

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

State of North Dakota,)
)
 Plaintiff-Appellee,) **Sup. Crt. No.:** 20170373
)
 vs.) **Dist. Crt. No.:** 53-2015-CR-02304
)
 Jean-Michael Kisi,)
)
 Defendant-Appellant.)

APPEAL FROM THE VERDICTS OF GUILTY
 AND SENTENCING FOLLOWING THE JURY TRIAL
 COMMENCING JUNE 30, 2017, THE
 HONORABLE JUDGE JOSHUA B. RUSTAD PRESIDING

Brief of the State of North Dakota,
 Appellee

Nathan Kirke Madden #06518
 Assistant State's Attorney
 Williams County
 P.O. Box 2047
 Williston, ND 58802-2047
 (701) – 577 – 4577
 53sa@co.williams.nd.us

Table of Contents

<i><u>Item</u></i>	<i><u>Page(s)/Paragraph(s)</u></i>
Table of Contents	i
Table of Authorities	ii
Statement of the Issues	1 – 2
Statement of the Facts	3 – 25
Law and Argument	26 – 70
Conclusion	71

Table of Authorities

<i><u>North Dakota cases</u></i>	<i><u>Paragraph(s)</u></i>
<u>State v. Bruce</u> , 2012 ND 140, 818 N.W.2d 747	26
<u>State v. Dahl</u> , 2009 ND 204, 776 N.W.2d 37	30, 38
<u>State v. Drader</u> , 374 N.W.2d 601 (N.D. 1985)	38
<u>State v. Ensminger</u> , 542 N.W.2d (N.D. 1996)	68
<u>State v. Fehl-Haber</u> , 2007 ND 99, 734 N.W.2d 770	27
<u>State v. Johnson</u> , 379 N.W.2d 291 (N.D. 1986)	36
<u>State v. Sadler</u> , 305 N.W.2d 913 (N.D. 1981)	34, 35
<u>State v. Sorenson</u> , 2009 ND 147, 770 N.W.2d 701	67, 68
 <i><u>North Dakota Century Code</u></i>	 <i><u>Paragraph(s)</u></i>
N.D.C.C. §12.1-01-04	40
N.D.C.C. §12.1-05-04	43
N.D.C.C. §12.1-20-02	38

Statement of the Issues

[¶1] I. Sufficient evidence was presented to support the conviction for Gross Sexual Imposition.

[¶2] II. Sufficient evidence was presented to support the conviction for Accomplice to Attempted Murder.

Statement of the Facts

[¶3] During trial, the jury heard from a variety of witnesses ranging from law enforcement to medical personnel to C.B. herself. They were able to watch videos of Kisi interacting with C.B. and videos of Kisi's interviews with law enforcement. They were able to compare his statements in those videos with his statements at trial. They saw photographs of the injuries to C.B. including photographs demonstrating multiple blows to her head.

Minot trip and cellphone videos.

[¶4] On November 19, 2015, Jean-Michael Kisi, David Mbulu, and C.B. traveled to Minot, North Dakota in an attempt to cash a check that C.B. had received. This check was purportedly for an amount between \$90,000.00 and \$100,000.00. Both Mbulu and Kisi had received information about the value of the check. They were traveling in Mbulu's Chrysler 200, which was also used for the return trip.

[¶5] C.B. was unable to cash the check at Wells Fargo, and they stayed overnight at the Super 8 motel in Minot. C.B. used her card to hold/pay for the room. The account linked to C.B.'s card had insufficient funds to cover the two rooms that were rented for the evening of the 19th and 20th. The three left the motel without paying.

[¶6] Prior to leaving Minot, Mbulu used his cellular telephone to record two videos of a verbal and/or physical confrontation between Kisi and Mbulu and C.B. These were introduced as Exhibit #131, and played for the jury. (R.O.A. Doc. No. 237). Kisi made many threats to C.B. including telling her that he should “nut” on her face for ruining his twenty-first birthday. Kisi further expressed anger about the financial situation with C.B. and the room. Kisi also talked about how they should f*** her up and throw her out of the car, how they should run her over with the car, and how back home in Atlanta, their acquaintances who have killed her and dropped her off of 285. There was also a barrage of profanity, and both Kisi and Mbulu shoving fingers and/or phones in her face.

[¶7] Later, in an interview with Detective Levi Cabler, Kisi attempted to explain away the videos by saying that C.B. was an “aggressive female” who needed to learn her place. (A.T. 392-394). Kisi also attempted to explain away the videos as him being angry because he wanted to go out drinking on his 21st birthday, and that things had not, euphemistically speaking, gone the way he wanted. (A.T. 394).

