

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	Supreme Court No. 20190290
)	
Plaintiff and Appellee,)	Case No. 18-2018-CR-01581
)	
vs.)	
)	
Jeffrey Scott Krogstad,)	
)	
Defendant and Appellant.)	

BRIEF OF DEFENDANT APPELLANT JEFFREY SCOTT KROGSTAD

Appeal from the Judgment dated September 18, 2019

In District Court, Grand Forks County, State of North Dakota

The Honorable John Thelen

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TABLE OF CONTENTS

	Paragraph Number
TABLE OF AUTHORITIES	
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	4
STATEMENT OF FACTS	5
LAW AND ARGUMENT	18
I. The standard of review.....	18
II. Whether the evidence presented at trial was sufficient to sustain a guilty verdict	19
III. The standard of review.....	21
IV. Whether Krogstad’s sixth amendment right to confrontation was violated	22
V. The standard of review.....	25
VI. Whether the Court abused its discretion in allowing the forensic video of K.L. as admitted.....	26
CONCLUSION.....	30

TABLE OF AUTHORITIES

CASES	Paragraph Number
<u>Crawford v. Washington</u> , 541 U.S. 36 (2004)	22
<u>State v. Blue</u> , 2006 ND 134, 717 N.W.2d 558.....	21, 22
<u>State v. Hirschhorn</u> , 2002 ND 36, 640 N.W.2d 439	25, 27, 28
<u>State v. Keller</u> , 2005 ND 86, 695 N.W.2d 703	18
<u>State v. Kinsella</u> , 2011 ND 88, 796 N.W.2d 678.....	18
<u>State v. Lambert</u> , 539 N.W.2d 288 (N.D. 1995)	18
<u>State v. Messner</u> , 1998 ND 151, 583 N.W.2d 109.....	21
<u>State v. Moos</u> , 2008 ND 228, 758 N.W.2d 674	25
<u>State v. Peterson</u> , 2016 ND 192, 886 N.W.2d 71	25
<u>State v. Sevigny</u> , 2006 ND 211, 722 N.W.2d 515	28
<u>State v. Vanreece</u> , 20017 ND 126, 736 N.W.2d 428	18
<u>State v. Wanner</u> , 2010 ND 121, 784 N.W.2d 154	18
<u>State v. Wegley</u> , 2008 ND 4, 744 N.W.2d 284.....	25
<u>United States v. Spotted Bear</u> , 920 F.3d 1199 (8th Cir. 2019)	8
 OTHER AUTHORITIES	
N.D.R.Crim.P. 29.....	19
N.D.R.Ev. 803.....	passim
U.S. Const. Amend. VI.....	2, 22, 27
U.S. Const. Amend. XIV	22

STATEMENT OF THE ISSUES

- ¶1 Whether the evidence presented at trial was sufficient to sustain a guilty verdict.
- ¶2 Whether Krogstad's Sixth Amendment right to confrontation was violated.
- ¶3 Whether the Court abused its discretion in allowing the forensic video of K.L. as admitted.

STATEMENT OF THE CASE

¶4 This is an appeal of the North East Judicial District Judgment dated September 18, 2019. App. 94. Krogstad was charged with Gross Sexual Imposition. App. 7. A jury trial was held on April 23, 2019, through April 25, 2019. App. 27. During the trial, a forensic interview of the victim, a 6 year old child, K.L., was admitted and K.L. took the stand to testify but refused to discuss the allegation at heart for a claim of gross sexual imposition with Krogstad. Regardless, Krogstad was found guilty of Gross Sexual Imposition. App. 93. Judgment was entered on September 18, 2019, and Krogstad filed a notice of appeal on September 19, 2019. App. 94, 96.

STATEMENT OF FACTS

- ¶5 On July 23, 2018, the State of North Dakota filed Information charging Krogstad with Gross Sexual Imposition. App. 7. More specifically, the Information, later amended, alleged that on or between the 7th day of February, 2018 and the 10th day of July, 2018, Krogstad, an individual at least 22 years of age, wilfully engaged in one or more sexual acts or cause another to engage in a sexual act, with a 6 year old child, K.L. App. 25.
- ¶6 On January 3, 2019, the State filed a notice pursuant to North Dakota Rules of Evidence Rule 803(24) of the following:

[¶1] The State is providing Notice Pursuant to Rule 803(24) that the State intends to introduce a statement by a child under the age of 12 years about sexual abuse of that child. The victim in this case was interviewed and the State intends to offer the content of that interview pursuant to Rule 803(24). Pursuant to this Rule, the State may provide or offer this statement if 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 the child either testifies at trial or is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

[¶2] The State submits this Notice and asks the Court to schedule a Hearing on this matter.

