't consider the summer visits with her father in Wisconsin. This is  
20 resolved by her stating that she merely forgot about the visits but other than the time she was  
21 in Wisconsin her description would still be the same. ( Trial Transcript Volume 1 at pages  
22 134-136)  
23  
24  
25  
26  
27

1 [¶23] T.M. testified that no other people knew of the abuse except her friend K.S. and that  
2 she had told K.S. when they were children after it had been occurring for a while.

3 [¶24] T.M. testified that she was *never home alone* ( emphasis added ) after school and that  
4 she was always at the K.S. house or the neighbor's house.

5 [¶25] T.M. is asked about this numerous times during cross examination and confirms that  
6 if she was ever home alone she was always supervised and specifically that the Defendant  
7 had only shown up at the house one time when no one was home supervising her. Also, that  
8 he had never come and "snatched her up" (Trial Transcript Volume 1 at page 123).

9 [¶26] The singular incident that T.M. Describes when the Defendant had been present at the  
10 home in Newberg with no one else around differs in some significant ways. One version  
11 describes her mother coming home which startles the Defendant and prevents an incident  
12 (Defendants exhibit "A" at time stamp 2:03). Another incident describes the mother's  
13 boyfriend R.B. coming home and startling the Defendant which prevents an incident (Trial  
14 Transcript Volume 1 at pages 172-173).

15 [¶27] T.M. testifies that the incidents would occur in the Defendant's home and always at  
16 the Defendant's home ( Trial Transcript Volume 1 at page 147 & 171).

17 [¶28] T.M. states that after arriving at the Defendant's home in Maxbass, the Defendant  
18 would lock the door and proceed to assault her. After these incidents concluded, T.M. would  
19 leave and go next door to play with her friends.

20 [¶29] T.M. describes being forced to dress up in outfits and role play. She describes the  
21 outfits as Halloween costumes initially. These costumes had been bought on a separate  
22 occasion when the Defendant had explained to T.E. that he wanted to take T.M with him to  
23  
24  
25  
26  
27



1 Minot, N.D. to get groceries. According to T.M., when they arrived in Minot they went to a  
2 second hand store and Defendant purchased these costumes to have her wear.

3 [¶30] This same scenario is presented during the Forensic interview conducted on  
4 September 29, 2011 and is described with substantial differences. When this scenario is  
5 explained during the forensic interview, T.M. describes that her mother was along during the  
6 trip to Minot in which these costumes had been purchased for her. It is explained that her  
7 mother, T.E., had gone to an appointment of some sort and then while she was at this  
8 appointment the Defendant and T.M. proceeded to the second hand store and the costumes  
9 were bought. ( See defense Exhibit "A" at times 2:16-2:40.( Trial Transcript Volume 1 at  
10 page109).

11  
12 [¶31] The acts that T.M. Describes throughout the investigation include a wide variety of  
13 sexual acts the specifics of which vary but many different incidents are described. At trial  
14 T.M. testified that she had been forced to shower with the Defendant. She also describes  
15 being taped to the bed, this also occurred one time, and later described as more than one  
16 time.

17  
18 [¶32] T.M. stated that she was made to watch pornographic movies, that were only "girl on  
19 girl action" but in other interviews was all types of pornographic films, but never "guy on  
20 guy".

21  
22 [¶33] T.M. testifies that the only other person she told other than her childhood friend K.S.  
23 was boyfriend C.D. and that she felt comfortable telling him because he was also a victim of  
24 abuse. (Trial Transcript Volume 1 at page 113). C.D. then tells the police. The time in  
25 which she tells C.D. varies from after one (1) month together to six (6) months together to  
26 specifically their two (2) year anniversary.  
27

1 [¶34] At trial T.M. cannot explain why the times are different when she is asked, but that  
2 she is sure it was the two (2) year anniversary and decides to go with that answer. She  
3 remembered it very specifically because he brought her flowers and chocolates and a card  
4 and when they were together she wanted to tell him. This she is eventually sure about. She  
5 describes the event as “we were hanging out and talking and stuff and letting it all hang out”  
6 ( Trial Transcript Volume 1 at page 154) .  
7

8 [¶35] T.M. testified at trial that she did not expect her boyfriend to report it to the police  
9 and that she did not think that she would be in the position of testifying about it. She also  
10 agrees during cross examination that if she at some point had decided to turn back and tell  
11 her boyfriend that she made it up to be closer to him that it would damage their relationship.  
12 T.M. assured counsel that that was, of course, not the case. She resolves this suggestion by  
13 the Defendant by explaining she told him first so she didn't know he was a victim before she  
14 told him ( Trial Transcript Volume 1 at page 165) contradicting her answer on direct  
15 examination.  
16

17 [¶36] T.M. explains at trial that she never informed anyone of these incidents and their  
18 regular weekly occurrence because of fear for her mother's safety due to the Defendant  
19 threatening to hurt her and that she and her mother were very close. ( Defense Exhibit “A” at  
20 1:55 )  
21

