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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff/Appellee,	)	
	)	
	)	**Sup. Court No. 20190017**
-vs-	)	
	)	
Kanakai Poulor,	)	
	)	
Defendant/Appellant.	)	
	)	

Brief of Defendant/Appellant Kanakai Poulor

Appeal from Criminal Judgment Entered on January 7, 2019
after Guilty Verdict on August 9, 2018

In District Court, County of Cass, State of North Dakota
The Honorable Douglas Herman

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[¶ 7] **Statement of the Case**

[¶ 8] This is an appeal by Kanaki Poulor (Poulor) from the Criminal Judgment and Commitment entered by the Honorable Douglas Herman, East Central Judicial District Court, on January 7, 2019. On April 17, 2018, Poulor was charged in a one-count Information with Gross Sexual Imposition, in violation of N.D.C.C. § 12.1-20-03(2)(a), alleging on or about the 11th day of May, 2018, Poulor, being 31 years of age, touched 8 year old B.O.F, yob 2008, between her legs, inside her pants and underwear.

[¶ 9] The case was tried to a thirteen-person jury between August 7 and August 9, 2018. The jury found Poulor guilty of Gross Sexual Imposition, in violation of N.D.C.C. § 12.1-20-03(2)(a).

[¶ 10] The District Court ordered a pre-sentence investigation on August 13, 2018. On January 7, 2019, Poulor was sentenced to 12 years, first to serve 8 years with the Department of Corrections on the charge of Gross Sexual Imposition, with credit for 58 days previously served, with the balance of 4 years suspended for a period of 5 years of supervised probation.

[¶ 11] **Statement of Facts**

[¶ 12] On May 11, 2017, D.A. was at work when she received a text message from her daughter, B.F., which read: "Come. Home. Now". (TTI, P. 58, L. 1-14). It was almost time for D.A. to get off work, so she waited until her shift was done at 9:00 PM and drove home. (TTI, P. 59, L. 5-17). She arrived home and her boyfriend, B.F.S, the Defendant, Kanakai Poulor (Poulor), and her brother-in-law, Samson (Sam), were in the garage, hanging out. They were sitting, talking, and had a 6 pack of beer. (TTI, P. 59, L. 19-25; P. 60, L. 1-14; P. 63, L. 23-25; P. 64, L. 1-13). D.A. went inside the house to change her clothes, and immediately B.F. told her "daddy's friend" Poulor touched her in her underwear. (TTI, P. 61, L. 3-6; 18-25).

[¶ 13] Poulor lived across the street from D.A. (TTI, P. 65, L. 11-13). D.A., B.F.S., B.F., Sam, and D.A.'s two smaller children walked over to Poulor's home. (TTI, P. 72, L. 24-25; P. 73, L. 1-5). They confronted Poulor about what B.F. disclosed. D.A testified that Poulor looked "shocked". (TTI, P. 73, L. 13-25; P. 74, L. 1-10). Poulor said he didn't know what they were talking about. (TTI, P. 74, L. 12-14). D.A. called the police. (TTI, P. 75, L. 18).

[¶ 14] D.A. testified it was common for the kids to give Poulor hugs. (TTI, P. 77, L. 21-24). She had known Poulor for about a year and trusted him with her children. (TTI, P. 80, L. 18-25). D.A. was aware that Sam, her brother-in-law, was not cooperating with the investigation and had moved out of their home. There was a family dispute and he moved out to live with his wife, who is D.A.'s sister. (TTI, P. 82, L. 11-25; P. 83, L. 5-23).

[¶ 15] B.F. testified she knew Poulor because he was a friend of her father. (TTI, P. 91, L. 20-23). Poulor was over at her house, sitting and talking with her dad in their garage. B.F. was in the house, watching her two younger siblings. (TTI, P. 92, L. 8-20). B.F. said Poulor came into the house the "first time" and put his hand down her pants and touched her private, while she was in the living room. (TTI, P. 92, L. 23-25; P. 93, L. 1-23). BF couldn't remember if Poulor's hand was underneath her underwear or on top, but subsequently said, "I think inside" when asked again if it was inside or outside her underwear. (TTI, P. 93, L. 16-18; P. 94, L. 4-7). There were no other adults in the house when this happened, and Poulor went back to the garage after touching her. (TTI, P. 94, L. 18-25; P. 95, L. 1-3).

