

**IN THE SUPREME COURT
 STATE OF NORTH DAKOTA**

State of North Dakota,

Plaintiff/Appellee,

vs.

Jean-Michael Kisi,

Defendant/Appellant.

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Supreme Court No.
 20170373

Williams County District No.
 53-2015-CR-02304

ON APPEAL FROM VERDICT OF GUILTY AND SENTENCE
 FROM THE DISTRICT COURT
 FOR THE NORTHWEST JUDICIAL DISTRICT
 WILLIAMS COUNTY, NORTH DAKOTA
 THE HONORABLE JOSH B. RUSTAD, PRESIDING

BRIEF OF APPELLANT

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[¶1] STATEMENT OF THE ISSUES

[¶2] The evidence presented at trial was insufficient to sustain the guilty verdict on both counts upon which Kisi was found guilty, specifically:

1. The evidence presented at trial was insufficient to sustain the guilty verdict upon the Gross Sexual Imposition charge.
2. The evidence presented at trial was insufficient to sustain the guilty verdict upon Accomplice to Murder.

[¶3] STATEMENT OF THE CASE

[¶4] This is an appeal arising from verdict of guilty following a jury trial and sentence in Williams County District Court for the offenses of Gross Sexual Imposition, a violation of § 12.1-20-03, N.D.C.C., and Accomplice to Attempted Murder, a violations § 12.1-03-01, N.D.C.C.

[¶5] On November 25, 2015, Jean-Michael Kisi (hereinafter “Kisi”) was charged by criminal complaint in Williams County district court with four counts, specifically Gross Sexual Imposition, a violation of § 12.1-20-03, N.D.C.C.; Criminal Conspiracy to Commit Gross Sexual Imposition, a violation of § 12.1-06-04, N.D.C.C.; Conspiracy to Commit Attempted Murder, a violation of § 12.1-06-04, N.D.C.C. and Accomplice to Attempted Murder, a violation of § 12.1-03-01, N.D.C.C. It was alleged that Kisi had engaged in conduct which would constitute Gross Sexual Imposition and had conspired with, and was an accomplice to, one David Ntoto Mbulu (hereinafter “Mbulu”) to commit Gross Sexual Imposition upon and to Murder a female victim (hereinafter “C.B.”).

[¶6] On November 19, 2015, Mbulu, Kisi, and C.B. traveled together from Williston to Minot, North Dakota. The purpose of the trip was twofold: first, to allow C.B. to cash a check written out to a large amount; and second, to celebrate Kisi’s

twenty-first birthday. C.B. had promised Mbulu that she would pay him three hundred (\$300) to transport her to Minot. However, when the three arrived in Minot and C.B. attempted to cash the check, it was discovered that the check was phony. A decision was made to rent a motel room, with C.B. to pay for the room. However, C.B.'s credit card was declined. Nevertheless, the desk clerk allowed them to occupy the room and to pay in the morning. After sleeping in the room, the three left the motel without paying and proceeded west to Williston. At some point, the vehicle went off the highway onto a rarely traveled country road, where C.B. was attacked, stripped, beaten with a car jack, and left in temperatures of between 18-22 degrees Fahrenheit with a 20 mile per hour wind. Transcript, 570:11-13.

[¶7] Kisi made his initial appearance before a magistrate on November 25, 2015. Following a written waiver of preliminary hearing, Kisi was arraigned on January 7, 2016, and pled Not Guilty to the charges in the Information. Mbulu was also charged in Case No. 53-2015-CR-02302, but on June 24, 2016, the trial judge denied the State's Motion to Consolidate the two cases in an Amended Order. No significant pretrial motions were filed in the instant case.

[¶8] A 12-person jury trial was held from June 26 through June 30, 2017, after which Kisi was found guilty of Gross Sexual Imposition, and Accomplice to Attempted Murder. Kisi was acquitted of Criminal Conspiracy to Commit Gross Sexual Imposition and Conspiracy to Commit Attempted Murder.

[¶9] At the conclusion of the State's case-in-chief, Kisi made a motion under N.D.R.Crim.P. 29 arguing there was insufficient evidence presented to sustain the State's burden of proof regarding the two conspiracy charges and the accomplice to commit

attempted murder charge. Defense counsel conceded that sufficient evidence had been presented upon the Gross Sexual Imposition charge. The State opposed the motion. However, the trial court, while acknowledging the concession by the defense regarding the Gross Sexual Imposition charge, nevertheless denied the same and found there was sufficient evidence for the Gross Sexual Imposition charge in the case to go forward. The trial court also denied the Rule 29 motion to dismiss regarding the other three charges. Tr., 771-778.