22 [¶37] To explain why no effects of the constant abuse as described were noticed by her  
23 mother, with whom she was so close, she responded that she would always spend her time  
24 away from family in her room so they would not notice any changes in her behavior. (Trial  
25 Transcript Volume 1 at page 132).  
26  
27

1 [¶38] At the end of the first day of trial anticipating that the next witness called by the State  
2 was going to be K.S., the Defendant made a motion regarding the testimony of K.S. The  
3 Defendant informed the Court that given the evidence in this case is entirely composed of the  
4 testimony from the victim the testimony K.S. should be excluded. The evidence as presented  
5 by the victim specifically and confidently established that no acts as alleged had occurred in  
6 her home in Newberg, ND. Also, the fact that she was not home alone after school or any  
7 other time unsupervised in the home in Newberg. The Defendant went on to explain that the  
8 testimony of K.S. would be entirely to the contrary and that in her statement she described a  
9 contradictory set of circumstances. Specifically that she would be testifying that she had  
10 observed acts in the home in Newberg when she and T.M. would be there alone after school.  
11 The scenario that would be presented by K.S. was specifically addressed by T.M. and it was  
12 stated that no part of this fact scenario was accurate. The Defendant expressed, among other  
13 concerns, that this testimony would be confusing to the jury by presenting an entirely  
14 different set of circumstances to be considered that had in no way been suggested by the  
15 victim. That the State would be impeaching their own witnesses and that without at least a  
16 suggestion of possibility that some of the incidents may have occurred at her home in  
17 Newberg, there was no foundation to allow the testimony about a different set of  
18 circumstances. The Court denied this motion explaining that it would appear to be favorable  
19 to the Defendant and that he should want this testimony for impeachment purposes. The  
20 Defendant acknowledged this possibility and reiterated his concerns in light of the  
21 impeachment opportunities and that the concern of confusion was greater than the possible  
22 use of the testimony for impeachment purposes. ( Trial Transcript Volume 1 at pages 186-  
23 190).  
24  
25  
26  
27

1 [¶39] The second day of trial began with an out of order witness for the Defendant because  
2 of availability of the Interactive Video network. The Witness was located in the Williston,  
3 ND area and because of availability of the courtroom the witness was only able to testify at  
4 this specific time.

5 [¶40] Prior to the testimony of Mr. Dewtiz, the State expressed a desire to utilize some  
6 additional witnesses it had not intended on calling. The purpose was for rebuttal under North  
7 Dakota Rules of Evidence Rule 801 and testimony regarding past consistent statements.  
8 After analysis on the record, it was conceded that impeachment had been, at minimum,  
9 implied and that the Defendant had already referenced material during impeachment so it  
10 understood the rule applied. ( Trial Transcript Volume 2 at pages 193-196)

11 [¶41] The Defendant's witness was a past deputy of the Bottineau County Sheriff's  
12 Department, Mr. Dewitz. The deputy testified that he had investigated similar allegations in  
13 2002 regarding the victim and the Defendant. It was revealed that Mr. Dewitz had  
14 interviewed the victim and her mother and they had denied any incidents and did not know  
15 where the information would have come from. Testimony was given as to any concerns of  
16 truthfulness or fear when interviewing the victim or her mother at this time in the past and  
17 none was observed. (Trial Transcript Volume 2 at pages 201-205)

18 [¶42] The presumed order of witnesses was altered at this time and K.S. was not going  
19 to testify at the time previously anticipated.

20 [¶43] The prosecution instead called a gentleman by the name of James Lessman, Sr. Mr.  
21 Lessman was a neighbor of the Defendant during the years alleged in the complaint and he  
22 testified as to his recollection of T.M being at the Defendant's home in Maxbass.  
23  
24  
25  
26  
27

1 [¶44] Mr. Lessman did confirm that he was sure he remembered T.M. being dropped off by  
2 her mother T.E. This would occur every once in a while and T.M. would come over and play  
3 with his granddaughter. He could not confirm the regular weekly trips but did testify that he  
4 remembered her being dropped off by T.E. (Trial Transcript Volume 2 at pages 213 & 218)

5 [¶45] He remembered T.M. coming over and that she seemed like a cheerful and playful  
6 girl when she would be over playing with his granddaughter. (Trial Transcript Volume 2 at  
7 pages 218 & 220)

8 [¶46] Mr. Lessman had been contacted shortly before trial and his testimony exhibited  
9 some concerns . When asked about the frequency of when he would observe T.M. being  
10 dropped off during re-direct he says “at least once a week” but then “not every week” (Trial  
11 Transcript Volume 2 at page 213). The years that he recalls observing these things are 2000  
12 or 2001, prior to the years T.M. lived in Newberg and Mr. Lessman states he thought that at  
13 this time the family lived in Maxbass. ( Trial Transcript Volume 2 at pages 212-213). He did  
14 not ever observe T.M. doing any chres or yard work around the house of the Defendant (Trial  
15 Transcript Volume 2 at Page 215). During cross examination, Mr. Lessman states that he is  
16 not really sure how often he would observe T.M. visiting, the period of time he observed  
17 regular visits, but was off and on during at least one summer (Trial Transcript Volume 2 at  
18 page 220)

19 [¶47] The next witness called by the State was the victim’s mother ,T.E. The testimony of  
20 this witness created the first of many concerning contradictions regarding significant  
21 elements in the testimony of T.M.

