20180357
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 21, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 20180357
	)	
Plaintiff/Appellee,	)	
	)	District Court No. 18-2017-CR-02377
vs.	)	
	)	
Karim Sabur Kabir Muhammad,	)	
	)	
Defendant/Appellant.	)	

ON APPEAL FROM ORDER DENYING POST-CONVICTION RELIEF
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JAY KNUDSON, PRESIDING

BRIEF OF APPELLEE

Meredith H. Larson
ND Bar ID #06206
Assistant State's Attorney
Grand Forks County
124 South 4th Street
P.O. Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

North Dakota State Cases

Other State Cases

North Dakota Statutes

North Dakota Rules of Criminal Procedure

STATEMENT OF THE ISSUES

I. Whether the district court properly overruled the Defendant's objection attempting to require the State to publish an exhibit?

II. Whether the district court properly denied the Defendant's Motion in Limine?

STATEMENT OF THE CASE

[¶1] On November 15, 2017, an Information was filed charging the Defendant with a Class A Felony Gross Sexual Imposition under N.D.C.C. § 12.1-20-03(1)(c). (Appellant's App. at 2.) A warrant was issued and served on November 16, 2017. (Appellant's App. at 2.) A bond hearing was held on November 16, 2017. (Appellant's App. at 2.) A scheduling order was issued with jury trial scheduled for March 13, 2018. (Appellant's App. at 2.) A preliminary hearing was held on December 18, 2017, there was a finding of probable cause, and the Defendant was arraigned and pled not guilty. (Appellant's App. at 2.) A speedy trial request was filed on December 20, 2017. (Appellant's App. at 2.)

[¶2] On February 7, 2018, the Defendant filed a Motion in Limine. (Appellant's App. at 2.) On February 20, 2018, the State filed a Brief in Opposition to Defendant's Motion in Limine and a Motion in Limine. (Appellant's App. at 3.) The State's Motion in Limine requested that the district court preclude the Defendant from using consent as a defense to the charged offense. (Appellant's App. at 3.) The State filed four exhibits in support of its brief and motion. (Appellant's App. at 3.) A hearing was held on February 28, 2018. (Appellant's App. at 3.) The Defendant did not present any testimony or evidence. Motion in Limine Tr., February 28, 2018. The State and Defense both presented arguments regarding the motions. Motion in Limine Tr., February 28, 2018. The court took the matters under advisement. Motion in Limine Tr., p. 21, February 28, 2018. On March 6, 2018, the court issued an order granting the State's Motion in Limine and denying the Defendant's motion in Limine. Orders on Motion in Limine, March 6, 2018.

[¶3] On March 8, 2018, the Defendant filed a Notice of Expert. (Appellant's App. at 3.) Trial was scheduled at that time for March 13, 2018. On Friday March 9, 2018, the State filed a Motion to Exclude Expert for being untimely as the trial was to commence on the following Tuesday. (Appellant's App. at 3.) The Defendant withdrew his speed trial request on March 9, 2018, the State and Defendant stipulated to a continuance, and the trial was rescheduled. (Appellant's App. at 3-4.) A continued scheduling order was filed March 9, 2018 setting the trial for May 22, 2018. (Appellant's App. at 3.)

[¶4] A jury trial commenced May 22, 2018. (Appellant's App. at 4.) On May 25, 2018, the jurors delivered a guilty verdict. (Appellant's App. at 4.) A pre-sentence investigation was ordered and subsequently filed on September 13, 2018. (Appellant's App. at 4.) The Defendant was sentenced on September 24, 2018. (Appellant's App. at 4.) A notice of appeal was filed September 25, 2018. (Appellant's App. at 4.)

STATEMENT OF THE FACTS

[¶5] On October 9, 2017, Detective Buzzo with the Grand Forks Police Department was notified of a sexual assault that had occurred within the city limits of Grand Forks. Jury Trial Tr., Vol. II., p. 320. The person who notified Detective Buzzo was Agent Linsalata, a Special Agent with the United States Air Force Office of Special Investigations, or OSI. Agent Linsalata was involved as the suspect, victim, and several witnesses were airmen. Jury Trial Tr., Vol. II., p. 320. Detective Buzzo and Agent Linslata conducted a joint investigation and began by interviewing the victim, A.I.