App. 8. The State later filed a Supplemental brief supporting that the K.L.'s statements are admissible. App. 9. Krogstad responded arguing that K.L. should first attempt to testify during the trial before any decision is made pursuant to 803(24) as Krogstad has the right to confront witnesses. App. 15. A hearing was held on March 25, 2019, to determine whether the time, content, and circumstances of K.L.'s statement provide sufficient guarantees of trustworthiness in accordance with 803(24). App. 16; Tr. p. 12, lns. 12-17; Mar. 25, 2019. The Court found "that the time, content, and circumstances of [K.L.]'s forensic interview statements provide sufficient guarantees of trustworthiness and her forensic interview will be admitted at trial." App. 18.

¶7 Trial took place on April 23, 2019 through April 25, 2019. App. 27. The State had Ms. Susan Spivey, an Advanced Forensic Interviewer, testify. App. 27; Tr. p. 43, lns. 1-11; Apr. 23, 2019. Ms. Spivey conducted a forensic interview with six year old K.L. on July 19, 2018. App. 27; Tr. p. 51, lns. 4-7; Apr. 23, 2019. During the interview, K.L. indicated that she gets some touches that she likes from Krogstad, and described the touches. App. 27; Tr. p. 55, lns. 9-24; Apr. 23, 2019. Trial concluded for the day during the middle of Ms. Spivey's testimony. App. 27; Tr. p. 62, lns. 19-25; Apr. 23, 2019.

¶8 The following day, Krogstad’s counsel objected to the timing of introducing the forensic interview with K.L. and Ms. Spivey citing United States vs. Spotted Bear. App. 27; Tr. p. 85-86, Ins. 12-7; Apr. 24, 2019. Specifically, Krogstad’s counsel objected that the forensic video should be played after K.L. testifies, not before K.L. testifies, to ensure accuracy. App. 27; Tr. p. 85-86, Ins. 12-7; Apr. 24, 2019. The State argued that Spotted Bear is not binding and does not prohibit what the State is intending to do and the Court has already ruled on the 803(24) motion. App. 27; Tr. p. 87, Ins. 5-21; Apr. 24, 2019. The Court’s ruled that it’s earlier ruling on the motion will stand. App. 27; Tr. p. 88, Ins. 17; Apr. 24, 2019.

¶9 Trial continued with a video of the forensic interview being admitted into evidence along with a transcript of the interview. See Doc. ID #155, 156.¹ After the video of the forensic interview was played, the State called K.L. to testify. App. 27; Tr. p. 104, Ins. 12-22; Apr. 24, 2019. K.L. testified that she did not want to tell what she has done with Jeff, and that she did not want to talk about it. App. 27; Tr. p. 112, Ins. 3-6; p. 113, Ins. 2-3; Apr. 24, 2019. When Krogstad’s counsel questioned K.L., she testified that “[Jeff] used to take us frisbeeing and I’m pretty sure that’s all I remember where he took us,” but immediately contradicted herself stating that Jeff took them to daycare, to the water park, and to the park. App. 27; Tr. p. 116-117, Ins. 19-4; Apr. 24, 2019. K.L. continued to testify contrary to her forensic interview and testified that she did not remember her interview with Ms. Spivey. App. 27; Tr. p. 118-119, Ins. 1-6; Apr. 24, 2019. K.L. also testified that

¹ Docket ID #156 is the transcript of the forensic interview. This is the same transcript that was sealed at the motion hearing, found as Docket ID #102. Docket ID #156 has not been redacted. In an abundance of caution for confidentiality, it has not been included in the Appendix but rather referred to in the brief as numbered in the Docket.

she did not remember going places with Jeff. App. 27; Tr. p. 120, lns. 10-17; Apr. 24, 2019.