[¶8] At trial, Kisi claimed to have never threatened C.B. in those videos. He claimed they contained “blank statements” that were made in the “heat of the moment.” (A.T. 812-813). This included the claim that placing video material on Williston Connections was a “blank statement,” despite him later referencing posting material related to the attack online to make “this bitch” a laughing stock. (A.T. 375, 812-813).

Return from Minot

[¶9] The three then left Minot with Kisi driving, and traveled West on US-2 with Mbulu’s cellular telephone pinging towers in Burlington, Berthold, and Epping. (R.O.A.

Doc. Nos. 216-218). Kisi then later turned down a dirt/gravel prairie trail that was approximately one mile North of Epping, North Dakota. Kisi stopped the vehicle in an isolated slough which cannot be easily viewed from Williams County 42 due to a ridge separating the slough from the road. The slough had tall grass along with brush and trees which restricted visibility from Williams County 42. E.g. (R.O.A. Doc. Nos. 6 and 8).

[¶10] Once at the location, Kisi and Mbulu got C.B. to exit the vehicle. C.B. attempted to leave the area, when she was ambushed from behind by Mbulu, who brought her to the ground and began striking her. Mbulu put C.B. in a chokehold, and while he was holding her down on the ground, she attempted to resist. Injuries to C.B.'s neck and chin area were noted by both Ms. Robin Pursiful and by Detective Amanda McNamee, with photographs of those injuries being introduced as exhibits. (R.O.A. Doc. Nos.: 144-145, 185).

[¶11] C.B. testified that while Mbulu was holding her down, Kisi began taking her pants and underwear off. Once they were off, she stated that Kisi began messing with her down there. While she was initially hesitant to describe what Kisi did to her, on cross-examination, she stated that Kisi had digitally penetrated her vagina. C.B. testified that afterwards, Kisi held her down so that Mbulu could get the jack from the car. (A.T. 768-769).

“Fake rape” material from Kisi

[¶12] According to Kisi, as C.B. was attempting to free herself from Mbulu, she kicked him in the groin, which caused him pain and made him angry. At this point, Kisi's stories about what purportedly happened next diverged depending on the stage of the interviews with law enforcement and/or his testimony at trial. Kisi claimed that

what happened next was after he had managed to convince Mbulu to let C.B. go, and was done to protect C.B. from being killed by Mbulu.

[¶13] In the interview with Detective Cabler, Kisi stated he removed C.B.'s pants and underwear to "make it look real." At one point in the interview, Kisi claimed that, after removing C.B.'s clothing, he "touched" her vagina but was "not really sure" if he digitally penetrated her. See. (A.T. 399).

[¶14] At another point in the interview with Detective Cabler, Kisi claimed that he had his lower garments down/off and "fake raped" C.B., and demonstrated the "fake rape" by simulating sex with the floor and the air in multiple different sexual positions. Kisi claimed that he had to make it look real to better protect C.B., though he later talked about posting it online and making "this bitch" a laughing stock. (A.T. 375). Kisi also claimed that the "fake rape" was the quickest thing he could think of to protect C.B. by making it feel like "this bitch is worthless." (A.T. 377). Kisi then complained about performance issues and that he "couldn't go through with it," but also claimed that he was disinterested in the activity. (A.T. 377). Kisi also claimed that he was not a rapist because his semen was not inside of C.B..

[¶15] In an interview with Detective McNamee, Kisi focused on his belief that in order to be convicted of rape, a man's semen needed to be found inside of the woman. (A.T. 631). Kisi claimed to Detective McNamee that he hadn't touched C.B, swearing to God, swearing on the grave of his mother (who was still alive), swearing on Bibles, and other such claims. This included: ""She was just kicking everywhere, like deadass, like - - if she tells you that I even - -she saw me physically like put my hands on her, on - - I - - I swear to my - - grandmother just died, my grandmothers dead grave that I didn't touch

that girl.” (A.T. 630-631). Kisi later claimed: “.. I did not, on my mother’s grave, lay a hand on that girl.” (A.T. 633). Kisi still later claimed: “**Q:** You didn’t touch her once? **A:** Nope, didn’t put a hand on her. Didn’t touch her at all, on my mother.” (A.T. 663). He later claimed that all he did was take her pants off and yell at her. (A.T. 663). Kisi told said that he did not think what he did was a crime. (A.T. 663).