[¶10] Kisi was found guilty of Gross Sexual Imposition and of Accomplice to Attempted Murder and acquitted of the two other charges. After the guilty verdict upon the two criminal charges, a sentencing hearing was held October 12, 2017. The Criminal Judgment was filed on October 13, 2017. Kisi was sentenced as follows:

1. Incarceration with the North Dakota Department of Corrections for a period of thirty-five (35) years, with ten (10) years of this sentence suspended for a period of ten (10) years.
2. Supervised probation following release from incarceration for a period of ten (10) years, and comply with conditions set forth in an Appendix A to the Criminal Judgment.
3. Credit for six hundred eighty-one (681) days previously served.
4. Fees as follows:
 - a. Criminal Administration Fee: \$ 900.00
 - b. Victim-Witness Fee: \$ 25.00
 - c. Defense/Facility Admin Fee: \$ 100.00
 - d. Fee Totals: \$1,025.00.
5. Register as a sexual offender and complete sex offender and anger management programs.
6. Have no contact with C.B. or her family.
7. Restitution to be determined within ninety (90) days.
8. Sentence concurrent upon both counts.

[¶11] Kisi filed a timely filed a notice of appeal on October 25, 2017. Register of Actions, Doc ID# 250. Kisi argues there was not sufficient evidence to support a finding of guilt beyond a reasonable doubt on both counts with which he was found guilty.

[¶12] STATEMENT OF THE FACTS

[¶13] Malina McClure, the property and evidence technician for the Williams County Sheriff's Office testified about the physical evidence which had been gathered in this case. Various items of evidence and photographs were introduced without objection. Tr. 198-220.

[¶14] Dr. Justin Schafer, M.D., who initially examined C.B. at the emergency room in Williston, North Dakota, testified about the physical injuries to C.B., specifically regarding her head injuries. After this examination, C.B. was transported to a medical facility in Minot, North Dakota. Tr. 223-233.

[¶15] Larry Welo, who was traveling on State Highway 42 on November 20, 2015, testified he encountered C.B. walking along the roadway wearing nothing but a t-shirt and with a bloody face. He also testified it was very cold that day. Welo identified the area where he stopped for C.B. An unidentified passing semi driver also stopped and called 911. Welo was directed by the 911 dispatcher to take C.B. to the Epping Fire Hall in Epping, North Dakota. Welo also noticed a gash on the left side of C.B.'s head. He took off his Carhartt jacket and placed it over C.B. He drove C.B. to the Epping Fire Hall and then cooperated with two deputies who were investigating the incident. Tr. 238-248.

[¶16] Dr. Maria Li, a practicing neurosurgeon at Trinity Hospital in Minot, North Dakota, testified that when she examined C.B., C.B. told her she had been hit multiple times on the head with a tire iron. Dr. Li also testified that C.B. appeared to be in a state of psychological shock due to exposure to the elements. Dr. Li testified as to the extent of C.B.'s injuries. Tr. 248-263.

[¶17] Leandra Reinholdt, a volunteer worker for the Ray Ambulance Service, testified about a report of the incident, which she had prepared. A copy of this report was introduced into evidence with no objection. She also testified as to C.B.'s physical appearance and apparent mental state on November 20, 2015, when she was transported from the Epping Fire Hall to Williston for medical treatment. Tr. 265-277.

[¶18] Williams County Deputy Sheriff Nathan Pederson, who was one of the law enforcement officers who was initially on the scene where the assault of C.B. had occurred, testified about what he observed. He also testified about his discussions with C.B. and others. Several photographs of the scene and evidence which were located at the scene of the assault were introduced into evidence with no objection. Tr. 280-314.

[¶19] Registered Sexual Assault Nurse Examiner (SANE) Robin Pursifull testified regarding the nature of her position and her qualifications. She then testified about her examination of C.B., including her external examination. She also took photographs of C.B.'s injuries, and the photographs from this examination were introduced into evidence without objection. There was some testimony regarding whether sand and gravel, which was found in the vaginal cavity, could be consistent with sitting on the road or would be consistent with penetrative sexual acts. Pursifull testified that could not answer that question. Defense counsel objected to this line of questioning, which was sustained. On cross examination, she testified that the sand and gravel were found in the posterior fourschette, which is the actual entry to the vaginal area. She also gave some testimony regarding ligature marks on C.B.'s neck. Tr. 315-333.

[¶20] Detective Levi Cabler of the Williams County Sheriff's Office testified he was part of the investigation into a sexual assault on November 20, 2018, which also

included Deputy Nathan Peterson. Detective Cabler testified about various items of evidence which were collected at the scene of the assault and photographs which were taken of the scene, including a tire jack, a Greyhound ticket with C.B.'s name on it, blood, shoe prints, and other items at the scene, which were admitted into evidence without objection. He also prepared a video of an interview he conducted with Kisi, which was played for the jury. In that interview, Kisi posited his explanation of a "fake rape" in an effort to save C.B. from Mbulu. Tr. 336-410.