[¶ 16] B.F. said Poulor came back into the house three more times. (TTI, P. 95, L. 4-5). The "second time", B.F. was on the couch and Poulor did the "same thing". Again, B.F. could not remember if it was inside or outside her underpants, but then stated, "I think on the inside". (TTI, P. 95, L. 8-21). There were no adults present inside the home. (TTI, P. 96, L. 13-15).

[¶ 17] Poulor came back inside the house a third time, and the "same thing" happened in the living room. This time B.F. does not describe Poulor's actions, other than to say, "the same thing" happened. (TTI, P. 96, L. 17-25). The fourth time Poulor came inside, he did the "same thing" and put his hand down her pants by her private, but from behind where her "rear" is, and B.F. was in the kitchen. B.F could not recall if his hand was inside or outside her underwear. (TTI, P. 97, L. 10-17; P. 98, L. 1-10). B.F. said Poulor never went to the bathroom during any of the times he came into the home. (TTI, P. 98, L. 17-19). B.F. didn't give him any hugs that day, and usually doesn't give him hugs.

(TTI, P. 98, L. 23-25; P. 99, L. 1-4). B.F. also testified she told her mom what happened when her mom arrived at home, and that she texted her mother: "Come. Home. Now." (TTI, P. 99, L. 18-25; P. 100, L. 1-9). B.F. testified she tried to hide from Poulor in the closet by the door. (TTI, P. 99, L. 10-17), and thinks she may have tried to tell her dad, but ended up going back in the house. (TTI, P. 100, L. 10-16)

[¶ 18] B.F. testified it was Poulor who did this to her, and Uncle Sam never did anything like this to her. (TTI, P. 101, L. 14-22). B.F. recalled the police coming, and then a week later talking to a lady named Jill. (TTI, P. 102, L. 10-23). B.F. didn't recall talking to the police, and testified the police never took the pants that she was wearing, or any DNA. (TTI, P. 104, L. 15-25; P. 105, L. 1-5).

[¶ 19] B.F.S., the father of B.F., testified on May 11, 2017, he picked up Poulor from work and they went to the liquor store to grab a six pack of Natural Ice, and went to his garage and drank. (TTI, P. 111, L. 12-18). The kids were in the living room watching T.V. (TTI, P. 111, L. 22-23). He said Poulor went inside his home to use the bathroom about four times that night. (TTI, P. 111, L. 25; P. 112, L. 1-4; L. 10-12). B.F. came outside and she tried to talk to B.F.S., but he sent her back into the house. (TTI, P. 113, L. 20-24). He also testified he heard B.F. scream at the same time Poulor was inside his home (TTI, P. 115, L. 19-23), but the scream sounded playful and he didn't follow up on it. (TTI, P. 118, L. 1-8).

[¶ 20] When D.A. got home that night around 9:00 P.M., she told him B.F. had texted her and said Poulor touched her. (TTI, P. 113, L. 20-24). B.F.S. then went over to Poulor's home to confront him. Poulor told him he went in the house to use the bathroom and gave B.F. a hug. (TTI, P. 114, L. 4-9). Poulor denied touching B.F. inappropriately. (TTI, P.

114, L. 10-14). B.F.S. testified Sam was also in the garage with him and Poulor, and that Sam never left the garage to go into the house during this timeframe. (TTI, P. 115 L. 2-6; 14-17). B.F.S. estimated Poulor had been over to his house over 100 times and never had any issues with him. Sam had been staying at their residence for 1 month prior to the incident. (TTI, P. 120, L. 18-24).