¶10 Counsels approached the bench and Krogstad's counsel repeated his concern regarding playing a video prior to K.L. testifying, and that she testified contrary to the video, and that you cannot unring a bell. App. 27; Tr. p. 122, lns. 5-17; Apr. 24, 2019. The Court proceeded with the next witness and indicated it would address Krogstad's attorney's concern after the next witness. App. 27; Tr. p. 122, lns. 14-16; Apr. 24, 2019.

¶11 The State called W.H., who is K.L.'s daycare provider, to testify. App. 27; Tr. p. 123, lns. 9-10, 23-25; Apr. 24, 2019. W.H. testified that it was common for Krogstad to take K.L. or her siblings to appointments or for lunch, etc., because he helped grandma out with the children, with grandma's permission. App. 27; Tr. p. 125-126, lns. 2-7; p. 128, lns. 13-16; p. 130, lns. 13-15; Apr. 24, 2019. W.H. was unaware of any allegations of sexual activity as K.L. never reported to W.H. any sexual activity. App. 27; Tr. p. 127, lns. 24-25; Apr. 24, 2019.

¶12 The State called Jake Lanes, who is an Investigator with the Grand Forks County Sheriff's Office, to testify. App. 27; Tr. p. 132, lns. 8-13; Apr. 24, 2019. Mr. Lanes became involved in this case through a 960 report from Walsh County Social Services alleging Krogstad sexually abused K.L. App. 27; Tr. p. 133, lns. 11-20; Apr. 24, 2019. Mr. Lanes set up the interview with Ms. Spivey the same day the 960 report was made. App. 27; Tr. p. 133, lns. 24-25; Apr. 24, 2019. Mr. Lanes observed the forensic interview then went back to the office to draft search warrants. App. 27; Tr. p. 134, lns. 5-14; Apr. 24, 2019. That same night, a search of Krogstad's home took place, along with Krogstad being interviewed. App. 27; Tr. p. 134-135, lns. 23-12; Apr. 24, 2019. Nothing illegal was found

as a result of the search of Krogstad's residence. App. 27; Tr. p. 188, lns. 20-22; Apr. 24, 2019. Pornographic videos and searches regarding sexual relations were found on his cellular phone, but nothing illegal was found on his phone. App. 27; Tr. p. 248, 249; Apr. 24, 2019. During the interview Krogstad described his relationship with the children as more of a taxi service, however he has taken K.L. to go Frisbee golfing and paint rocks. App. 27; Tr. p. 140, lns. 17-25; p. 141, lns. 1-3; Apr. 24, 2019.

¶13 The Court took a recess and addressed Krogstad's counsel's 803(24) admission of the forensic video concerns. App. 27; Tr. p. 143, lns. 6-9; Apr. 24, 2019. Counsel's main concern was that the forensic video was played prior to K.L. testifying, when K.L. refused to talk about the elements of the case, and Krogstad was denied the ability to cross examine the witness. App. 27; Tr. p. 143-150, lns. 21-11; Apr. 24, 2019. Krogstad's counsel requested a mistrial or a dismissal. App. 27; Tr. p. 150, lns. 7-11; Apr. 24, 2019. The Court denied the request for a mistrial or a dismissal because the Court indicated it would have admitted the video even if K.L. testified first. App. 27; Tr. p. 150-151, lns. 18-1; Apr. 24, 2019. Krogstad's counsel then moved to strike K.L.'s testimony as unresponsive and/or hostile along with the forensic interview and moved for a mistrial based upon the fact K.L.'s testimony would not be in compliance with the rules of evidence. App. 27; Tr. p. 153-154, lns. 17-14; Apr. 24, 2019. The Court again denied the motion to strike and the motion for a mistrial. App. 27; Tr. p. 155, lns. 20-24; Apr. 24, 2019.

¶14 Mr. Lane's testimony continued to discuss the search of Krogstad's vehicle, where a body wand was discovered along with a painted rock and frisbee discs. App. 27; Tr. p. 161, lns. 2-24; p. 163, lns. 9-12; Apr. 24, 2019. Krogstad's and K.L.'s DNA along with the body wand were sent to the state lab for testing. App. 27; Tr. p. 170, lns. 3-14; Apr.