[¶21] Former Patrol Deputy Austin Bagley of the Williams County Sheriff's Department testified he was called to an apartment complex on November 20, 2015, to secure a vehicle which was suspected of being involved in a crime. The vehicle was then loaded and transported to the Williams County Law Enforcement Center. Tr. 415-417. Deputy Bagley testified about several photographs of the contents from a search of the vehicle, which were admitted into evidence without objection, and to establish a chain of custody. Tr. 418-420.

[¶22] Williams County Sheriff's Detective Caleb Fry testified he collected clothing from Mbulu and Kisi. Detective Fry testified about several photographs of the contents from a search of the vehicle, which were admitted into evidence, and to establish a chain of custody. He also testified that he collected DNA samples and clothing from both Mbulu and Kisi. Detective Fry testified Mbulu's clothing had blood stains, but Kisi's did not have any blood stains. Tr. 421-430.

[¶23] Emily Verstraet, a forensic scientist with the North Dakota State Crime Laboratory, testified regarding her analysis of DNA on various items of evidence, which were admitted into evidence as exhibits without objection. These included swabs which

were collected from Kisi's hands and penis which showed a connection to C.B. Tr. 431-459.

[¶24] Kyle Splichal, a forensic scientist with the North Dakota State Crime Laboratory, testified regarding his analysis of DNA from the victim's SANE (sexual assault) kit. Tr. 460-519. Splichal testified there was a positive result for C.B.'s DNA on the head of Kisi's penis and on Kisi's right middle finger. Tr. 498:20-25; 500:13-23. On cross-examination, Splichal testified that this could have resulted from "touch DNA" in which epithelial cells are transferred from one person to another. Tr. 516:19-25. This was further explored on redirect examination. Tr. 518:15-25.

[¶25] Lisa Gemar, a criminal intelligence analyst with the North Dakota Bureau of Criminal Investigation, testified about a forensic examination of the cell phones from Mbulu and Kisi, which indicated that certain signals from those cell phones were consistent with a trip from Minot to Williston. Tr. 524-542.

[¶26] Charissa Remus, a special agent with the North Dakota Bureau of Criminal Investigation, testified regarding her role in finding photographs of Mbulu and Kisi on social media and locating Kisi's address. Tr. 543-546.

[¶27] Sergeant Detective Amanda McNamee, Williams County Sheriff's Department, testified that she interviewed C.B. in the emergency room and took photographs of C.B., and of Mbulu's vehicle, including the items in the trunk, which were introduced as exhibits without objection. She also testified about her contacts with C.B., Mbulu, and Kisi. Tr. 548-592. Detective McNamee testified that the weather conditions on November 20, 2015 were 18-22 degrees Fahrenheit, with a 20 mile per hour wind. Tr. 570:11-13. On cross-examination, Detective McNamee testified that she

did not observe any blood on Kisi's clothing. Tr. 594-595. On redirect, Detective McNamee testified that Kisi stated he placed C.B.'s clothing in the trunk of Mbulu's vehicle. Tr. 595:16-22.

[¶28] Joshua Melom, a patrol officer with the Minot Police Department, testified that he had retrieved the sexual assault kit from C.B. at Trinity Hospital in Minot. Tr. 596-598.

[¶29] Detective McNamee was recalled to testify about the collection of vehicle keys, cell phones, and clothing from Mbulu and Kisi. She also testified about general factors in investigating sexual assault crimes. She then testified about an interview with Kisi, a video of which was played for the jury. Tr. 599-695.

[¶30] Williams County Sheriff's Department Patrol Corporal Chris Lindquist testified that he observed C.B. at the Epping Fire Hall in Epping, North Dakota, on November 20, 2015, as he was investigating an alleged assault. He testified he saw C.B. dressed only in a long shirt and a jacket given to her by Larry Welo, who had picked her up after the assault. Corporal Lindquist testified that he observed C.B. was covered in dried blood on her face and was dripping blood down her legs. He testified she appeared to have had a traumatic experience. She had a large bruise on the back of her head and a defensive wound on her right hand. He testified that Mbulu and Kisi were persons of interest and issued a BOLO (be on the lookout) for a Chrysler vehicle which they were suspected of driving. Corporal Lindquist also assisted in obtaining a search warrant for the Chrysler and during the execution of the search warrant, located a pair of blue ladies' underwear, a pair of pink sweatpants, a pink jacket and another jacket in the Chrysler's trunk. Tr. 699-707.