[¶ 21] Officer Gustafson testified she responded to a call from dispatch on May 11, 2017 about a possible sexual assault. (TTI, P. 123, L. 1-8). She arrived on scene and encountered D.A. and B.F. She spoke with B.F., who told her she had been touched inappropriately by the family friend that was over to visit her dad, and that he had come inside the house four to five times and had asked to hug her each time. After he hugged her, he would put his hand down her underwear and touch her around the bottom. B.F. identified Poulor as the family friend. (TTI, P. 124, L. 1-14; L. 20-22).

[¶ 22] Officer Gustafson spoke with Poulor about B.F.'s accusations and recorded the conversation. (TTI, P. 125, L. 5-13). Poulor told her he hugged the kids but denied touching B.F. inappropriately. (TTI, P. 128, L. 7-17). Gustafson did not collect any evidence from the scene and did not enter the home where the alleged assault occurred. (TTI, P. 130, L. 10-25; P. 131, L. 1-23).

[¶ 23] The State endorsed Megan Williamson (Williamson) as an expert pediatric sexual assault nurse examiner. She examined B.F. on May 17, 2017, the day after watching B.F.'s CAC interview. (TTII, P. 141, L. 16-25). She described a forensic interview as a specialized type of interview where the interviewer is specially trained to talk to children to get their disclosure in their words without leading them or putting any words into their

mouth. (TTII, P. 140, L. 13-170). Typically, medical, social services, law enforcement, and any other team members involved are present in another room watching the interview. (TTII, P. 140, L. 6-12). Williamson examined B.F.'s entire body and testified her exam was "completely normal". (TTII, P. 144, L. 19-25; P. 145, L. 1-3).

[¶ 24] Detective Jason Skalicky (Skalicky), an investigator with the Fargo Police Department in the crimes against children unit, was assigned the case on the Tuesday after it occurred, which was on a Thursday. (TTII, P. 154, L. 8-11; P. 155, L. 6-11).

[¶ 25] Skalicky set up the forensic interview with B.F. at the CAC (Children's Advocacy Center) and viewed the interview live from a different room. (TTII, P. 156, L. 1-3; 13-19). The State moved to admit the forensic interview of B.F., Exhibit 6, and it was received. (TTII, P. 157, L. 6-13).

[¶ 26] After the CAC interview of B.F. was complete, Skalicky talked to her parents again, who provided him Uncle Sam's phone number. (TTII, P. 159, L. 4-10). Skalicky contacted Uncle Sam twice and each time Uncle Sam told Skalicky that he did not wish to be involved, and that he did not want to make any statements. (TTII, P. 160, L. 11-17). Skalicky did not consider Uncle Sam a target of the investigation. (TTII, P. 160, L. 3-5).

[¶ 27] Near the conclusion of Skalicky's direct testimony, the State played B.F's forensic interview for the Jury. (TTII, P. 165, L. 8-11). Skalicky testified B.F. was eight years old at the time of the interview. (TTII, P. 168, L. 21-24).

[¶ 28] Skalicky testified that when he interviewed Poulor, he told Poulor B.F.'s assertions seemed "spot on", but Skalicky could not recall if he told Poulor about the discrepancies

in B.F.'s statements about her scream and about her hiding in the closet. (TTII, P. 172, L. 1-23). Skalicky testified that each child's recollection of the events and how they talk about it in a forensic interview is different and what B.F.'s consistency is compared to another child's consistency, is two different things. (TTII, P. 179, L. 6-20).

[¶ 29] At the close of the State's case, Poulor's attorney made a motion for a judgment of acquittal pursuant to N.D.R.Crim.P. 29(a). (TTII. P. 183, L. 6-16). The trial court denied Poulor's motion. (TTII, P. 183, L. 23-25; P. 184, L. 1-5).

[¶ 30] Poulor testified he was invited to B.F.S.'s house about 7:00 P.M. (TTII, P. 192, L. 16-24). First, they gathered in the garage, then went in the house to eat, and then back out to the garage. (TTII, P. 193, L. 2-7). He drank three beers. (TTII, P. 193, L. 22-24). He entered the home to use the bathroom on three occasions between 7:00 P.M. and 10:00 P.M. He also testified he saw B.F.S. and "the uncle" use the restroom. (TTII, P. 194, L. 7-19).