[¶6] A.I. relayed having gone to a bar in downtown Grand Forks with several friends and having become intoxicated. Jury Trial Tr., Vol. II., p. 321. At the end of the night, A.I. received a ride back to the Grand Forks Air Force Base from the Defendant, who was sober. Jury Trial Tr., Vol. II., p. 321. Also present was a friend of the victim, who encouraged her to get a ride from the Defendant, Kayla Torres. Jury Trial Tr., Vol. II., p. 321. During the initial interview with law enforcement, A.I. relayed that she recalled Kayla Torres being dropped off at the base, but the next thing she recalled is waking up to being sexually assaulted in the Defendant's apartment in Grand Forks. Jury Trial Tr., Vol. II., p. 321.

[¶7] Subsequent to the initial interview with A.I., Detective Buzzo and OSI Special Agent Linsalata conducted a pretext call with the Defendant. State's Exhibit 1, Index #87, Jury Trial Tr., Vol. II., p. 322. During the pretext call, the Defendant corroborated A.I.'s version of the events. State's Exhibit 1, Index #87, Jury Trial Tr., Vol. II., p. 324. He admitted A.I. was passed out, could not stay awake, and admitted to having sex with A.I.. State's Exhibit 1, Index #87, Jury Trial Tr., Vol. II., p. 324-325.

The pretext call was conducted without the Defendant's knowledge that law enforcement was involved or listening. Jury Trial Tr., Vol. II., p. 398.

[¶8] After the pretext call, the Defendant was interviewed on October 13, 2017. Jury Trial Tr., Vol. II., p. 399. Agent Linsalata took the lead in the interview with assistance from Detective Buzzo. Jury Trial Tr., Vol. II., p. 399. The Defendant was read his rights and agreed to speak to law enforcement. Jury Trial Tr., Vol. II., p. 399. The Defendant initially told law enforcement that he gave A.I. a ride because of how intoxicated she was and his concern that someone would take advantage of her. State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 401. The Defendant claimed he brought her to his apartment, she laid down, the Defendant went to Wal-Mart, came back to his apartment to find the victim's naked, and then he later brought her back to her male friend's house. State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 402. The Defendant admitted to being sober. State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 402. During this first version of the evening, the Defendant describes A.I. as "in and out of consciousness". State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 404.

[¶9] After letting the Defendant tell his version of the evening, law enforcement began to question the Defendant further. The Defendant then provides his second version of the evening. State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 405. The Defendant admits during the second version of the evening that everything he told law enforcement was true, but he added that he did, in fact, have sex with her. State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 405. He claimed the sex was consensual. State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 405.

[¶10] Based on the information law enforcement had obtained, including the pretext call and the Defendant's own statements to A.I. when he was unaware law enforcement was listening, neither Agent Linsalata nor Detective Buzzo believed the Defendant's second version of the evening. Jury Trial Tr., Vol. II., pp. 405-406. The Defendant was further questioned. The Defendant then provided his third version of the evening. The Defendant claimed then that he had sex with A.I. two times that evening. State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 407. He indicated that he had sex with her the first time on his bed which was completely consensual and the second time while on the couch when A.I. was in and out of consciousness initially and for the last two to three minutes was completely unconscious and asleep. State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 407. The Defendant also repeated his story that between the first and second sexual assaults he left the apartment to go to Wal-Mart to get deodorant. State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 408. The Defendant was confronted that Wal-Mart was not open during that time and it would not have been possible to purchase deodorant. State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 408. The Defendant then changed his story regarding the deodorant several times claiming he went to two separate gas stations, then retracting that, then claiming he did go to Wal-Mart, but after realizing it was closed he did not go in. State's Exhibit 11, Index #97, Jury Trial Tr., Vol. II., p. 408.

[¶11] The Defendant wrote a letter to the victim during the October 13, 2017 interview. State's Exhibit 13, Index #99, Jury Trial Tr., Vol. II., p. 409. The Defendant admits in his letter to A.I. that she had appeared to pass out one and a half minutes prior to him completing the sexual act. State's Exhibit 13, Index #99, Jury Trial Tr. Vol. II, p.