[¶31] Williams County Sheriff's Department Patrol Corporal Tony Helman testified that on November 20, 2015, he was on patrol and was called to assist in the apprehension of Mbulu and Kisi at an apartment building. Upon Kisi's arrest, Corporal Helman conducted a search of Kisi's person, and he found a small quantity of marijuana in Kisi's pocket.

[¶32] North Dakota Bureau of Criminal Investigation Special Officer Derek Bernier testified that he conducted a cell phone analysis of the cell phones belonging to Mbulu and Kisi. On Mbulu's cell phone, Special Officer Bernier testified he discovered two (2) videos from November 20, 2015, which were played to the jury. These videos involved Mbulu, Kisi, and C.B. and appeared to be an argument between the three of them which had been taken while the three were in Minot. On this video, there were statements by Mbulu to the effect that Mbulu would leave C.B. on the highway and an intimation of a sexual nature by Kisi. Tr. 716-728.

[¶33] Lamonte Jacobson, an analyst formerly of the North Dakota State Crime Laboratory, testified he had tested the green leafy substance found on Kisi and determined the substance to be marijuana. Tr. 728-734.

[¶34] C.B. testified that on November 19, 2015, she made arrangements to cash a check by having Mbulu drive her to Minot for perhaps \$300, which was to be paid when she cashed her check. She was unaware that Kisi would be traveling with them until Mbulu picked her up in his automobile. She testified there were no plans for them to stay in Minot that night. When she got to the bank in Minot, she found out the check was not real and she could not cash it. At that point, Kisi and Mbulu became angry. It was decided they would stay in a motel in Minot that night and C.B. would pay for the room.

C.B. said she attempted to pay for the room, but her credit card was declined. However, the desk clerk allowed them to stay overnight. C.B. testified the next morning Kisi seemed upset and angry, and he was cursing because they could not pay for the room. She testified “[i]t was kind of hot during the day but cold at night.” Tr. 746:17-18. At some point on the trip back to Williston, Kisi, who was driving, pulled off the road out “in the middle of nowhere” and stopped the vehicle. Tr. 747:6. She was told to get out of the car, and Mbulu came up behind her, put his arm around her neck, and slammed her to the ground. Mbulu began choking her and hitting her. Tr. 747:7-25. C.B. testified Kisi “was just standing there the whole time.” Tr. 748:2. Kisi then came over to C.B., took off her pants, jacket, and clothes until she only had on a t-shirt. C.B. testified Kisi “started messing with me down there with his hands”, specifically in her vaginal area. Tr. 748:9-20. Mbulu then had C.B. sit on a surface of grass and gravel. Tr. 749:10-13. C.B. testified Kisi directed Mbulu to get something out of the trunk, which he did, and when Mbulu returned, he had an object in his hand and began hitting C.B. on her head until she stopped moving. Tr. 750:1-5. C.B. was apparently unconscious for a period of time. C.B. apparently regained consciousness fairly quickly, and when she saw Mbulu and Kisi standing “pretty far away”, she hid in some bushes. Tr. 7-22. Although Mbulu and Kisi looked for her, they could not find her. They then left. Tr. 737-751. C.B. then identified various photographs, which were introduced into evidence. Tr. 752-756.

Upon direct examination, C.B. denied that Kisi had digitally penetrated her:

Q. (By Ms. Wilder) A little more detail, if we could, when you mentioned that Mr. Kisi was messing around down there. I think you said he touched you with his fingers; do you recall that testimony?

A. Yes.

Q. Do you know if any part of his body was inserted into you?

MR. MOTTINGER: Objection, leading.

THE COURT: Overruled.

Q. (Ms. Wilder continuing) Go ahead.

A. Um, no. I really don't remember. I don't think that he did. I just thing that he was messing with me, like playing with me down there with his hands. He sexually assaulted me. I don't thing – I don't think he raped me because the doctor said that I was fine down there. I didn't have any bruising or any rips or tears.

Tr. 755:19-25; 756:1-9.

[¶35] On cross-examination, C.B. testified that while Mbulu was assaulting her, Kisi was not involved in this assault and Kisi did not hit her or strike her with the tire jack. Tr. 763:7-14. She testified while Mbulu held her on the ground, Kisi took off her pants. Tr. 763:15-19. C.B. testified Kisi never touched her with his penis. Tr. 764:1-3:

Q. You said he (Kisi) was messing around down there with his hands.

A. Yes.

Q. He touched you?

A. Yes.

Q. Never penetrated you with his fingers?

A. I think maybe he did, but he didn't do it with his penis. With his hands he did, but with his penis he did not.

Q. You think he did, or you know he did?

A. I know ----

Q. And there's a difference, ma'am.

A. Yes, I know he did.

Q. What happened at that point?

A. I was squirming around on the ground. I was very angry. Um, and after they – after he was finished, David went and got the car jack and then started hitting me in the head with the car jack.