[¶ 31] Poulor went into the house to retrieve his phone, which was on a charger. The youngest child was playing with it, and the two older children, including B.F., helped him get it back from the younger child. (TTII, P. 195, L. 20-25; P. 196, L. 1-9). He gave all of them a hug and then went out to the garage and told B.F.S. that he was leaving to go home. It was normal for him to give them hugs because they are family friends. (TTII, P. 196, L. 10-25). He gave B.F. more than one hug that night. (TTII, P. 204, L. 24-25; P. 25, L. 1-13).

[¶ 32] Poulor first learned about the accusations of inappropriate touching about 15 minutes after he went home. B.F.S. came to his house, and the "other group" was right behind him. Poulor told B.F.S. "to stop playing with me, bro". (TTII, P. 197, L. 7-20). Poulor testified he had no contact with the family after that night. (TTII, P. 207, L. 3-9).

[¶ 33] Outside the presence of the Jury, the Judge ruled that B.F.'s statements were "trustworthy under 803 and case law factors, the spontaneity, consistent repetition, mental state of the declarant, use of terminology not necessarily expected of an eight-year-old and finally, lack of motive to fabricate" and that the Court would not be giving any limiting instructions to the jury regards B.F.'s statements. (TTII, P. 185, L. 1-25).

[¶ 34] **Argument**

[¶ 35] The prosecution violated the Confrontation Clause when it presented, pursuant to N.D.R. Ev. 803(24), the substance of a testimonial forensic interview through the trial testimony of a lay witness who took no part in the recorded forensic interview, where defendant had no opportunity to confront the forensic interviewer who interviewed B.F.

[¶ 36] The Confrontation Clause of the Sixth Amendment to the Constitution of the United States, applicable to the states through the Fourteenth Amendment, declares: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI. Our standard of review for a claimed violation of a constitutional right, including the right to confront an accuser, is de novo. State v. Messner, 1998 ND 151, ¶ 8, 583 N.W.2d 109. State v. Blue, 2006 ND 134, ¶ 6, 717 N.W.2d 558, 561.

[¶ 37] Under *Crawford*, the admission of out-of-court testimonial statements in criminal cases is precluded, unless the witness is unavailable to testify and the accused has had an opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, at 59, 124 S.Ct. 1354 (2004). State v. Blue, 2006 ND 134, ¶ 8, 717 N.W.2d 558, 561.

[¶ 38] The Supreme Court described three "formulations" of the "core class of 'testimonial' statements." Crawford at 51, 124 S.Ct. 1354. First, the Court described a class consisting of "ex parte in-court testimony or its functional equivalent," which includes such things as "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.* The second class of testimonial statements consists of out-of-court statements "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Id.* at 52, 124 S.Ct. 1354. The final class described by the Supreme Court is comprised of testimonial statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* State v. Blue, 2006 ND 134, ¶ 9, 717 N.W.2d 558, 562.

[¶ 39] Specifically, in *Crawford*, the Supreme Court recognized a witness's tape-recorded statement made during a police interrogation was a testimonial statement. *Id.* at 53, 124 S.Ct. 1354. The Court stated, "interrogations by law enforcement officers fall squarely within [the] class [of testimonial hearsay]." *Id.*

[¶ 40] In Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Supreme Court further explored the dichotomy between testimonial and nontestimonial statements. The Supreme Court held: Statements are nontestimonial when

made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.* at 2273-74. In *Davis,* the Supreme Court held a witness's statement identifying a victim's assailant to a 911 operator during an incident of domestic violence was a nontestimonial statement. *Id.* at 2277. In the companion case of *Hammon,* the Supreme Court held a victim's affidavit given during an investigation by police officers into past criminal activity at a time removed from any threat of immediate danger was a testimonial statement. *Id.* at 2279. The Supreme Court focused on the timing and nature of the two reports. *Id.* at 2276. The *Davis* court determined that whether an individual was acting as a witness and in essence "testifying" should be determined by looking to the surrounding circumstances of when a report is made, the nature of the report given, the level of formality when making a report, and the purpose of the report. *Id.* at 2276-77.