[¶16] Kisi later said:

I didn’t touch her. I didn’t even physical - - she’s - - I didn’t man, if you believe what David is telling in that vi - bro, David - - I did not do that. I swear on my mother’s grave I did not touch that girl. I didn’t do it. I did not touch that girl, dude. I swear to God, on my mother’s grave. I don’t have to sit here and lie about anything. I did not touch that girl. I did not put my hands on her. I’ll sit here. I’ll jump the Bible. I’ll even - - I’ll testify a million times, I did not put my hands on that girl. (A.T. 666).

[¶17] At trial, Kisi told a different story about the “fake rape” compared to what he told Detectives Cabler and McNamee. Kisi claimed that he removed C.B.’s pants because he was frustrated after C.B. kicked him in the crotch. He later claimed that he had taken his pants down, and put his hand on top of C.B.’s vagina, but claimed to have never penetrated her. (A.T. 796-797). Kisi then later claimed to not know how you would fabricate a rape, and claimed that he had not removed his underwear despite what he said in the interviews. (A.T. 817).

[¶18] After the “fake rape” incident, Kisi claimed that he placed C.B.’s pants and underwear in the Chrysler 200. Kisi first testified that, after touching her vagina, he “backed up,” took her pants and threw them in the vehicle, got into the vehicle, and observed Mbulu moving toward C.B.. (A.T. 798). Kisi later claimed that after his contact with C.B.’s genitalia, he was “stumbling” to the car and holding onto his groin, leaving

C.B. with Mbulu outside of the vehicle. (A.T. 819). Kisi never did explain how he was protecting C.B. by leaving her outside of the vehicle with Mbulu, the man he was trying to save her from dying to, after the “fake rape.”

Kisi’s fabrication of statements

[¶19] During direct examination, Kisi claimed that he had lied to law enforcement during their interviews. (A.T. 801-802). Kisi claimed that this was because he was afraid of Mbulu and what Mbulu would do to his family, i.e. his mother, if somebody snitched on Mbulu. (A.T. 802). Kisi had previously claimed during the interview(s) that his mother was dead, as he swore on her grave that he was telling the truth.

[¶20] The interviews with law enforcement provided examples of Kisi minimizing his involvement in the criminal aspects of what transpired while maximizing the involvement of Mbulu. Kisi claimed that Mbulu was the one who wanted to kill C.B.. Kisi claimed that Mbulu was the one who was angry about the situation in Minot. This material is in contrast with Kisi’s claims to the jury that he lied to law enforcement in order to protect his mother from Mbulu.

Medical and biological testimony

[¶21] Ms. Robin Pursiful is the SANE nurse who examined C.B. at Trinity Hospital in Minot, North Dakota. She took photographs of injuries to C.B. including ligature marks across her neck, which is an injury that can be inflicted through the use of a choke hold. Ms. Pursiful referenced the presence of petechiae on C.B., which is consistent with a strangulation injury. (A.T. 326-327). Ms. Pursiful also testified about the presence of gravel inside of C.B.’s vaginal cavity, which can be indicative of penetrative sex acts. (A.T. 329). Along with Ms. Pursiful’s testimony, the State

introduced evidence, through both testimony and photographs, that the conditions at the location consisted of a gravel/dirt roadway. E.g. (R.O.A. Doc. No. 117).

[¶22] Mrs. Emily Hoge (f.k.a. Emily Verstraete), is a biological screener at the North Dakota State Crime Laboratory. She testified that she took samples from various items such as the car jack used in this case, and that she processed swabs taken from various parts of Kisi's body to include his fingers and the head of his penis.

[¶23] Mr. Kyle Splichal, is a DNA analyst at the North Dakota State Crime Laboratory. He testified about the process of DNA testing, and stated that he found C.B.'s DNA on the car jack, on one of the fingers of Kisi's hands, on the head of Kisi's penis, and on other items. Mr. Splichal also described what are known as combined summary tables, which are spreadsheets showing the comparison of alleles between known DNA samples and unknown materials taken from either the scene or from the co-defendants. (R.O.A. Doc. Nos.: 210-213 and 215). In addition to the testimony of Mr. Splichal, the State introduced evidence in the form of Kisi's interview with Detective Levi Cabler, of Kisi demonstrating multiple sexual positions using the floor and/or air as props while he was explaining how he "fake raped" C.B.. (R.O.A. Doc. No. 151).

[¶24] Dr. Maria Li, a neurologist from Montreal was C.B.'s treating physician at Trinity Hospital in Minot. Dr. Li testified about the dangers of blows to the head, particularly involving blows with weapons. Dr. Li identified the "Z" shaped laceration on C.B.'s head which matched up with the car jack. (R.O.A. Doc. No. 140). Dr. Li also testified about the effects of cold weather exposure on persons with head injuries, and the dangers associated with repeated blows to the head. Dr. Li was at a loss to explain how

C.B. survived the incident. Against this information, Kisi claimed that he “knew” that C.B.’s injuries were not life-threatening. (A.T. 803).