24, 2019. The results indicated that neither Krogstad nor K.L.'s DNA could be excluded as contributors on the body wand, and that at least two or more individuals contributed to the DNA on the body wand. App. 27; Tr. p. 294-295; p. 301-302, Ins. 25-3; Apr. 25, 2019. However, the DNA was not blood or semen, it could have come from someone touching it. App. 27; Tr. p. 318, Ins. 10-19; Apr. 25, 2019.

¶15 K.L.'s grandmother, S.E., testified that K.L. made an allegation similar to the present allegation a few years prior against S.E.'s son. App. 27; Tr. p. 217-218, Ins. 10-6; Apr. 24, 2019. S.E. did not believe K.L.'s allegation then was true. App. 27; Tr. p. 218, Ins. 1-10; Apr. 24, 2019. Regardless, S.E. testified that Krogstad does help her out a lot with the children. App. 27; Tr. p. 222, Ins. 16-25; Apr. 24, 2019.

¶16 After the State rested, Krogstad moved for a mistrial or dismissal based on K.L.'s lack of testimony, which would not allow the forensic video to be admitted, and a Rule 29 motion for verdict of acquittal. App. 27; Tr. p. 324-326, Ins. 13-13; Apr. 25, 2019. The State argued that under 803(24)(B), K.L. testified and was unavailable, therefore the video is still admissible, and the State has presented more than sufficient evidence for the charge of gross sexual imposition. App. 27; Tr. p. 327, Ins. 12-17; p. 329, Ins. 13-17; Apr. 25, 2019. The Court denied the motions for mistrial and dismissal and the Rule 29 motion. App. 27; Tr. p. 329, Ins. 21-23; p. 331, Ins. 13-21; Apr. 25, 2019.

¶17 Krogstad did not present any witnesses and rested. App. 27; Tr. p. 334-335, Ins. 24-3; Apr. 25, 2019. The jury returned a verdict that Krogstad was guilty to the crime of gross sexual imposition. App. 27; Tr. p. 382, Ins. 7-12; Apr. 25, 2019. Judgment was entered in accordance with the jury verdict on September 18, 2019. App. 94. On September 19, 2019, Krogstad submitted a notice of appeal. App. 96.

LAW AND ARGUMENT

I. The Standard of Review.

¶18 This Court’s standard of review for challenges to sufficiency of the evidence is as follows:

When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. When considering insufficiency of the evidence, we will not reweigh conflicting evidence or judge the credibility of witnesses A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty.

State v. Kinsella, 2011 ND 88, ¶ 7, 796 N.W.2d 678 (citing State v. Wanner, 2010 ND 121, ¶ 9, 784 N.W.2d 154) (quotations omitted). “A reversal is warranted only if, after viewing the evidence and all reasonable evidentiary inferences in the light most favorable to the verdict, no rational factfinder could have found the defendant guilty beyond a reasonable doubt.” State v. Vanreece, 20017 ND 126, ¶ 14, 736 N.W.2d 428 (citing State v. Keller, 2005 ND 86, ¶ 50, 695 N.W.2d 703). Standard of review on appeal is the same whether sufficiency of evidence is questioned on motion for judgment of acquittal at close of state’s case, at close of evidence, or after return of guilty verdict. State v. Lambert, 539 N.W.2d 288, 289 (N.D. 1995).

II. The Evidence Presented at Trial was Insufficient to Sustain the Guilty Verdict.

¶19 “After the prosecution closes its evidence or after the close of all the evidence, the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” N.D.R.Crim.P. 29(a). “The court may

reserve decision on the motion, proceed with the trial If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.” N.D.R.Crim.P. 29(b).

¶20 In the present case, after the State rested, Krogstad moved for a mistrial or dismissal based on K.L.’s lack of testimony, which would not allow the forensic video to be admitted, and a Rule 29 motion for verdict of acquittal. App. 27; Tr. p. 324-326, lns. 13-13; Apr. 25, 2019. The State argued that under 803(24)(B), K.L. testified and was unavailable, therefore the video is still admissible, and the State has presented more than sufficient evidence for the charge of gross sexual imposition. App. 27; Tr. p. 327, lns. 12-17; p. 329, lns. 13-17; Apr. 25, 2019. The Court denied the motions for mistrial and dismissal and the Rule 29 motion, which it should not have. App. 27; Tr. p. 329, lns. 21-23; p. 331, lns. 13-21; Apr. 25, 2019.