22 [¶48] T.E. testified that she and T.M. had moved to Maxbass in the year 2000. (Trial  
23 Transcript Volume 2 at page 223) and that they had moved to North Dakota because of her  
24  
25  
26  
27

1 relationship with a man named Randy Brend, a cousin of the Defendant. (Trial Transcript  
2 Volume 2 at page 224)

3 [¶49] When asked about dropping T.M. off at the Defendant's home in Maxbass, T.E.  
4 states she had no recollection of ever doing so (Trial Transcript Volume 2 at page 233)

5 [¶50] T.E. testified that she had no knowledge of the numerous conversations T.M. had  
6 described between T.E. and the Defendant discussing reasons for him to come and pick T.M.  
7 up and take her to Maxbass .

8 [¶51] T.E testified that she had never had any conversations with T.M. about doing chores  
9 around the Defendant's home. (Trial Transcript Volume 2 at page 235) and that she didn't  
10 specifically know that T.M. was spending time at the Defendant's home. (Id) When T.E. is  
11 further questioned about any concerns that she had during this time when the Defendant was  
12 picking up her eight year old daughter T.M. on a regular weekly basis, she again states that  
13 she had no knowledge these things were happening and that she did not recall any  
14 conversations regarding T.M. going to Maxbass as described in earlier testimony by T.M.  
15 (Trial Transcript Volume 2 at pages 233, 239, & 247) T.E. testifies that she she had no  
16 knowledge of the circumstances until more recently ( Trial Transcript Volume 2 at page 240)

17 [¶52] T.E. does testify similarly to T.M. regarding the time being left alone in the house.  
18 Testifying that she would be at one of the older people's houses from the neighborhood or in  
19 the alternative that R.B. would be home with her. ( Trial Transcript Volume 2 at page 232 &  
20 page 233)

21 [¶53] T.E. testifies that the Defendant was not around the house hanging out casually as  
22 T.M. had described and was not a family friend or had any other type of acquaintance that  
23  
24  
25  
26  
27

1 would resolve concern if she had known about the supposed weekly contact with T.M.  
2 (Trial Transcript Volume 2 at page 238 & 246).

3 [¶54] T.E. testifies that T.M. was a healthy young girl and never complained of any  
4 physical ailments and no issues were ever presented such as infections or other “red flags”  
5 that perhaps something was occurring (Trial Transcript Volume 2 at pages 242-244)

6 [¶55] T.E. testified that her and T.M. had a close relationship and would always spend time  
7 together when she wasn't working and would have noticed if anything was out of the norm.  
8 There is no testimony or recollection of T.M. becoming withdrawn into her room to explain  
9 why the presumed trauma of being molested and raped on at least a weekly basis was never  
10 noticed. (Trial Transcript Volume 2 at pages 243-244)

11 [¶56] T.E. testified that the Defendant was contacting her recently and being flirtatious  
12 and that her new husband did not like it. After being asked to stop multiple times, the  
13 Defendant would not stop sending messages via text message and had become a nuisance.  
14 (Trial Transcript Volume 2 at pages 240-242)

15 [¶57] T.E. also confirms that during this time T.M. would sometimes be back in Wisconsin  
16 visiting her father (Trial Transcript Volume 2 at page 242)

17 [¶58] The State next called C.D. for purposes of testifying to past consistent statements.  
18 C.D. confirms that T.M. had told him that she was a victim of past abuse. The testimony of  
19 time and place of this conversation is described with confidence as it was by T.M. The  
20 details are significantly different in the version testified to by C.D. It is expressed that the  
21 conversation had occurred on their two (2) year anniversary. However, it was not in person  
22 but rather over the phone. Another significant difference is that the victim did not reveal  
23 her past to initiate the conversation but C.D. revealed to her that he was a victim of abuse  
24  
25  
26  
27

1 and this initiated the conversation leading to the later complaint by C.D. to law enforcement.  
2 (Trial Transcript Volume 2 at pages 253-254 & 260-261)

3 [¶59] The State next called K.S. The testimony of K.S. was received and was of the nature  
4 described by the Defendant in his objection. The objection itself was not renewed at this time  
5 in the trial.