346. The Defendant stated, “In my state of euphoria and intoxication, I didn’t think to stop or anything. In my mind, my only thought was to finish”. State’s Exhibit 13, Index #99, Jury Trial Tr. Vol. II, p. 346.

[¶12] After the first interview with the Defendant, law enforcement proceeded to follow up on various timeline issues and other evidentiary issues. Jury Trial Tr., Vol. II., p. 414. After following up on these issues and finding some contradictions to address with the Defendant, law enforcement conducted a second consensual interview with the Defendant on October 17, 2017. State’s Exhibit 12, Index #98, Jury Trial Tr., Vol. II., pp.414-417.

[¶13] During the second interview, the Defendant provided his fourth version of the evening. State’s Exhibit 12, Index #98, Jury Trial Tr., Vol. II., p. 419. The Defendant claimed that he had sex with A.I. twice, but during both times A.I. was nodding in and out of consciousness and for the last couple of minutes she was completely unconscious. State’s Exhibit 12, Index #98, Jury Trial Tr., Vol. II., p. 419. The Defendant was questioned about his state of mind during the sexual assault. The Defendant was asked what would cause him to continue to have sex with A.I. when she was incapacitated beyond a point where she could reasonably consent or be aware of the sexual act. State’s Exhibit 12, Index #98, Jury Trial Tr., Vol. II., p. 419. The Defendant stated that he had a “mindset to finish” and that “the devil got ahold of me”. State’s Exhibit 12, Index #98, Jury Trial Tr., Vol. II., p. 419. The Defendant admitted to sexually assaulting the victim. State’s Exhibit 12, Index #98, Jury Trial Tr., Vol. II., pp. 419-420.

[¶14] During the second interview, the Defendant also provided an additional written statement. Once again, he confessed to the elements of the offense. State’s

Exhibit 14, Index #100, Jury Trial Tr., Vol. II., p. 421. During the course of the two interviews, the Defendant made admissions to the elements of the offense approximately 43 different times. State's Exhibit 11, Index #97, State's Exhibit 12, Index #98, Jury Trial Tr., Vol. II., p. 352.

[¶15] Law enforcement also learned that the Defendant had provided another version of the evening to a third party. Jury Trial Tr., Vol. II., p. 423. The Defendant told another individual that he had given A.I. an Uber ride home and that she subsequently made up a story about him sexually assaulting her. Jury Trial Tr., Vol. II., p. 423.

[¶16] During trial, the State presented testimony from A.I., Kayla Torres, Detective Buzzo, and Agent Linsalata. The State offered 14 exhibits which included the pretext call recording, photographs of the Defendant's apartment where the sexual assault was perpetrated, both the Defendant's interviews, and both the Defendant's written admissions. (Appellant's App. at 4.) The exhibits were all published for the jury with the exception of the two interviews of the Defendant. The interviews totaled approximately six hours in length. Prior to offering the exhibits, Defense counsel objected to the State offering the exhibits in full, but publishing portions of the interviews for the jury. Jury Trial Tr., Vol. II., pp. 305-316. Additionally, prior to trial, the State sought a stipulation from Defense counsel to offer a certified transcript of the interviews as an exhibit, along with the exhibits of the interviews, but Defense counsel would not agree to that either. Jury Trial Tr., Vol. II., p. 307. In response to Defense counsel's issues with the exhibits, the State opted to offer both interviews in full, but to have Agent Linsalata testify about the Defendant's admissions during the interviews, rather than publish six hours of video. Jury Trial Tr., Vol. II., pp. 305-316. Defense counsel did not object to foundation or the

admissibility of the exhibits. Jury Trial Tr., Vol. II., pp. 305-316. Defense counsel could not provide a rule or any authority to the court would require the State to publish the exhibits in full. Jury Trial Tr., Vol. II., pp. 305-316. The objection was raised several other times and ruled upon. Jury Trial Tr., Vol. II, pp. 336-339, 352.