[¶25] Kisi attempted to testify regarding medical and biological issues citing his experience watching UFC fights. (A.T. 818). Kisi claimed that, based on his experience with watching UFC, he knew how long it would take somebody to die from asphyxiation. (A.T. 818). Kisi admitted to having no advanced medical training.

Law and Argument

[¶26] In his Brief, Kisi asks this Court to become the omnipotent thirteenth juror and substitute itself in place of the jury to reweigh evidence and reassess the credibility of witnesses. This Court has repeatedly held that it does not act as a thirteenth juror to override the findings of the original trial jury. See, State v. Bruce, 2012 ND 140, 818 N.W.2d 747. Much of the basis for his claims comes completely from his own self-serving statements.

[¶27] The question with insufficiency of the evidence claims is whether there is sufficient evidence, when viewed in the light most favorable to the conviction, to support the conviction. It is not whether information counter to a finding of guilt was introduced. See, State v. Fehl-Haber, 2007 ND 99, 734 N.W.2d 770.

[¶28] While Kisi references his testimony at trial, the jury is not required to believe the statements made by a criminal defendant during trial. The State submits that this is especially true when there is ample impeachment material from the defendant such as multiple prior stories and statements which are inconsistent both with the prior stories and statements made during trial. One blatant example of that is the reference to his mother being dead and buried in interviews with law enforcement. Another blatant

example is him swearing on his dead mother's grave and on Bibles, and him saying that he would testify a million times that he never laid a hand on C.B.. The State submits that the statement that he would be willing to testify a million times that he never laid a hand on C.B., given the materials from the interview and his other statements in court provided the jury with all of the information it needed to fully disbelieve Kisi's testimony.

[¶29] Here, Kisi attempted to distance himself from his multiple prior stories by claiming that those had been lies; essentially claiming that this time he was telling the truth and that the jury should believe this particular story. After having a considerable amount of time to realize how absurd the claims made by him were, to the point of even defense counsel calling the "fake rape" story "ridiculous," Kisi reconfigured his story and his assertions for trial to better portray himself as a type of hero in this matter. Kisi also asserted that he does not believe himself to be a rapist.

[¶30] The State submits that these issues represent some of the primary reasons why jurors are not required to believe a criminal defendant's testimony at trial. See, State v. Dahl, 2009 ND 204, 776 N.W.2d 37 (defendant testifying that he did not intend to threaten victim). If all that was necessary to guarantee an acquittal was for the defendant to take the stand and say "I didn't do it," criminal proceedings would be utterly pointless.

I. Sufficient evidence was presented to support the conviction for Gross Sexual Imposition.

[¶31] In support of his assertion that there was insufficient evidence to support the conviction, Kisi cites to paragraphs in his brief. These paragraphs do not contain the testimony of C.B..

[¶32] There is one paragraph, number 35, in Kisi's brief which is omitted from his citations in the section on insufficient evidence to support the Gross Sexual Imposition conviction. This paragraph included material from the cross-examination of C.B. On cross-examination, C.B. testified that Kisi did digitally penetrate her. (A.T. 764).

[¶33] This is in stark contrast to Kisi's claims that: "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." (Appellant's Brief at ¶54). It is unclear how a statement of knowing that Kisi digitally penetrated her is "no evidence" of a penetrative sexual act.

[¶34] Additional evidence of penetrative sexual activity comes from the foreign material consistent with the surface of the roadway that was found inside of C.B.'s vaginal cavity. Further evidence of penetrative sexual activity comes from the presence of C.B.'s DNA on Kisi's finger and the head of his penis. These are the places that one would expect a victim's DNA to be present in such a situation. This places the instant case in line with State v. Sadler, 305 N.W.2d 913 (N.D. 1981), wherein the victim was did not unequivocally state that penetration occurred, but there was medical evidence to show that such penetration did occur.

[¶35] In Sadler, the defendant claimed that testimony about penetration of the rectum did not translate into penetration of the anus. Sadler, 305 N.W.2d 913 at 915. Here, Kisi himself repeated mentioned touching C.B.'s vagina. The vulva includes the labia which serve to cover the vaginal opening itself.

[¶36] In State v. Johnson, 379 N.W.2d 291 (N.D. 1986), this Court reviewed a conviction for Gross Sexual Imposition involving the sexual act of cunnilingus in which the defendant was licking the victim's vulva with his tongue along with engaging in digital/vaginal penetration. The victim testified as to the defendant licking her vaginal area. The Court noted that the contact between the defendant's mouth and the victim's vulva satisfied the statutory definition of "sexual act" based upon the information presented at trial.