6 [¶60] K.S. testified that she and T.M. would often be alone at the home of T.M. in Newberg  
7 after school and that this was as often as everyday of the week and on some weekends. Trial  
8 (Transcript Volume 2 at page 267-268 & Page 281)

9 [¶61] K.S. testified that the Defendant would show up sometimes and that no other adults  
10 or chaperones would be present when this occurred. (Trial Transcript Volume 2 at page 269)

11 [¶62] K.S. described a number of different incidents that she had observed that she  
12 perceived to be sexual in nature including the Defendant touching T.M. in the pelvic area  
13 while sitting next to each other with a blanket over their laps. (Trial Transcript Volume 2 at  
14 pages 270-272) She went on to describe that things end by Defendant just stopping and  
15 getting up and leaving. ( Trial Transcript Volume 2 at page 273)

16 [¶63] K.S. could not describe the details of the Defendant appearing at the house in  
17 Newberg, but that he was just there. (Trial Transcript Volume 2 at page 281-282)

18 [¶64] The description of events by K.S. was completely contradictory to the testimony of  
19 all of the witnesses describing the acts would occur in the home in Newberg whenever T.E.  
20 was not around and that the Defendant would appear at the home. ( Trial Transcript Volume  
21 2 at page 276) Also, that T.M. had never discussed with her any incidents that occurred in the  
22 Defendant's home in Maxbass. (Trial Transcript Volume 2 at page 276)



1 [¶65] Following the testimony of K.S., the State called the investigating officer to testify.  
2 The deputy testified that he had received a very basic one page write up describing that he  
3 had been contacted by C.D. to report that his girlfriend had been abused when she was  
4 younger. (Trial Transcript Volume 2 at pages 297-298)

5 [¶66] After receiving the initial report, the deputy initiated contact with T.E. and T.M. to  
6 arrange an interview. It is confirmed that the interview was not done with T.M. alone but  
7 with T.E. and C.D. present at the time. The deputy agrees this is not the optimal situation for  
8 an interview of this type and that he had concerns about people other than T.M. being  
9 present.  
10

11 [¶67] The Deputy describes his training and that the situation with an audience was  
12 contrary to his training and made him uncomfortable but this did not concern him regarding  
13 the integrity of the information obtained. (Trial Transcript Volume 2 at pages 329-333)

14 [¶68] The recording of this interview was played pursuant N.D.R.Evid 801. After the  
15 recording of the interview is played, the state proceeds with direct examination.  
16

17 [¶69] Following the initial interview, the deputy then proceeded to arrange a forensic  
18 interview. At this time a search warrant is requested and granted to search the residence  
19 described in the interviews and testimony at the Defendant's home in Maxbass.  
20

21 [¶70] The Deputy testifies that during the search of the home a number on pornographic  
22 movie covers are found but no actual movies. These item had been described by T.M. as  
23 being hidden under the bed. When asked, the deputy said that they were not under the bed  
24 but in a dresser. Also found during the search are a roll of tape and a pink skirt. (Trial  
25 Transcript Volume 2 at pages 311-322) The deputy testified there was no DNA evidence  
26 recovered and that he could not determine how long any of the items had been there.(Trial  
27

1 Transcript Volume 2 at pages 338-342) The deputy agreed that to the best of his knowledge  
2 the Defendant had not lived there for some time (Trial Transcript Volume 2 at page 311 )

3 The bed in the house at the time of the search was examined and no tape residue was found.  
4 (Trial Transcript Volume 2 pages 338 & 340 ). There were no outfits or costumes found in  
5 the home that matched the description given by T.M. except arguably the pink skirt.

6 [¶71] After the initial search of the home, T.M. contacted the Deputy and said that she had  
7 found some shoes that she stated had been given to her by the Defendant. These shoes had no  
8 indicators that would show how old they may have been and the shoes had not been  
9 described in detail in the earlier statements by T.M. other than that they had high heels.

10 [¶72] On cross examination it is revealed that many other people are brought up in the  
11 interviews with T.M. that would have been sources of information for the investigation, but  
12 other than the friend K.S., law enforcement made no effort to locate or interview them during  
13 the investigation. (Trial Transcript Volume 2 at pages 331-334) Just before trial, the deputy  
14 had located James Lessman Sr. and he was added to the witness list and testified at trial.

15 [¶73] At the close of the State's case in chief, the Defendant made a motion for acquittal  
16 based on lack of evidence to sustain a conviction citing the evidence as presented had been  
17 entirely contradictory. (Trial Transcript Volume 2 at pages 352-354). This motion was  
18 denied.

19 [¶74] The Defendant did not testify at trial or give any interviews to law enforcement to be  
20 addressed.

21 [¶75] The jury announced the verdict of guilty on the evening of March 6, 2013.

22 [¶76] The Defendant renewed his motion for acquittal under Rule 29 (c)(2) N.D.Crim.P on  
23  
24  
25  
26  
27

1 April 9, 2013 and this motion was also denied (Transcript of Motions Hearing April 9, 2013  
2 at pages 3-7).

3 [¶77] After a Pre-sentence Investigation was completed, the Defendant was sentenced on  
4 May 31, 2013.