[¶17] The Defendant testified during trial. During the Defendant's testimony, defense counsel published portions of the interviews, despite previously objecting to the State's intent to do so. Jury Trial Tr., Vol. III., pp. 512-526. During cross-examination, the Defendant admitted he described the victim as really drunk, lifeless, motionless, unaware, passed out, clearly intoxicated, and stumbling. Jury Trial Tr., Vol. III., pp. 539-541, 549, 559-560. The Defendant admitted that the victim was in no condition to consent to having sex with anyone that night. Jury Trial Tr., Vol. III., p. 547. The Defendant admitted that he observed A.I. to pass out on more than one occasion that night. Jury Trial Tr., Vol. III., p. 549. The Defendant admitted to attempting to manipulate A.I. on the pretext call and that he did not know law enforcement was listening. Jury Trial Tr., Vol. III., p. 549. The Defendant admitted to lying to law enforcement and providing multiple different versions of the offense. Jury Trial Tr., Vol. III., pp. 555-559. The Defendant admitted, during cross-examination, that he knew A.I. was unaware of a sexual act being committed upon her, but he continued to perpetrate that act so he could ejaculate. Jury Trial Tr., Vol. III., p. 565. The Defendant admitted that he knew A.I. was "really out cold" before he ejaculated. Jury Trial Tr., Vol. III., p. 565. The Defendant admitted to sexually assaulting the victim during the following exchange on cross-examination:

Q: You were trying to protect A.I. from getting raped that night by those two men downtown, weren't you?

A: Yes.

Q: You agree that you sexually assaulted her yourself, correct?

A: Yes.

Jury Trial Tr. Vol. III., p. 566.

[¶18] During trial, a frequently raised issue was the Defendant attempting to describe his encounter with the victim as the "same as usual". Jury Trial Tr., Vol. III., pp. 511, 514, 518, 519, 534, 571. Prior to trial, a Motion in Limine had been filed by defense counsel. The motion requested that the district court permit the Defendant to bring up prior alleged instances of sexual contact between the Defendant and the victim. His purpose of attempting to offer it was to show that her behavior was "no different than her behavior each time they spent time with one another and engaged in consensual sexual activity". Motion in Limine for Admission of N.D.R.Ev. 412 Evidence, February 7, 2018. The State filed a Brief in Opposition with four exhibits. February 28, 2018, a hearing was held on the Motion in Limine. Arguments were made by counsel, but no additional evidence or testimony was submitted. At the hearing, Defense counsel stipulated that consent was not relevant to the offense charged. Motion in Limine Tr. pp. 8-9. Defense counsel's argument was that prior sexual encounters with the victim should be permitted, despite Rule 412 of the North Dakota Rules of Evidence, to show his state of mind to determine whether he knew or should have known the victim was unaware. Motion in Limine Tr. pp. 8-9. Defense counsel failed to provide testimony, evidence, or an offer of proof as to what prior acts were being discussed or how it affected the

Defendant's state of mind. Motion in Limine Tr. pp. 12-16. The State objected arguing Rule 412 precluded such testimony. The district court ultimately denied the Defendant's motion and granted the State's motion precluding testimony on prior alleged sexual acts and prior consent. Orders on Motions in Limine, March 6, 2018. Despite this limitation, the Defendant repeatedly alluded, during trial, to the exact same testimony that he was precluded from presenting by the district court's order. Jury Trial Tr., Vol. III., pp. 511, 512, 514, 518, 519, 534, 571. At one point on direct examination, the Defendant was asked:

> Q: Okay. What makes it okay, then, for you to engage in a sexual act with her if she's clearly intoxicated to you?
>
> A: This has never been a problem. We've both been intoxicated. She has been intoxicated, I have been intoxicated. Frankly, this has never been a problem before.

Jury Trial Tr., Vol. III., p. 512. The court repeatedly reminded Defense counsel this was prohibited.

[¶19] Ultimately, on May 25, 2018, the Defendant was convicted. The Defendant was sentenced on September 24, 2018 and subsequently filed a notice of appeal.

LAW AND ARGUMENT

I. The district court properly overruled the Defendant's objection attempting to require the State to publish an exhibit.