The *Davis* court also recognized that the Confrontation Clause requires evaluation of the "declarant's statements, not the interrogator's questions." *Id.* at 2274 n. 1. Finally, the Court clarified that statements made in the absence of interrogation could be testimonial because the "Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation." *Id.* State v. Blue, 2006 ND 134, ¶ 11, 717 N.W.2d 558, 562–63.

[¶ 41] [I]f a statement is made as part of an investigation by government officials the statement is generally considered testimonial. Blue at ¶ 14.

[¶ 42] In cases since *Crawford,* other states with the functional equivalent of the Children's Advocacy Center involved in this case have held that similar statements made by a child with police involvement inevitably are testimonial. *See, e.g., People v. Sisavath,* 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753, 757 (2004) (holding as testimonial under *Crawford* interview of child victim of sexual abuse taken and videotaped at county facility designed and staffed for interviewing children suspected of being victims of sexual abuse); *Contreras v. State,* 910 So.2d 901, 903-06 (Fla.Dist.Ct.App.2005) (videotaped statement of defendant's thirteen-year-old daughter by a coordinator of Florida's child protection team, while working with a county sheriff connected electronically in another room, was testimonial and could not be used at trial); *In re Rolandis G.,* 352 Ill.App.3d 776, 288 Ill.Dec. 58, 817 N.E.2d 183, 189-90 (2004) (seven-year-old made the same statement to his mother, a police detective, and a child abuse investigator, but only the statement to his mother was nontestimonial); *State v. Snowden,* 867 A.2d 314, 325-26 (2005) (testimony of sexual abuse investigator employed by Child Protective Services as to statements made by child sexual abuse victim held testimonial under *Crawford*); *Rangel v. State,* No. 2-04-514-CR, 2006 WL 2076552 (Tex.App. July 25, 2006) (videotape recording of interview between a six-year-old child and a forensic investigator with the Child Protective Services was held to be testimonial).

[¶ 43] In this case, the videotape of B.F.’s statement to the forensic interviewer was testimonial as defined under *Crawford.* The statement was made with police involvement. Statements made to non-government questioners acting in concert with or

as an agent of the government are likely testimonial statements under *Crawford.* State v. Blue, 2006 ND 134, ¶ 16, 717 N.W.2d 558, 564.

[¶ 44] The forensic interviewer in this case was either acting in concert with or as an agent of the government. The court must look to the purpose of the questioner. State v. Blue, 2006 ND 134, ¶ 16, 717 N.W.2d 558, 564.

[¶ 45] The forensic interviewer's purpose was undoubtedly to prepare for trial. Forensic means "suitable to courts." *Merriam-Webster's Collegiate Dictionary* 490 (11th ed. 2005). The police involvement adds to the testimonial nature of the interview. Officer Skalicky viewed the live interview in another room and received a copy of the interview after the interview was completed. Police involvement under these facts indicates the purpose of the interview was in preparation for trial. Skalicky also testified he used the interview to detail his notes and to determine if any follow-up interviews were needed. (TTII, P. 157, L. 20-25).

[¶ 46] Because there was no "ongoing emergency" and the primary purpose of the videotaped interview in this case was "to establish or prove past events potentially relevant to a later criminal prosecution," the videotape recording constituted a testimonial statement.

[¶ 47] [W]hen testimonial statements are at issue, the constitutional right to confrontation cannot be superseded by reliability and trustworthiness. Crawford, 541 U.S. at 68, 124 S.Ct. 1354; State v. Blue, 2006 ND 134, ¶ 21, 717 N.W.2d 558, 565.