[¶37] Given that the act of engaging in cunnilingus constitutes a "sexual act," the State submits that making contact with the actual vagina, as opposed to the outside of the labia constitutes penetration of the vulva.

[¶38] While Kisi claimed that he was not a rapist because he did not ejaculate inside of C.B., the State notes that ejaculation is not required. Specifically, N.D.C.C. §12.1-20-02(4) states: "Emission is not required." Further, Kisi's claims of performance difficulties are not evidence that prevents a finding of guilt. See, State v. Drader, 374 N.W.2d 601 (N.D. 1985) (erection not required for a conviction). Kisi's claims that he does not believe himself to be a rapist do not prevent a finding of guilt. Dahl, 2009 ND 204, 776 N.W.2d 37.

[¶39] Additionally, Kisi engaged in a multi-positional demonstration of the "fake rape" he engaged in during the incident. Later, Kisi claimed to not know how one would fabricate a rape. This would lead one to believe that, based on Kisi's own statement of not knowing how to fabricate a rape, the demonstration on the interview room floor was a demonstration of the actual events that occurred.

[¶40] With regard to the force portion of the statute, significant evidence was introduced regarding the ambush of C.B. by Mbulu, the striking of C.B. by Mbulu, the placing of C.B. in a chokehold by Mbulu, and the actions of Kisi removing C.B.'s clothing and sexually abusing her while Mbulu was holding her. Bruising on C.B.'s neck/chin was visible not only when Ms. Pursiful conducted her SANE examination, but also when Detective McNamee later photographed C.B. Scrapes and other injuries to C.B. that were photographed at the hospital were also visible during the later photographs taken by Detective McNamee. The State submits that physically assaulting and/or physically restraining a person meets the requirements of "force" as defined by N.D.C.C. §12.1-01-04(10).

[¶41] As such, sufficient evidence was presented at trial which supports the conviction for Gross Sexual Imposition with the use of force.

II. Sufficient evidence was presented to support the conviction for Accomplice to Attempted Murder.

[¶42] Here, Kisi asks this Court to completely ignore all of the evidence contrary to his claims that was presented in court and completely believe the entirety of his self-serving statements. Kisi even goes so far as to claim that "this testimony by Kisi may outline an imperfect defense of others claim." It is completely unclear how providing assistance to Mbulu to allow him to flee the scene with C.B.'s clothing, identification cards, and cellular telephone (R.O.A. Doc. No. 180) was helping C.B.. Kisi removed her ability to protect herself from the elements and her ability to call for help, while simultaneously removing materials that could aid in the identification of C.B. from the scene as he drove off with Mbulu.

[¶43] In this case, a defense of others situation would have entailed Kisi using his self-professed physical superiority to Mbulu to end the attack on C.B. through the use of force against Mbulu; something that never happened based on the testimony of witnesses other than Kisi, and based on evidence found at the scene and inside of the Chrysler 200. See N.D.C.C. §12.1-05-04.

[¶44] Kisi also claims that he did not aid Mbulu in the attempted murder; something that is utterly false by Kisi's own admissions. The jury heard much evidence about the assistance that Kisi provided to Mbulu, including, but not limited to: 1) participation in the recorded videos in Minot that were later claimed to show how "crazy" C.B. was for purposes of alleging self-defense; 2) Kisi's statements in those videos relating to sexually assaulting, f***'ing her up and leaving her on the side of the road, and/or killing C.B.; 3) driving to the location North of Epping; 4) holding C.B. in place so that the car jack could be retrieved; 5) removing C.B.'s clothing and placing items of it in the vehicle; 6) transporting C.B.'s clothing and many identifying items from the scene; and 7) transporting Mbulu away from the scene.

[¶45] Kisi claimed that he helped C.B. by "fake raping" her after he told Mbulu to stop strangling/hitting her. Rather than leave C.B. fully clothed and physically stopping/restraining Mbulu, by his own words, Kisi elected to "fake rape" her to protect her from Mbulu. Rather than collect C.B., put her in the car, and leave Mbulu, Kisi claimed to have helped her with the "fake rape" that he was going to post online. After which, he claimed to have gotten back into the vehicle leaving Mbulu and C.B. alone outside. According to Kisi, this is defending others.