[¶20] Four factors must be present to avoid structural error in closing a courtroom: 1) the claiming party must advance an overriding interest that is likely to be prejudiced, 2) the closure must be no broader than necessary to protect that interest, 3) the trial court must consider reasonable alternatives to closing the proceeding and 4) it must make findings adequate to support the closure. State v. Decker, 2018 ND 43, ¶9, 907 N.W.2d 378. The denial of a right to a public trial is a constitutional structural error. Id. at ¶8. While this Court has stated issues cannot be heard for the first time on appeal, structural errors are immune to such an argument and require automatic reversal regardless of if they have been forfeited or waived. Id.

[¶21] Defendant claims, on appeal, that the district court's decision to overrule the objection to the State not publishing two recordings during trial is tantamount to a closed trial. However, Defendant presents no case or legal authority for the argument. The record reflects a public trial and there is no argument that the courtroom was physically closed or that anyone was prevented from viewing the trial. During trial, the Defendant objected to the State offering State's Exhibit 11 and 12, but not publishing the full recording for the jury. Jury Trial Tr., Vol. III, 305-316, 336-339. The Defendant also had previously objected to the State offering the exhibit and publishing portions of it, as well as offering the exhibit and offering a certified transcript of the exhibit. Jury Trial Tr., Vol. III, 305-316. The Defendant did not have an objection to foundation or admissibility of the document substantively. Jury Trial Tr., Vol. III, 305-316, 336-339.

The Defendant's specific objection was that he found it unfair that the State would offer the exhibits and not publish them. Jury Trial Tr., Vol. III, 305-316, 336-339. The legal arguments presented by Defense counsel regarding this issue were under Rule 106 of the North Dakota Rules of Evidence and Rule 403 of the North Dakota Rules of Evidence. Jury Trial Tr., Vol. III. pp. 305-316, 336-339.

[¶22] The State's position at trial is the same position on appeal. The State offered and the court admitted two recordings of the Defendant's interrogations. The interviews were lengthy and difficult to hear. In an effort to present them in a way that was reasonable, from a time perspective, and clear for the jury, the State initially suggested publishing portions of each interrogation. Jury Trial Tr., Vol. III. pp. 305-316. The Defendant objected. Jury Trial Tr., Vol. III. pp. 305-316. Subsequently the State sought a stipulation from the Defendant to offer a certified transcript for the jurors to use along with the recorded exhibits. The Defendant objected. Jury Trial Tr., Vol. III. pp. 305-316. Finally, the State simply offered the lengthy exhibits and had Detective Buzzo and Special Agent Linsalata testify to the pertinent portions of the interrogations and to summarize the lengthy exhibits. Additionally, the Defendant testified, offered portions of the interviews despite previously objecting to portions being published, and was cross-examined regarding his statements. Jury Trial Tr., Vol. III., pp. 512-513, 520-522, 525-526.

[¶23] During trial, the objections articulated by the Defendant were under Rule 106 and Rule 403 of the North Dakota Rules of Evidence. Because the issue of a public trial was never raised, the district court did not engage in the four part analysis set forth in Decker. Further, under Rule 106 of the North Dakota Rules of Criminal Procedure, the

issue is *offering* evidence, not *publishing* evidence. N.D.R.Ev. 106. The State offered, and the Court accepted, two complete exhibits. Under Rule 403 of the North Dakota Rules of Evidence, Defendant claimed at trial that the exhibits were misleading. Jury Trial Tr., Vol. III., pp. 336-337. The State again argued that there was a difference between the admission of evidence and the publication of evidence. It was, and continues to be, the State's position that the State had the discretion in the manner in which the State presented its case in chief and to publish documents in the manner in which made sense to the State. Furthermore, the State presented the argument that the statements on the interrogation were admissions by a party opponent that could be testified to by the law enforcement witnesses who received them. The State used its witnesses to publish and summarize the content of very lengthy exhibits. The State articulated Rule 1006 of the North Dakota Rules of Evidence, which permits the content of a recording to be proved with a summary. In this instance, the content was not even being proved with a summary, but rather published in that manner. The content, both exhibits, were offered in full and available to the jury for their review. Additionally, both the witnesses who testified to the pertinent contents of the interrogation recordings were subject to cross-examination by the Defendant.