5 [¶78] The Defendant filed his appeal from the conviction on June 6, 2013 and it was timely.

6 **LAW AND ARGUMENT**

7  
8 [¶79] **A. Jurisdiction**

9 [¶80] The Defendant appeals from his conviction by jury and the denial of his motions for  
10 acquittal due to lack of evidence.

11 [¶81] The Defendant may appeal to the Supreme Court as a matter of right for reasons  
12 provided for in Chapter 29-28. ( N.D.C.C. 29-28-03) The reasons more specifically set out  
13 from which a Defendant may appeal are established as follows:

14  
15 [¶82] An appeal may be taken by the Defendant from :

- 16 1. A verdict of Guilty;
- 17 2. A final judgment of Conviction;
- 18 An order refusing to arrest judgment;
- 19 3. An order denying a motion for a new trial;
- 20 4. An order made after judgment affecting any substantial right of a party.

21 (N.D.C.C. 29-28-06)

22  
23 [¶83] **B. Standard Of Review**

24 [¶84] The standard of review that applies to an appeal challenging the sufficiency of the  
25 evidence to sustain a conviction and the denial of a new trial, and the trial court allowing  
26 testimony of a prejudicial and confusing nature over an objection is an abuse of discretion  
27

1 standard.

2 [¶85] C. Issues Presented

3 [¶86] 1. Did the trial court abuse its discretion in denying the Defendant's motions for  
4 Acquittal and special finding regarding a new trial due to lack of evidence?

5 [¶87] 2. Did the trial court abuse its discretion in allowing contradictory and confusing  
6 testimony of the victims childhood friend K.S. after objection from the Defendant?

7 [¶88] D. Argument

8 [¶89] Did the trial court abuse its discretion in denying the Defendant's motions for  
9 Acquittal and special finding regarding a new trial due to lack of evidence?

10  
11 On an appeal from the denial of a motion for an acquittal based on insufficiency of the  
12 evidence, this Court has addressed the standards it will apply when determining if a new trial  
13 should be granted. In State of North Dakota vs. Stanley Trig Tranby, 437 N.W. 2d  
14 (N.D.1989) the Court addressed this issue and explained:

15  
16 “In ruling on a motion for a new trial, the trial court may, within limits, weigh the  
17 evidence and evaluate for itself the credibility of the witness. State v Kringstad,, 353  
18 N.W.2d 302, 306 (N.D. 1984 . However, a motion for a new trial is committed to the  
19 sound discretion of the trial court and its judgment is conclusive unless we (the  
20 appellant court) can say that, in denying the motion, such judgment was abused.”

21 [¶90] This is further addressed by the Court and it has expressed the position that if  
22 conflicting evidence can lead to an inference that would reasonably prove guilt the Court will  
23 not substitute its judgment for that of the fact finder. State v. Olmstead, 246 N.W.2d 888,  
24 890 ( N.D. 1976)

25 [¶91] In the present case, the evidence at trial at almost entirely testimonial and the  
26 evidence was entirely the recollection of the victim with additional testimony that was  
27 supposed to corroborate her testimony.

1 [¶92] At trial this was not the effect of the additional testimony. The separate testimony was  
2 so contradictory that it cannot support a conviction. The testimony of the victim explained a  
3 scenario where the abuse began after she resided in Newberg. The abuse would occur at the  
4 home of the Defendant in Maxbass on a weekly basis and also at least every weekend and  
5 more often in the summer when she did not have school. This is contradicted when T.M. is  
6 asked about visiting her father in Wisconsin. She explains that she would be visiting him in  
7 the summer but had forgotten until asked at trial. These trips to Maxbass would occur after  
8 the Defendant picked her up and drove her to his home after giving an explanation to  
9 someone, either T.E. or R.B. about why he would pick her up. Repeatedly T.M. stated that  
10 specifically her mother would be informed of this arrangement. This is also contradicted by  
11 T.M. explaining sometimes her mother would know, but sometimes she would not know  
12 until later. The abuse never occurred in her home in Newberg according to T.M.

13  
14  
15 [¶93] This is contradicted by the testimony of the mother who stated she had no idea any of  
16 these things had been happening, she had no conversations with the Defendant and did not  
17 associate with him. The mother also testified she assumed that T.M. was under the care of  
18 her boyfriend R.B. or one of the neighbors after school.

19 [¶94] Both scenarios are further contradicted by the testimony of K.S. who stated that she  
20 and T.M. would often be at the home of T.M. in Newberg alone after school and that she had  
21 witnessed incidents in there, a scenario expressly denied by T.M. and T.E.