[¶46] While Kisi did claim to convince Mbulu to leave, it was not because he wanted to save C.B., it was because he knew he would be in trouble if anyone found out. Kisi had a working cellular telephone and did not call 911 because he would have gotten into trouble if he had. (A.T. 810-811). Kisi claimed to be able to intimidate Mbulu sufficiently to get Mbulu to let C.B. go when he was strangling her, yet was suddenly unable to keep Mbulu from continuing to attack C.B. after the “fake rape.”

[¶47] The State submits that the jury was correct in rejecting Kisi’s claim that he could intimidate Mbulu into releasing C.B. so that Kisi could do the “fake rape” to show how worthless she was, but couldn’t have prevented the later attack. The more plausible explanation for what occurred on the road North of Epping is that Kisi and Mbulu were working together to either restrain and/or assault C.B..

[¶48] Based on photographs from the scene, there was enough time taken to ransack C.B.’s purse, and several of its contents were found scattered on and along the prairie trail, with the obvious identifying materials and her cellphone placed in the car. There was enough time taken to place C.B.’s jacket, hoodie, pants, underwear, boot(s), and other items inside of the vehicle before leaving. Kisi told various stories about how certain clothing items found their way into the Chrysler 200. Simply stated, the incident could not have occurred the way Kisi claims that it did a trial.

[¶49] Further, Kisi’s story at trial does not explain how/why C.B. would still be at the scene when Mbulu supposedly got the car jack, or how they were able to ransack C.B.’s purse, and take her identification materials and cellular telephone. One would obviously be trying to get away from an attack of that nature if given the opportunity to do so. C.B.’s testimony of Mbulu holding her down, telling Kisi to get the car jack

out of the vehicle, and Kisi's bringing it back to Mbulu answers that question; Kisi's self-serving statements do not.

[¶50] Kisi's story does not explain how virtually all of C.B.'s clothing wound up in the care. At the time of the "fake rape," C.B. appears to have been clothed from the waist up according to Kisi. Starting with the lower body clothes, the jury knew that Kisi not only removed C.B.'s pants and underwear, but he also took the time to put them in the car. With that piece of information, Kisi's claim about how he told Mbulu to get off of C.B. and he did makes little sense. Why would C.B. stay at the location if she was not being forced to, especially given Kisi's complaint about her kicking and struggling resulting in being kicked in the crotch. C.B.'s testimony about Mbulu holding her down while Kisi removed her lower garments and engaged in one or more sexual acts does explain how Kisi had time to take the pants and underwear to the car.

[¶51] Similarly, Kisi's story regarding how he got Mbulu into the vehicle, and "confirming" that C.B. was alive when he drove off does not match with C.B.'s jacket and most of her upper clothing winding up in the vehicle. The jury both heard and saw that C.B.'s jacket and hoodie wound up in the trunk of the vehicle. Nothing that Kisi said either on the stand, or in the interviews, explained how her upper garments came to be placed in the car at the scene. Simply stated, it is impossible to go from C.B. being clothed from the waist up to her jacket and hoodie being in the vehicle if all that happened after the "fake rape" was that Kisi got in the car, Mbulu started striking her, Kisi got Mbulu back in the car, and they drove off leaving C.B. sitting in the round in her T-shirt.

[¶52] The weather was bad enough that Kisi and Mbulu were both wearing multiple layers of clothing, and C.B. would not have voluntarily remained at the location while Kisi and/or Mbulu stripped her down. C.B. testified that she had blacked out at some point while being struck with the car jack, and, after coming too, initially fled into some cover in the area. (A.T. 750). While she had some time loss issues, i.e. she claims to have come too “instantly,” C.B.’s version of events fits better with the items found inside of the vehicle, as she would not have been resisting when her jacket and hoodie were removed.

[¶53] Kisi’s stories also failed to explain a depression in the tall grass that was off of the prairie trail. This depression had no trail leading to it from the road, indicating that no one had walked down there, and contained C.B.’s blood on the grass. It was also in a position to not be immediately visible from the road. The nature of the depression, the presence of C.B.’s blood in the depression, and the lack of tracks leading to it from the prairie trail is consistent with Kisi’s threats to C.B. that they should dump her on the side of the road after f***ing her up. It is not consistent with Kisi’s claim that he visually confirmed that she was alive and on the road when they left.

[¶54] After the majority of C.B.’s clothing and identifying materials were loaded into the car, Kisi drove off with Mbulu inside of the vehicle. Kisi, by his own statements, indicated that he had observed Mbulu striking C.B. with the car jack. Kisi made several self-serving statements in which he minimized the events, but then later claimed to have saved C.B. because Mbulu was attacking her with a weapon.

[¶55] Kisi vacillated from claiming that it was, at most a bad domestic, to his claims at trial that he knew Mbulu was going to kill her and he needed to do something.