[¶24] With respect to the issue of a public or closed trial, the Defendant experienced a public trial. Defendant has not provided any authority to suggest that the district court's ruling on an evidentiary issue resulted in a closed trial. The State has not found any case law to support such an argument, but rather case law regarding a closed courtroom relates literally to the exclusion of the public to a trial. Additionally, the Defendant was able to cross-examine the witnesses who testified about the exhibits and

was able to publish portions of the video he felt were persuasive for the jury. The district court's decision on this evidentiary issue should be affirmed as the Defendant's right to a public trial was not violated.

II. The district court properly denied the Defendant's Motion in Limine.

[¶25] Pursuant to Rule 412 of the North Dakota Rules of Evidence, evidence regarding a victim's sexual behavior or predisposition is in admissible. N.D.R.Ev. 412(a)(1) and (2). The rule provides that the court may admit the evidence in certain exceptions. N.D.R.Ev. 412(b)(1). Those exceptions include: A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and C) evidence whose exclusion would violate the defendant's constitutional rights. N.D.R.Ev. 412(b)(1).

[¶26] In the case at hand, Defense counsel filed a Motion in Limine requesting admission of evidence under Rule 412(b)(1)(B) and (C). Defense counsel alleged that the "Defendant and A.I. engaged in several sexual encounters prior to the alleged crime. The Defendant informed law enforcement, and still contents that A.I.'s behavior this evening was no different than her behavior each time they have spent time with one another and engaged in consensual sexual activity". Motion in Limine for Admission of N.D.R.Ev. 412 Evidence, February 6, 2018.

[¶27] The State responded to the motion objecting and requesting that consent as a defense be precluded. The State articulated that the Defendant was being charged

pursuant to N.D.C.C. § 12.1-20-03(1)(c) and the essential elements of the offense required that the State prove that the Defendant engaged in a sexual act with the victim and the Defendant knew or had reasonable cause to believe the victim was unaware. Consent was not an element of the offense, nor was it relevant. While consent may, in certain situations, be a defense to a Gross Sexual Imposition by Force, whether a person previously consented to a sexual encounter, does not make it more or less probable that a Defendant perpetrated a sexual act upon the victim when he knew or should have known she was unaware. A victim who is unaware is incapable of consenting, which is the whole intent of the statute, and consent from an alleged prior incident is irrelevant. The State cited Rule 401 and 412 of the North Dakota Rules of Evidence in support of its position. Additionally, the State provided the court a case, State v Parker, to review, with a factually similar statute and issue. In State v. Parker, a defendant was charged with raping a woman who was "incapable of consent because she was physically helpless". State v. Parker, 2010 Ar. 173 (2010). The Defendant attempted to admit evidence of prior sexual encounters. Id. at 1. The Supreme Court of Arkansas precluded such a defense indicating that the defense of consent and prior sexual history is irrelevant where a victim cannot consent due to being physically helpless. Id. at 5.

[¶28] A motion hearing was held on the issue on February 28, 2018. The district court heard arguments on the motion. The State offered, with its brief and Motion in Limine, four exhibits. Those exhibits include the Defendant's admissions, approximately 43 different times, to engaging in sexual acts with the victim when she was unaware. State's Exhibit 11, Index #97, State's Exhibit 12, Index #98, Jury Trial Tr., Vol. II., p. 352.

Further, those exhibits include comments by the Defendant regarding his state of mind during the commission of the offense. State's Exhibit 11, Index #97, State's Exhibit 12, Index #98. The Defendant articulated that he continued having sex with A.I. after he knew she was unaware because he simply had the "mindset to finish". State's Exhibit 12, Index #98. Those exhibits also provide insight as to the Motion in Limine as the Defendant early on in the investigation admitted to law enforcement that he had never had sex with the victim previously and that she had "teased" him. State's Exhibit 11, Index #97, State's Exhibit 12, Index #98, State's Exhibit 13, Index #99, State's Exhibit 14, Index #100.