22  
23 [¶95] The Court has been clear that the jury shall have the exclusive task to weigh the  
24 evidence and judge credibility of the witnesses State v. Manke, 328 N.W.2d 799-805 (N.D.  
25 1982). In addressing concerns of contradictory testimony, the court has also expressed that  
26 the uncorroborated testimony of a rape victim is sufficient to sustain a conviction State v.  
27

1 Schill, 406 N.W.2d 660-662 ( internal citations omitted)

2 [¶96] The Defendant opines that the level of contradiction creates a body of evidence that  
3 cannot allow a reasonable inference to support guilt. The facts that are contradicted in the  
4 testimony are not of a minor detail or recollection, but present entirely different locations,  
5 and entirely different fact scenarios. The root of the allegations involve a scheme of  
6 conversations to justify the Defendant transporting a young child without suspicion by  
7 providing legitimate excuses to the mother, T.E. The testimony of T.E. clearly shows that she  
8 did not ever have these conversations. The issues in the present case can not be considered  
9 mere lack of corroboration or an issue of recollection. The contradictions are about more  
10 than minor details and effect entire elements of the allegations as presented by T.M.  
11

12 [¶97] On appeal when addressing sufficiency of the evidence, the Court has said that it will  
13 not resolve conflicts or weigh the credibility of witnesses but will only determine whether  
14 there is competent evidence that would allow a jury to draw a reasonable inference tending to  
15 prove guilt and fairly warrant a conviction. State v. Chacano 2013 ND 8, ¶ 19, 826 N.W.2d  
16 294, 301.  
17

18 [¶98] The testimony presents facts that cannot reasonably or competently be reconciled.  
19 The testimony of K.S. presents a set of facts contradicting the victim regarding supervision  
20 after school stating they were often together at T.M.'s house after school alone, that she  
21 observed sexual acts in the home in Newberg, which T.M. stated did not occur, and that they  
22 would be together on weekends while T.M. testified she was always at the Defendant's home  
23 in Maxbass being abused.  
24

25 [¶99] The Court in State v. Krull, (ND 63, 693 N.W.2d 631) was presented with a similar  
26 concern because of the victims testimony being contradictory with their prior statements to  
27

1 law enforcement. The Court explained:

2 "In an appeal challenging the sufficiency of the evidence, this Court " look[s]  
3 only to the evidence most favorable to the verdict and the reasonable  
4 inferences therefrom to see if there is substantial evidence to warrant a  
5 conviction.( citations omitted ) "A conviction rests upon insufficient evidence  
6 only when no rational fact finder could have found the defendant guilty  
7 beyond a reasonable doubt after viewing the evidence in a light most  
8 favorable to the prosecution and giving the prosecution the benefit of all  
9 inferences reasonably to be drawn in its favor.(Citations omitted) This  
10 Court "will not weigh conflicting evidence, nor judge the credibility of  
11 witnesses."(Citations omitted). The existence of conflicting testimony or other  
12 explanations of the evidence does not prevent the jury from reaching a  
13 conclusion the evidence is clear beyond a reasonable doubt.(Citations omitted)  
14 "A jury may find a defendant guilty even though evidence exists which, if  
15 believed, could lead to a verdict of not guilty.(Citations omitted)."

16 [¶100] In Krull, the victims were two (2) young children and they had varying descriptions  
17 of the acts that occurred. This Court resolved the issues of testimony by explaining that  
18 opportunity was given to bring the credibility of the girls into question and the jury chose to  
19 believe the girls and acknowledged that the Defendant had also implicated himself. (Id. At  
20 ¶15)

21 [¶101] In the present case, the contradictions affect more than the details of one or more  
22 incidents. But the method of facilitation, location, frequency, time, and resulting emotional  
23 impact are all entirely contradicted. Corroboration of any of the witnesses is entirely  
24 nonexistent when looking at the totality of the testimony.

25 [¶102] In Krull, the inconsistencies effected details of the acts, but at minimum the location,  
26 time and general nature of the acts remained consistent to some extent.

27 [¶103] The plethora of contradictions in the evidence in the present case rises to such a level  
that should be determined as not only insufficient but so confusing that no rational or

competent inferences can be drawn to establish proof of guilt beyond a reasonable doubt.

[¶104] An Iowa Court has addressed a similar set of circumstances in State v. Smith, 508 N.W. 2d. 101 (Iowa App. 1993) wherein the Defendant in Smith was convicted of sexually assaulting his stepdaughters. The Smith Court reversed the conviction after reviewing the testimony because they determined that testimony of the victims was contradictory and inconsistent and some descriptions “bordered on the absurd”. (Id at 103)

[¶105] The testimony in the Smith case included multiple acts. The descriptions sometimes lacked detail and were inconsistent and included situations in the presence of other people. These are the same issues in the present case. The argument may be made that in contrast to Smith, the descriptions provided by T.M. had detail, however, the concern is that those details were rarely consistent.