Q. What was Mr. Kisi doing when David was hitting you with the car jack?

A. Standing there watching.

...

Q. But just so we're clear on this, Mr. Kisi never struck you with the jack?

A. No.

Q. Mr. Kisi never hit you?

A. No.

Q. Mr. Kisi never held you down while Mr. Mbulu was hitting you?

A. (No response.)

Q. Correct?

A. Um, no.

Q. And Mr. Kisi never told Mr. Mbulu to hit you either, did he?

A. I don't know what they – had a conversation when we got out of the car so.

Q. I guess the question is, you never heard Mr. Kisi tell Mr. Mbulu to do anything to you, did you?

A. No. I didn't hear the conversation.

Tr. 764:7-23; 767:22-25; 767:1-13.

[¶36] The State rested, and the defense made a motion to dismiss, pursuant to Rule 29, NDRCrP. The motion was denied. *See* [¶9], above.

[¶37] Kisi testified on his own behalf. Generally, he testified that he was asked to ride with Mbulu to Minot, and since it was his birthday, he agreed. He did not know in advance that C.B. would also be going along. Kisi testified that C.B. had a check for \$100,000 that she intended on cashing, but when she went to a bank in Minot, she found the check was no good. They decided to stay at a motel, with C.B. to pay for the rooms. Her credit card was declined, but they were allowed to stay anyway. They left the next morning without paying the bill. Kisi admitted that the arguments on the two videos took place, but after the three left Minot, things calmed down within the vehicle. Kisi was driving, and Mbulu was providing directions. At some point, Mbulu directed Kisi to turn off the highway onto a two track country road and stop. Kisi testified Mbulu and C.B. were arguing, and Mbulu finally told C.B. to get out of the car and walk. When C.B. got out of the car, Mbulu slammed her to the ground and began choking her. Tr. 781-795. Kisi testified he got out of the car, saw C.B. “kicking for her life”, and tried to pry Mbulu’s arm off C.B. neck. Tr. 795:20-25. Kisi testified C.B. kicked Kisi in his private area, which made him feel “frustrated.” Tr. 796:2-8. Kisi testified he attempted to yank Mbulu’s arm off C.B. and then pulled off her pants. Kisi testified he removed his outside pants, but he kept on his boxer shorts and possibly another item of underclothing. Other items of C.B.’s clothing items were removed, and Kisi admitted he placed his hand on C.B.’s “vaginal”, but he denied penetrating her with his fingers. Tr. 796:10-25; 797; 798:1-13. Kisi then threw some of C.B.’s clothing in the back seat of the car and

returned to sit down “with my hands clenched in my private area,” presumably because of the pain. Tr. 800:7-9. Kisi testified that he saw C.B. on her hands and knees on the ground, with Mbulu beating C.B. over the head with the car jack that Mbulu had taken from the car trunk. Kisi testified he got out of the car and ran toward Mbulu, yanked him by the collar, told him to get his “ass” in the car, and took off in the automobile. When Kisi and Mbulu left C.B., Kisi testified he could physically see in the rear view mirror she was alive. Tr. 800:12-24.

[¶38] Kisi testified he lied to law enforcement when he was interviewed twice. He said he was less than truthful because Mbulu threatened that he would harm him or his family. Tr. 801:18-25; 802:1-8.

[¶39] On cross-examination, Kisi admitted he took off C.B.’s clothing, and he testified on November 20, it was cold enough so he was wearing three layers of clothing. Tr. 809-810. Kisi also admitted that although he had a cell phone, he did not call 911 while Mbulu attacked C.B., since by the time anyone came, C.B. could be dead. He testified he saved C.B.’s life by physically restraining Mbulu and leaving the scene with Mbulu. Tr. 810. Kisi also testified he had approximately \$400 to \$500 on him for his trip to Minot, so he could have paid for the motel room. Tr. 814:24-15. However, he testified the motel would not accept cash. Tr. 816:10-11. Kisi testified he stated in one of his interviews with law enforcement that he had enacted a “fake rape” strategy to protect C.B. from Mbulu, which included demonstration which appeared on the video which had been played for the jury. Tr. 816-820.

[¶40] On redirect, Kisi explained that despite the flaws in his plan to help C.B. while she was being beaten by Mbulu with the car jack, he did separate Mbulu from C.B.,

got him in the car, and drove off. Tr. 821-822. Kisi was acquitted of two charges involving conspiracy, but was found guilty upon the offenses of Gross Sexual Imposition, and Accomplice to Attempted Murder. Kisi now appeals from his conviction.