According to Kisi, that something was to leave C.B. outside in a shirt after all of this while he drove off with Mbulu and C.B.'s clothing and other items.

[¶56] This claim repeats itself in in the Brief before this Court wherein Kisi portrays himself as a hero who “took actions to prevent the commission of the murder of C.B. by Mbulu” and that he “reasonably believed that Mbulu intended to engage in conduct likely to result in death or serious bodily injury.” (Appellant Brief at ¶63). The exchange of claims between Kisi and his trial attorney still failed to address how C.B.'s upper garments wound up in the vehicle.

[¶57] However, the exchange contained a critical piece of information; Kisi indicating that he felt he had to get out of the place. This is the essence of why Kisi drove away with C.B.'s clothing in the vehicle and drove away with Mbulu in the vehicle instead of C.B.. He knew he was going to be in trouble if he got caught out there, and the choice of packing up C.B.'s clothing and identifying documents and transporting them away from the scene along with Mbulu was based on self-interest and not care for C.B.. It is unsurprising that the jury rejected Kisi's claim that leaving C.B. mostly naked in sub-freezing temperatures was a way of protecting her.

[¶58] What is interesting is that Kisi claimed he needed to get Mbulu out of there to prevent him from doing more things to C.B. (Appellant Brief at ¶63). However, the jury had previously heard from Kisi's own mouth that he could intimidate Mbulu into stopping by simply telling Mbulu to get off of her. Obviously, by his own words, Kisi had nothing to fear from Mbulu. Kisi could have intimidated Mbulu into staying and brought C.B. to medical treatment. There is a reason he did not do so; if C.B. found treatment and survived, she could testify against him and the jury already heard that Kisi

was not interested in calling for help for C.B. because it would have gotten him into trouble.

[¶59] Despite Kisi's claims, there is no indication that stripping someone down to a shirt and leaving them in windy and sub-freezing temperatures would be a means to preserve and protect their life. Even Kisi admitted that he at least observed Mbulu striking C.B. multiple times with the car jack prior to them leaving. Dr. Li testified that head injuries and cold weather is a bad combination that can quickly lead to a life-threatening situation. The State submits that the jury correctly determined that this was not helpful behavior on the part of Kisi, but was either an action aimed at removing identifying evidence from the scene, making "sure" that C.B. died, or both.

[¶60] However, Kisi's actions are exactly what he said should be done to C.B. during those video recordings. Those videos were a preview of what happened to C.B. on that prairie trail. Just as Kisi said what he should do, he and Mbulu beat up and sexually abused C.B., and then left her on the side of the road. The only difference between "dropping" (i.e. killing) her and leaving her on the side of the road and what transpired here is that Kisi and Mbulu were unsuccessful in their attempt to kill C.B..

[¶61] What is even more telling that the actions of Kisi had nothing to do with protecting C.B., is that once he got back to Williston and away from Mbulu, he basically went about life doing what he generally did. Instead of calling law enforcement to ask them to check on the location, he found himself some marijuana, and called acquaintances to meet with, toked up with, and complained about how badly his birthday had gone. During a search of Kisi's person incident to arrest, law enforcement located a

baggy of marijuana on his person, further demonstrating that Kisi was interested only in himself and not what happened to C.B.

[¶62] At trial, Kisi claimed to be afraid of Mbulu and what he might do to either himself or his family. However, law enforcement located and arrested him as he was returning to the building where Mbulu was staying.

[¶63] At trial, Kisi also claimed that he feared for the safety of his mother and what Mbulu would do to her (A.T. 811-812); this is the same mother on whose grave the jury heard him swear that he was telling the truth during his interviews with law enforcement. This inconsistency is in keeping with Kisi's admission that he lied about matters relating to this case; ironically the concern for his mother is why he claimed that he had lied. The State submits that, as the jury saw that Kisi was willing to make blatantly false assertions about the purported truth of what he was saying, the jury was rational in rejecting the new stories told by Kisi at trial.

[¶64] In contrast to Kisi's shifting stories, claims of "fake raping" to provide protection, and driving off with C.B.'s clothing to provide protection, C.B. testified that Kisi was an active participant in what transpired including making sure that she could not flee while the weapon was obtained. This information fits with the rest of the evidence presented in the case including why C.B. did not flee the scene before being repeatedly struck with the car jack. The jury saw the bruises and lacerations on C.B. that were caused by blows with the jack, they saw the blood on the roadway, they saw the blood in the grass where it appeared that C.B. had been dumped, and they saw the blood on the jack. The jury heard that C.B. fled when she was able to. As such, it is rational to

believe that C.B. was physically prevented from being able to flee before being struck with the car jack.