[¶106] The testimony of T.M. also bordered on the absurd when describing the incidents in Maxbass and explaining often after the abuse she would proceed to go play next door while experiencing the pain and trauma of being molested moments prior or she would, at the age of eight (8) years old, proceed to go out and mow the Defendant's lawn. ( Trial Transcript Volume 1 at pages 146-147 )

[¶107] This issue is compounded by the testimony of the T.E. having no recollection of weekly conversions about T.M. going to Maxbass, dropping her off in Maxbass, or having any knowledge of the constant visits to Mr. Benson. ( citations omitted)

[¶108] As well the testimony of K.S. stating that she did not recall any conversations with T.M.. about any incident at the Defendant's home in Maxbass. (citation omitted)

[¶109] The amount of inconsistencies and contradictions impact multiple variables of the allegations as described by T.M. creates confusion. The effect of the testimony of each



1 witness creates unreasonable circumstances for a jury to competently determine the weight  
2 or credibility of any or all the witnesses.

3 [¶110] Did the trial Court abuse its discretion in overruling objection from counsel regarding  
4 the testimony of K.S. Due to it being confusing and prejudicial?

5 At trial after the victim, T.M., had established the basis and the details of her allegations, in  
6 anticipation of the testimony of K.S. The defendant motioned to exclude the testimony on the  
7 grounds that her testimony would include facts that the victim had specifically denied and  
8 that the testimony would equate to the State impeaching its own witnesses, and cause  
9 confusion in the evidence. (Trial Transcript Volume 1 at page 188)

10 [¶111] A specific rule was not cited to the trial court. However, The applicable authority the  
11 Defendant cites here is under Article IV of the North Dakota Rules of Evidence and more  
12 specifically set out as follows:

13 [¶112] N.D.R.Ev. Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice,  
14 Confusion, or Waste of Time.

15 “Although Relevant evidence may be excluded if its probative value is  
16 substantially outweighed by the danger of unfair prejudice, confusion of the  
17 issues, or misleading the jury, or by consideration of undue delay, waste of  
18 time, or needless presentation of cumulative evidence.”

19 [¶113] In the present case, the testimony of the victim T.M. substantiating and detailing her  
20 allegations is the evidence. The testimony was received through direct examination and  
21 lengthy cross examination. The opportunity arose many times to allow for the possibility of  
22 suggesting incidents may have occurred at her home in Newberg. However, the victim  
23 confidently and specifically testified that no incidents had occurred there. ( citation omitted)

24 [¶114] The testimony of T.M. concluded at the end of the first day of trial. The Defendant  
25  
26  
27

1 expressed that he would like to make a motion regarding the testimony of K.S. (Trial  
2 Transcript Volume 1 at page 186)

3 [¶115] After the jury was dismissed for the day, the Defendant voiced concern about the  
4 nature of the testimony from K.S. The Court was informed that from reviewing the statement  
5 provided by K.S. to law enforcement the information that was going to be provided had been  
6 excluded by the victim. The Court was advised that the foundation for such testimony had  
7 been specifically and confidently denied by T.M. when she assured the jury and counsel that  
8 no acts had taken place in the home in Newberg. (Trial Transcript Volume 1 at pages 188-  
9 190)

11 [¶116] The testimony of K.S. would present an entirely different set of facts for the jury  
12 including, but not limited to, the fact that she had observed incidents occurring at the home  
13 in Newberg.

15 [¶117] The concern was stressed that these things had been entirely denied by T.M. and there  
16 was no foundation to allow these facts in, also that this set of facts varied from the testimony  
17 of T.M. to such an extent that it would equate to the State impeaching its own witnesses and  
18 cause confusion to the jury and result in prejudice. The statements of K.S. regarding  
19 incidents that she had witnessed was not supported by any testimony of T.M. The objection  
20 was based on the complete impossibility in light of the testimony that the version of facts  
21 K.S. was suggesting had been specifically denied by T.M.( Trial Transcript Volume 1 at  
22 pages 188-190) The prejudicial effect of an alternative and completely different set of facts  
23 unsupported and specifically denied by testimony of T.M. clearly would have tainted the  
24 information that the jury was supposed to weigh in determining what they believed.

26 [¶118] The Court denied the motion and expressed it may be beneficial to the Defendant for  
27

1 impeachment purposes stating “ it would be at the State's own risk” and that we will see how  
2 it plays out.(Trial Transcript Volume 1 at page 188 line 14)

3 [¶119] The Defendant reiterated that the concern of confusion and the impact on the jury.  
4 (Trial Transcript Volume 1 at page 188 lines 15-16)

5 [¶120] The probative value of this testimony was outweighed by the confusion and prejudice  
6 it would create. The allegations of multiple sexual acts had been established by the T.M. at  
7 length with detail and confidence through her testimony. The scenario to be presented by  
8 K.S. had been specifically ruled out by T.M. allowing this testimony skewed the information  
9 the jury was given by T.M. and confused the issues. This set of facts was not supported by  
10 anything T.M. had testified to it would not add any corroboration to the testimony of T.M.  
11