[¶ 48] The introduction of the videotaped testimony violated Poulor's constitutional right to confrontation in violation of *Crawford* and the violation was not harmless beyond a reasonable doubt. B.F.'s statements to Jill Perez, the forensic interviewer with Children's

Advocacy Center, were testimonial. Perez was not unavailable for cross-examination purposes, and Poulor did not have an opportunity to cross-examine Perez at trial. If the forensic interview is introduced as evidence, the Defendant must have an opportunity to cross-examine the forensic interviewer at trial.

[¶ 49] The District Court erred in Granting the State's Motion to Present Hearsay statements Pursuant to North Dakota Rule of Evidence 803(24), namely the Video of the Forensic Interview by Jill Perez.

[¶ 50] The District Court erred by overruling Poulor's objection to admit into evidence a child's out of court statements about sexual abuse pursuant to N.D.R. Ev. 803(24).

[¶ 51] N.D.R.Ev. 803(24) provides that:

An out of court statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child is admissible as evidence (when not otherwise admissible under another hearsay exception):

> (A) the trial court finds, after hearing on notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness; and
>
> (B) the child either:
>
> > (i) testifies at the trial; or
> >
> > (ii) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

[¶ 52] A district court considering the factors for trustworthiness of a child's out-of-court statement about sexual abuse must make explicit findings as to what evidence it relied upon regarding the factors and explain its reasons for either admitting or excluding the

testimony, so a defendant can be assured the required appraisal has been made. Id. State v. Muhle, 2007 ND 131, 737 N.W.2d 636.

[¶ 53] State v. Messner set forth factors to be considered for Rule 803(24) trustworthiness: (1) "spontaneity and consistent repetition" of the statements, (2) "the mental state of the declarant," (3) "use of terminology unexpected of a child of similar age," and (4) "a lack of motive to fabricate." State v. Messner, 1998 ND 151, ¶ 15, 583 N.W.2d 109 (citing *Idaho v. Wright*, 497 U.S. 805, 821–22, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)). State v. Muhle, 2007 ND 131, ¶ 12, 737 N.W.2d 636, 640.

[¶ 54] Although B.F.'s initial statement was spontaneous, it lacked consistent repetition, as evidenced by changing significant details. Hiding in a closet and screaming at one point during one of the assaults were details B.F. did not disclose in every interview. The *Merriam Dictionary* defines repetition as "the act or instance of being repeated." Absent the expertise of the forensic interviewer, the mental state of the declarant, B.F., is unknown. Without the forensic interviewer's testimony, it is unclear whether terminology used by B.F. is consistent with her age when describing the incident and parts of the human body to Perez. Moreover, there was no expert testimony regarding what type of terminology is consistent for a child of similar age. During the pretrial conference, the State informed the Court that it was going to use Detective Skalicky to address "any of those other issues under the factors; spontaneity, and consistent repetition, mental state of declarant, the use of terminology unexpected of a child of similar age, and lack of motive to fabricate." (TTI, P. 8, L. 7-12). The State also indicated that D.A. and Officer Gustafson "might give testimony under the rule." (TTI, P. 10, L. 24-25; P. 11, L. 1). However, none of these witnesses are experts. The State informed the Court it was not

going to call Perez, the forensic examiner, but didn't elaborate on that. (TTI, P. 10, L. 8-13). Because the time, content, and circumstances of B.F.'s statements failed to provide sufficient guarantees of trustworthiness, the District Court erred by allowing the out of court statement by B.F.

[¶ 55] The Evidence was Insufficient to Sustain the Conviction of Gross Sexual Imposition.

[¶ 56] Poulor's attorney timely made a motion for a judgment of acquittal pursuant to N.D.R.Crim.P. 29(a) at the close of the State's case and at the close of all the evidence, preserving the issue of sufficiency of the evidence for appellate review. (TTII, P. 183, L. 6-16). The trial court denied Poulor's motion for a judgment of acquittal (TTII, P. 183, L. 23-25; P. 184, L. 1-5). Poulor asserts the trial court's denial of his motion for a judgment of acquittal was erroneous, and asks this Court to reverse that decision, as well as the judgment of conviction.