[¶65] The jury also heard that Kisi was extremely concerned about getting into trouble about what happened out there, which is an excellent reason to engage in zero witness cleanup. Even Kisi testified that C.B., if alive, would be a problem; he just claimed that he was thinking that it would be a problem for Mbulu. The State submits that it was perfectly reasonable for the jury to believe that Kisi provided material assistance to Mbulu by preventing C.B. from escaping while the car jack was obtained. The State further submits that it was perfectly reasonable for the jury to believe that that Kisi provided such assistance to Mbulu knowing that the intent was to kill C.B. and prevent her from being a witness to the events.

[¶66] It would be completely irrational to believe that, after the ambush of C.B. by Mbulu, the strangling and beating of C.B. by Mbulu, the Gross Sexual Imposition by Kisi, the removal of clothing and identifying materials, and the statement by Kisi that he knew he would get in trouble if he called for help, there was no intent to kill C.B. when the weapon was retrieved.

[¶67] Given this information, the jury was rational in determining that Kisi wanted to remove C.B. as a potential witness to prevent him from getting into trouble from what transpired North of Epping. There is no other viable explanation for why he got the jack out of the car and brought it to Mbulu while Mbulu was holding C.B. down. Kisi himself recognized that striking C.B. with the car jack could cause fatal injuries. (A.T. 800-801). The State submits that this fits with the elements of accomplice liability including the intent that an offense be committed and aiding another in the commission of

the offense. See. State v. Sorenson, 2009 ND 147, 770 N.W.2d 701 (aiding through diagramming the target location and destruction of evidence).

[¶68] The jury was also rational in its decision that Kisi's removal of evidence from the scene and transportation of Mbulu from the scene constituted aiding in the commission of attempted murder. See. Sorenson, 2009 ND 147, 770 N.W.2d 701; State v. Ensminger, 542 N.W.2d 272 (N.D. 1996)(taking money from victims).

[¶69] Correspondingly, the jury was rational in determining that Kisi's driving to the remote location, after the videos showing what they intended to do with C.B. and with the results winding up virtually identical to what was said, represents assisting Mbulu in bringing C.B. to a location where these actions could be carried out with a minimum of interruption.

[¶70] The State submits that it would have been completely irrational for the jury to adopt the position advocated here on appeal by Kisi; that he did not aid Mbulu in any of these matters and/or did not intend for the crimes to occur. From the videos in Minot where Kisi and Mbulu laid out what they should do to C.B. to the end results there on the road North of Epping, Kisi intended for the death of C.B. to occur and provided assistance to Mbulu.

Conclusion

[¶71] For the above-stated reasons, the State respectfully requests that this Court affirm the jury's verdict below.

Dated this 29th day of April, 2018.

/s/ Nathan Kirke Madden
Nathan K. Madden #06518
Assistant State's Attorney
Williams County
P.O. Box 2047

Williston, ND 58802-2047
(701) – 577 – 4577
553sa@co.williams.nd.us

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

State of North Dakota,)	CERTIFICATE OF SERVICE
)	
Plaintiff-Appellee,)	Sup. Cert. No.: 20170373
)	
vs.)	Dist. Cert. No.: 53-2015-CR-02304
)	
Jean-Michael Kisi,)	
)	
Defendant-Appellant.)	

[¶1] I, Nathan Kirke Madden, hereby certify that on April 29, 2018, a true and accurate copy of the State's Brief was served on Atty. Myhre via email.

Dated this 29th day of April, 2018.

/s/ Nathan Kirke Madden
Nathan K. Madden #06518
Assistant State's Attorney
Williams County
P.O. Box 2047
Williston, ND 58802-2047
(701) – 577 – 4577
553sa@co.williams.nd.us

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

State of North Dakota,)	CERTIFICATE OF SERVICE
)	
Plaintiff-Appellee,)	Sup. Cert. No.: 20170373
)	
vs.)	Dist. Cert. No.: 53-2015-CR-02304
)	
Jean-Michael Kisi,)	
)	
Defendant-Appellant.)	

[¶1] I, Nathan Kirke Madden, hereby certify that on April 26, 2018, a true and accurate copy of the State's Brief was served on Atty. Myhre via email.

Dated this 26th day of April, 2018.

/s/ Nathan Kirke Madden
Nathan K. Madden #06518
Assistant State's Attorney
Williams County
P.O. Box 2047
Williston, ND 58802-2047
(701) – 577 – 4577
553sa@co.williams.nd.us