[¶41] JURISDICTION

[¶42] Appeals are allowed from lower district courts to the Supreme Court as provided by law. N.D. Const. art. VI, § 6. A defendant may appeal from a verdict of guilty and final judgment of conviction. N.D.C.C. § 29-28-06.

[¶43] STANDARD OF REVIEW

[¶44] “When the sufficiency of evidence to support a criminal conviction is challenged, [the Supreme] Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction.” State v. Schmeets, 2007 ND 197, ¶ 8, 742 N.W.2d 513. This standard also applies to a review of the district court’s denial of a motion of judgment of acquittal under N.D.R.Crim.P. 29. State v. Romero, 2013 ND 77, ¶ 24, 830 N.W.2d 586.

[¶45] ARGUMENT

[¶46] The evidence presented at trial was insufficient to sustain the guilty verdict upon the Gross Sexual Imposition charge.

[¶47] The Supreme Court reviews the record at trial “to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction.” Schmeets, 2007 ND 197, ¶ 8, 742 N.W.2d 513. A conviction is not supported by sufficient evidence when no rational factfinder could have found the defendant guilty beyond a reasonable doubt, even after viewing the

evidence in the light most favorable to the prosecution and giving the prosecution all reasonable inferences. Id. The Supreme Court should reverse a guilty verdict if no reasonable factfinder could find the defendant guilty beyond a reasonable doubt. State v. Vantreece, 2007 ND 126, ¶ 14, 736 N.W.2d 428.

[¶48] It is the defendant's burden on appeal to show the evidence does not support the verdict even when all reasonable inferences are given to the prosecution. State v. Zottnick, 2011 ND 84, ¶ 14, 796 N.W.2d 666. The Supreme Court will not reweigh conflicting evidence or judge the credibility of witnesses. Id. A jury may find a defendant guilty even if evidence exists could lead to a verdict of not guilty. Id.

[¶49] A defendant may move the court to enter a judgment of acquittal prior to jury deliberations if the prosecution has failed to establish its case with sufficient evidence to sustain a conviction. N.D.R.Crim.P. 29(a). A motion under Rule 29 preserves the issue of sufficiency of the evidence for appellate review. Romero, 2013 ND 77, ¶ 24, 830 N.W.2d 586. Kisi made a motion for acquittal under N.D.R.Crim.P. 29 at the close of the State's case-in-chief, arguing there was insufficient evidence presented to sustain the State's burden of proof. The trial court denied the Rule 29 motion. *See* ¶9, above.

[¶50] Kisi was charged with violation of N.D.C.C. § 12.1-20-03, which states:

1. A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if:
 - a. That person compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;
 - b. That person or someone with that person's knowledge has substantially impaired the victim's power to appraise or control the victim's conduct by administering or employing without the victim's knowledge intoxicants, a controlled substance as defined in chapter 19-03.1, or other means with intent to prevent resistance;

- c. That person knows or has reasonable cause to believe that the victim is unaware that a sexual act is being committed upon him or her;
- d. The victim is less than fifteen years old; or
- e. That person knows or has reasonable cause to believe that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct.

2. A person who engages in sexual contact with another, or who causes another to engage in sexual contact, is guilty of an offense if:

- a. The victim is less than fifteen years old;
- b. That person compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being; or
- c. That person knows or has reasonable cause to believe that the victim is unaware that sexual contact is being committed on the victim.

3.

- a. An offense under this section is a class AA felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, if the actor's conduct violates subdivision a of subsection 1, or if the actor's conduct violates subdivision d of subsection 1 and the actor was at least twenty-two years of age at the time of the offense. For any conviction of a class AA felony under subdivision a of subsection 1, the court shall impose a minimum sentence of twenty years' imprisonment, with probation supervision to follow the incarceration. The court may deviate from the mandatory sentence if the court finds that the sentence would impose a manifest injustice and the defendant has accepted responsibility for the crime or cooperated with law enforcement. However, a defendant convicted of a class AA felony under this section may not be sentenced to serve less than five years of incarceration.
- b. Otherwise the offense is a class A felony.

4. If, as a result of injuries sustained during the course of an offense under this section, the victim dies, the offense is a class AA felony, for which the maximum penalty of life imprisonment without parole must be imposed unless the defendant was a juvenile at the time of the offense.

[¶51] Kisi maintains that the evidence supports his claim that he did not engage in a “sexual act” with C.B.; rather, he argues that the evidence indicates that he engaged in “sexual contact” with C.B.