[¶ 57] This Court discussed the legal issue of the sufficiency of the evidence in State v. Yineman, 2002 ND 145, 651 N.W.2d 648. Poulor preserved this issue on appeal when he made his Motions for a Judgment of Acquittal pursuant to N.D.R.Crim.P. 29(a). Yineman at ¶ 14.

[¶ 58] This Court stated in State v. Hannah, 2016 ND 11,¶ 7, 873 N.W.2d 668:

> On appeal, Hannah argues the evidence is insufficient to support the jury finding him guilty of simple assault-domestic violence. When a defendant challenges the sufficiency of evidence supporting a verdict, we apply the following standard of review:
>
> In an appeal challenging the sufficiency of the evidence, we look only to the evidence and reasonable inferences most favorable to the verdict to

> ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt. In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses.

State v. Rufus, 2015 ND 212,¶ 6, 868 N.W.2d 534 (quoting State v. Corman, 2009 ND 85,¶ 8, 765 N.W.2d 530).

[¶ 59] Applying this standard, Poulor asserts the evidence was insufficient to sustain the conviction of gross sexual imposition. Both D.A. and Poulor testified it was normal for Poulor to give the children hugs. However, B.F. testified she didn't give Poulor any hugs that day, and usually doesn't give him hugs. B.F. had trouble articulating whether she was touched on the inside or outside of her underwear, and after prompting said she *thought* on the inside. The third incident B.F. described as "the same thing" happening – with no other detail. She mentioned one time hiding in a closet [from Poulor], and another time screaming, but wasn't consistent in those statements. Poulor had been to B.F.'s home over 100 times – hanging out with B.F.S. in the garage while the kids played in the home - and nothing like this was ever brought up before. Uncle Sam was staying in B.F.'s home for 1 month, refused to cooperate with the investigation, and moved out of the home shortly after B.F.'s allegations against Poulor.

[¶ 60] **Conclusion**

[¶ 61] Based on all the foregoing reasons, Kanakai Poulor respectfully requests that his criminal conviction be in all things reversed and the case be remanded to the district court for a new trial.

[¶ 62] Respectfully submitted this 26th day of April, 2019.

__/s/_____

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IN THE SUPREME COURT, STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
Plaintiff/Appellee,	)	**CERTIFICATE OF SERVICE**
vs.	)	
Kanakai Poulor,	)	
	)	**Sup. Court No. 20190017**
Defendant/Appellant.	)	

[¶ 1] I, Amy L. Mihulka, an employee of the Fargo Public Defender Office, hereby certify that on **April 26, 2019**, the following documents, **APPELLANT'S BRIEF** and **APPELLANT'S APPENDIX,** was filed with the Supreme Court Clerk of Court. A copy of this document was served electronically on all separately represented parties at the e-mail addresses pursuant to N.D.R.Ct. 3.5 to the party below:

Ryan J. Younggren
State's Attorney's Office
SA-defense-notices@casscountynd.gov

[¶ 2] This service was made under N.D.R.Ct. 3.5; N.D.R.Crim.P. 49; and N.D.R.Civ.P. 5(b).

[¶ 3] Dated: April 26, 2019.

/s/
Amy L. Mihulka, CP
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20190017
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 1, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, **Plaintiff/Appellee,** **vs.** **KANAKAI POULOR,** **Defendant/Appellant.**	**CERTIFICATE OF SERVICE** **Sup. Court No. 20190017**

[¶ 1] I, Amy L. Mihulka, an employee of the Fargo Public Defender Office, hereby certify that on **May 1, 2019**, a copy of the following documents, **Appellant's Brief** and **Appellant's Appendix,** were deposited into the U.S. Mail in an envelope, with postage pre-paid, addressed to the following individual at his last known address:

Kanakai Poulor #55006
James River Correctional Center
2521 Circle Drive
Jamestown, ND 58401

[¶ 2] This service was made under N.D.R.Ct. 3.5; N.D.R.Crim.P. 49; and N.D.R.Civ.P. 5(b).

[¶ 3] Dated: May 1, 2019.

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