12 [¶121] By allowing this testimony without limitation, it impacted the role of the jury to  
13 weigh the evidence presented by the T.M. by presenting a different and unsupported version  
14 of facts that were specifically denied by T.M. as her testimony was primarily the evidence  
15 against the Defendant and it affected the Defendant's ability to receive a fair trial by creating  
16 confusion and prejudice.  
17

18 [¶122] The testimony of K.S. may have been appropriate within the limits of Rule 801  
19 allowing her to testify to past consistent statements from T.M. about what she was  
20 experiencing but this limitation was not imposed.  
21

### 22 **Conclusion and Remedy Requested**

23 [¶123] The level of contradiction that exists in the testimony rises to the extent that no  
24 rational fact finder could conclude guilt was proven beyond a reasonable doubt. The  
25 confusion that arises from the testimony because of these contradictions as they apply to  
26  
27

1 substantial elements of the allegation as described by T.M. make it impossible for any  
2 reasonable or competent inferences to be made. The abuse of discretion by the trial in  
3 allowing the unrestricted testimony of K.S. facilitated this confusion and impacted the ability  
4 of the jury to apply the jury instructions and reach a fair verdict.

5 ¶124] The Defendant asks for a reversal of his conviction for the above stated reasons and  
6 to have the case remanded back to the district court for further proceedings to enter an  
7 acquittal or, in the alternative, a new trial.  
8

9  
10  
11  
12  
13 Respectfully Submitted,  
14

15 Dated this 15<sup>th</sup> day of November, 2013.

16 

17 Ryan J. Thompson  
18 Attorney at Law  
19 ND. ID #: 06621  
20 409 4<sup>th</sup> Avenue NE  
21 Devils Lake, ND 58301  
22 Telephone: 701)662-2177  
23 Fax: 701)662-2178  
24 Attorney for Defendant-Appellant  
25  
26  
27

**IN THE SUPREME COURT  
NORTH DAKOTA**

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

NOV 15 2013

State of North Dakota, )

Plaintiff-Appellee, )

vs. )

Barry Lee Benson, )

Defendant-Appellant. )

STATE OF NORTH DAKOTA

Supreme Court No. 20130179  
District Court No. 05-2012-CR-128

**AFFIDAVIT OF SERVICE  
OF SERVICE BY MAIL**

STATE OF NORTH DAKOTA )  
 )SS.  
COUNTY OF RAMSEY )

**KelSie Mertens**, being first duly sworn, deposes and says: that she is of legal age, a citizen of the United States, and is not a party to, nor has she an interest in the above entitled action; that on November 15, 2013 she deposited, with postage prepaid in the United States mail in the city of Devils Lake, North Dakota a true and correct copy of the following document(s) in the above-entitled matter:

- 1. BRIEF OF THE APPELLANT**
- 2. APPENDIX**

That said envelope(s) was addressed as follows:

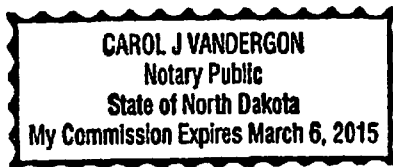
Anthony Benson  
Bottineau Assistant State's Attorney  
616 Main  
Bottineau, ND 58318


Page 2  
Affidavit of Service By Mail

To the best of your affiant's knowledge, information and belief, such address as given above was the actual post office address of the party intended to be so served. That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Criminal Procedure.

  
KelSie Mertens

Subscribed and sworn to before me this 15<sup>th</sup> day of November, 2013.



  
Carol J. Vandergon, Notary Public  
Ramsey County, North Dakota  
My Commission Expires: March 6, 2015

IN THE SUPREME COURT  
NORTH DAKOTA

State of North Dakota )

Plaintiff-Appellee )

Supreme Court Case: 20130179

District Court Case: 05-2012-CR-00128

vs. )

AFFIDAVIT OF SERVICE

Barry Benson, )

Defendant-Appellant. )

[¶ 1] I, KelSie Mertens, being first duly sworn, deposes and says that on the 15<sup>th</sup> day of November, 2013, she served one (1) original unbound and seven (7) bound copies of the Appellant's Brief and Appendix upon the following person by placing them in an envelope with postage paid, at the Devils Lake Post Office, Devils Lake, North Dakota, addressed as follows:


[¶ 2] Clerk of Supreme Court of North Dakota  
600 East Boulevard Avenue  
Department 180  
Bismarck, ND 58505-0530

[¶ 3] And further certify that an electronic copy was filed with the Supreme Court on November 15<sup>th</sup>, 2013.

[¶ 4] Dated this 15<sup>th</sup> day of November, 2013.

  
KelSie Mertens

[¶ 5] Subscribed and sworn to before me this 15<sup>th</sup> day of November, 2013.

  
Ryan J. Thompson, Notary Public  
Ramsey County, North Dakota

RYAN J. THOMPSON  
Notary Public  
State of North Dakota  
My Commission Expires Nov. 6, 2015