[¶52] Subsection 4 of Section 12.1-20-02, N.D.C.C., defines “sexual act” as follows:

"Sexual act" means sexual contact between human beings consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any other portion of the human body and the penis, anus, or vulva; or the use of an object which comes in contact with the victim's anus, vulva, or penis. For the purposes of this subsection, sexual contact between the penis and the vulva, the penis and the anus, any other portion of the human body and the anus or vulva, or an object and the anus, vulva, or penis of the victim, occurs upon penetration, however slight. Emission is not required.

[¶53] Subsection 5 of Section 12.1-20-02, N.D.C.C, defines “sexual contact” as follows:

"Sexual contact" means any touching, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires.

[¶54] Kisi maintains that C.B.’s testimony about the incident indicates that Kisi did not penetrate her digitally. *See* ¶¶ 26-28, above. Kisi contends C.B.’s testimony corroborates his own testimony, that he did not digitally penetrate C.B. *See* ¶¶ 30, 32. Kisi’s testified he did intervene with Mbulu when Mbulu had C.B. on the ground and was choking her, but after being kicked in the private area, Kisi testified that he then removed C.B.’s clothing and touched her body, including her “intimate parts”, which would constitute “sexual contact.” However, Kisi contends the testimony of both Kisi and C.B. indicate that at no time was there any “sexual act” involving penetration, however slight, of C.B.’s vulva with any portion of his body. Kisi maintains there was only “sexual contact.”

[¶55] Defense counsel attempted to have a jury instruction included for lesser included offense of Sexual Imposition pursuant to N.D.C.C. § 12.1-20-04 and of Sexual Assault pursuant to N.D.C.C. § 12.1-20-07. Tr. 843-840. The trial judge permitted an instruction on sexual assault as a lesser included offense, but not on sexual imposition.

Tr. 856:7-25 to 859:1-3. Instructions on “sexual act” and “sexual contact” were also included.

[¶56] The jury found Kisi guilty of Gross Sexual Imposition and not of the lesser included offense. However, Kisi contends that the evidence does not support or sustain the guilty verdict on Gross Sexual Imposition. Kisi contends even when giving all reasonable inferences to the prosecution, the evidence presented at trial is not sufficient to support the guilty verdict.

[¶57] The evidence presented at trial was insufficient to sustain the guilty verdict upon Accomplice to Murder.

[¶58] Kisi contends the testimony and evidence presented at trial was insufficient to sustain a guilty verdict upon the Accomplice to Murder charge because C.B.’s testimony indicates that at no time did Kisi hit, strike, or otherwise physically cause injuries upon C.B. *See* ¶¶ 26-28, above. While Kisi, in his testimony, described the acts which he committed upon C.B., these acts and actions included removal of her clothing and groping her body. Kisi also testified that he managed to interrupt Mbulu when he was choking C.B. and later, when Mbulu was repeatedly striking C.B. on the head with a car jack. Kisi testified he managed to convince Mbulu to leave the scene and verified that she was still alive. *See* ¶¶ 30, 32, above. While this testimony by Kisi may outline an imperfect defense of others claim, Kisi contends his actions did not cause Mbulu to engage in the conduct with which Mbulu engaged and he did not command, induce, procure, or aid Mbulu in committing the acts for which Mbulu was ultimately convicted.

[¶59] Section 12.1-03-01, N.D.C.C., states as follows:

1. A person may be convicted of an offense based upon the conduct of another person when:

- a. Acting with the kind of culpability required for the offense, he causes the other to engage in such conduct;
- b. With intent that an offense be committed, he commands, induces, procures, or aids the other to commit it, or, having a statutory duty to prevent its commission, he fails to make proper effort to do so; or
- c. He is a coconspirator and his association with the offense meets the requirements of either of the other subdivisions of this subsection.

A person is not liable under this subsection for the conduct of another person when he is either expressly or by implication made not accountable for such conduct by the statute defining the offense or related provisions because he is a victim of the offense or otherwise.

2. Unless otherwise provided, in a prosecution in which the liability of the defendant is based upon the conduct of another person, it is no defense that:

- a. The defendant does not belong to the class of persons who, because of their official status or other capacity or characteristic, are by definition of the offense the only persons capable of directly committing it; or
- b. The person for whose conduct the defendant is being held liable has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

[¶60] Section 12.1-16-01, N.D.C.C., states as follows:

1. A person is guilty of murder, a class AA felony, if the person:

- a. Intentionally or knowingly causes the death of another human being;
- b. Causes the death of another human being under circumstances manifesting extreme indifference to the value of human life; or
- c. Acting either alone or with one or more other persons, commits or attempts to commit treason, robbery, burglary, kidnapping, felonious restraint, arson, gross sexual imposition, a felony offense against a child under section 12.1-20-03, 12.1-27.2-02, 12.1-27.2-03, 12.1-27.2-04, or 14-09-22, or escape and, in the course of and in furtherance of such crime or of immediate flight therefrom, the person or any other participant in the crime causes the death of any person. In any prosecution under this subsection in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:
 - (1) Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid the commission thereof;
 - (2) Was not armed with a firearm, destructive device, dangerous weapon, or other weapon which under the circumstances indicated a readiness to inflict serious bodily injury;

- (3) Reasonably believed that no other participant was armed with such a weapon; and
- (4) Reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury.