[¶29] On March 6, 2018, the district court issued an order denying the Defendant's motion. The district court found that the evidence of any alleged prior sexual history should be precluded based on Rule 401, Rule 412, and Rule 403 of the North Dakota Rules of Evidence. The district court also found that the Defendant did not provide any specific offer of proof as to what specifically the "several sexual encounters" may have been, how many there were, the circumstances of those encounters, when they occurred, or where they occurred.

[¶30] On appeal, the district court's ruling is reviewed on an abuse of discretion standard. State v. Stoppleworth, 2003 ND 137, ¶6, 667 N.W.2d 586. A trial court abuses its discretion only when it acts in an arbitrary, unreasonable, or capricious manner, or misapplies or misinterprets the law. Id. This Court has also stated that judges are not ferrets, obligated to engage in unassisted searches of the record for evidence to support a litigant's position. Earnest v. Garcia, 1999 ND 196, ¶10, 601 N.W.2d 260.

[¶31] The district court did not act in an arbitrary, unreasonable, or capricious manner, or misapply or misinterpret the law. In fact, the district court strictly applied the law as set forth in Rule 412 of the North Dakota Rules of Evidence. Defense counsel failed to connect the dots as to his argument in this case, failed to provide a sufficient offer of proof, and admitted that consent in this case was not relevant. Motion in Limine Tr. pp. 8-9. Rule 412 is a rape shield law designed to prevent rape victims from having their sexual history and inadmissible character evidence paraded in front of the jury to imply that they somehow deserved to be assaulted. The district court in this case reviewed the exceptions to Rule 412 and found that they did not apply in the case. A hearing was held, evidence and case law was reviewed, and the court's order was consistent with that authority. The court's order, and Rule 412's prohibition on introducing prior sexual behavior or predisposition, was designed to prohibit defendants from introducing testimony that alleged consent to drunk sex previously was a license to later perpetrate a sexual act upon a victim who was unaware. Despite the district court's ruling, the Defendant, during trial, repeatedly attempted to elicit such testimony. Jury Trial Tr., Vol. III., pp. 511, 512, 514, 518, 519, 534, 571.

[¶32] Because the district court properly relied on case law, Rules of Evidence, and the evidence before the court and appropriately applied the law, the order denying the Defendant's Motion in Limine should be affirmed.

CONCLUSION

[¶33] Based upon the above-stated facts, law, and argument, the district court's order must be affirmed.

Meredith H. Larson
ND Bar ID #06206
Assistant State's Attorney
Grand Forks County
124 South 4th Street
PO Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 20180357
	)	
Plaintiff/Appellee,	)	
	)	District Court No. 18-2017-CR-02377
vs.	)	
	)	
Karim Sabur Kabir Muhammad,	)	
	)	
Defendant/Appellant.	)	

AFFIDAVIT OF SERVICE
BY E-MAIL

SA# 144614

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 21 day of March, 2019, she served true copies of the following documents:

Appellee's Brief

And that said email was served on the address of:

Samuel A. Gereszek and said email is: sam@brudviklaw.com

Bobbi Jo Davidson
States Attorney's Office

Subscribed and sworn to before me this 21st day of March, 2019.

Jennifer Fleck
Notary Public

bjd

JENNIFER FLECK
Notary Public
State of North Dakota
My Commission Expires April 13, 2019

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, vs. Karim Sabur Kabir Muhammad, Defendant/Appellant.	)))))))))	Supreme Court No. 20180357 District Court No. 18-2017-CR-02377

AFFIDAVIT OF SERVICE
BY E-MAIL

SA# 144614

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 22 day of March, 2019, she served true copies of the following documents:

Table of Contents (corrected)
Table of Authorities (corrected)

And that said email was served on the address of:

Samuel A. Gereszek and said email is: sam@brudviklaw.com

Bobbi Jo Davidson
States Attorney's Office

Subscribed and sworn to before me this 22 day of March, 2019.

Notary Public

JENNIFER FLECK
Notary Public
State of North Dakota
My Commission Expires April 13, 2019

bjd