Subdivisions a and b are inapplicable in the circumstances covered by subsection 2.

2. A person is guilty of murder, a class A felony, if the person causes the death of another human being under circumstances which would be class AA felony murder, except that the person causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse must be determined from the viewpoint of a person in that person's situation under the circumstances as that person believes them to be. An extreme emotional disturbance is excusable, within the meaning of this subsection only, if it is occasioned by substantial provocation, or a serious event, or situation for which the offender was not culpably responsible.

[¶61] Defense counsel attempted to have a jury instruction included for lesser included offense of Reckless Endangerment pursuant to Section 12.1-17-03, N.D.C.C. This request was denied by the trial judge. *See discussion* Tr. 835:17-25 through 840:1-22; and Tr. 854:17-24.

[¶62] Section 12.1-17-03, N.D.C.C., states as follows:

A person is guilty of an offense if he creates a substantial risk of serious bodily injury or death to another. The offense is a class C felony if the circumstances manifest his extreme indifference to the value of human life. Otherwise it is a class A misdemeanor. There is risk within the meaning of this section if the potential for harm exists, whether or not a particular person's safety is actually jeopardized.

[¶63] The trial judge, citing State v. Ellis, 2001 ND 84, 625 N.W.2d 544, held that Reckless Endangerment is not a lesser included offense to Accomplice to Attempted Murder and did not present that as an instruction to the jury. Tr. 854:17-24. However, Kisi's contention is not that Ellis should be overturned or that the trial judge abused his discretion by denying the defense's request for a jury instruction for Reckless

Endangerment. Rather, Kisi's contention is that when he reasonably saw Mbulu was armed with a weapon—a car jack—and reasonably believed that Mbulu intended to engage in conduct likely to result in death or serious bodily injury, Kisi took actions to prevent the commission of the murder of C.B. by Mbulu.

Q. (By Mr. Mottinger) So it's not like you stood there and did nothing and watched her get the hell beat out of her with that jack, is it?

A. No, sir.

Q. Did you take some steps to try and protect her to that point?

A. Yeah. I stopped him (Mbulu) from pretty much crushing her skull.

Q. Then you got in the car?

A. Yup, I got in the car.

Q. You tell him to get in the car?

A. Yep. Told him to get in the car.

Q. And you left?

A. And we left.

Q. And you left why?

A. At that time, it was just – I was feeling that if I would have stayed, -- I don't know, it was just like a body vibe that I got that I just had to get out of this situation, out of that place.

Q. And get Mbulu out of there too?

A. Yes, sir.

Q. Before he did something else?

A. Yep.

Tr. 822: 5-25; 823: 1-2.

[¶64] The State must establish proof beyond a reasonable doubt all elements of a charged offense. In this case Kisi contends the evidence was insufficient to prove beyond a reasonable doubt that Kisi engaged in a sexual act, as that term is defined by Section 12.1-20-02, N.D.C.C., when C.B. testified that she did not think Kisi had digitally penetrated her. Even when giving all reasonable inferences to the prosecution, the evidence presented at trial is not sufficient to support the guilty verdict.

[¶65] CONCLUSION

[¶66] The guilty verdicts were not supported by sufficient evidence for either Gross Sexual Imposition or for Accomplice to Attempted Murder. Kisi requests the Supreme Court to reverse the criminal judgment and remand for an entry of judgment of acquittal.

[¶67] The Appellant respectfully prays that the Court grant the relief requested.

Dated this 4th day of April, 2018.

Respectfully submitted,

/s/ Russell J. Myhre

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State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No.
)	20170373
vs.)	
)	
Jean-Michael Kisi,)	Williams County District No.
)	53-2015-CR-02304
)	
Defendant/Appellant.)	CERTIFICATE OF SERVICE

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1. Brief of Appellant
2. Appendix of Appellant

The copies of the foregoing were securely enclosed in an envelope and addressed as follows:

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Bismarck, ND 58506

To the best of my knowledge, information, and belief, such address was the last known post office address of the party intended to be so served. These above-referenced documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, Rule 5.

Respectfully submitted this 4th day of April, 2018.

/s/ Russell J. Myhre

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