III. The Standard of Review.

¶21 The 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 (citing State v. Blue, 2006 ND 134, ¶ 6, 717 N.W.2d 558, 561).

IV. Whether Krogstad’s Sixth Amendment Right to Confrontation was Violated.

¶22 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. 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, 59, (2004). In Crawford, the Supreme Court included out of court statements as testimonial statements. Id. at 52. In State v. Blue, the video of a child's statements to the forensic interviewer were testimonial under Crawford. 2006 ND 134, ¶ 16. Since the video of the child's statements are testimonial, there must be the opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 69, (2004). If a defendant has an opportunity to cross-examine the witness at trial, the admission of testimonial statements would not violate the Confrontation Clause. State v. Blue, at ¶23.

¶23 In the present case, Krogstad did not have the opportunity to cross-examine K.L. At trial K.L. testified that she did not want to tell what she has done with Jeff, and that she did not want to talk about it. App. 27; Tr. p. 112, lns. 3-6; p. 113, lns. 2-3; Apr. 24, 2019. When Krogstad's counsel questioned K.L., she testified that "[Jeff] used to take us frisbeeing and I'm pretty sure that's all I remember where he took us," but immediately contradicted herself stating that Jeff took them to daycare, to the water park, and to the park. App. 27; Tr. p. 116-117, lns. 19-4; Apr. 24, 2019. K.L. continued to testify contrary to the forensic interview and testified that she did not remember her interview with Ms. Spivey. App. 27; Tr. p. 118-119, lns. 1-6; Apr. 24, 2019. K.L. also testified that she did not remember going places with Jeff. App. 27; Tr. p. 120, lns. 10-17; Apr. 24, 2019.

¶24 Counsels approached the bench and Krogstad's counsel repeats his concern regarding playing a video prior to K.L. testifying, and she testifies contrary to the video. App. 27; Tr. p. 122, lns. 5-17; Apr. 24, 2019. K.L.'s unwillingness to testify about the allegations before Krogstad robbed Krogstad of his opportunity to cross-examine his accuser on the allegations of gross sexual imposition. To date, Krogstad has not had an

adequate opportunity to cross-examine his accuser.

V. Standard of Review.

¶25 This Court applies an abuse of discretion standard of review to a district court's evidentiary rulings under N.D.R.Ev. 803(24). State v. Wegley, 2008 ND 4, ¶ 12, 744 N.W.2d 284 (citing State v. Hirschhorn, 2002 ND 36, ¶ 7, 640 N.W.2d 439). "A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law." State v. Peterson, 2016 ND 192, ¶8, 886 N.W.2d 71 (citing State v. Moos, 2008 ND 228, ¶ 30, 758 N.W.2d 674).

VI. Whether the Court Abused its Discretion in Allowing the Forensic Video of K.L. as admitted.

¶26 North Dakota Rules of Evidence, Rule 803(24) provides as follows:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(24) Child's statement about sexual abuse. A statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child if:

(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.

¶27 In State v. Hirschhorn, this Court explained the purpose of N.D.R.Ev. 803(24) and its application:

Enactment of child-hearsay rules is intended to ensure that child abusers do not go free merely because the prosecutor is unable to obtain witnesses to the abuse other than the child, who is unable to testify about the abuse. While the child-hearsay rule permits the admission of otherwise inadmissible hearsay evidence in order to facilitate prosecution, the rule's

requirements are also intended to safeguard the accused's right to confront the witnesses testifying against him. The child-hearsay rule is intended to balance the interests of the accused and the interests of the truth-seeking process. Indicia of reliability and guarantees of trustworthiness are constitutionally required before admission of hearsay statements to preserve the Sixth Amendment's basic interest in requiring "confrontation," even though an accused cannot directly confront the hearsay declarant. Because of the importance of the accused's confrontation rights, the safeguards built into the child-hearsay rule must be strictly observed.

2002 ND 36, ¶11, 640 N.W.2d 439.

¶28 The "[f]actors the court must consider when deciding whether to admit a child's out-of-court statements are the spontaneity and consistent repetition of the statements, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and a lack of a motive to fabricate." State v. Sevigny, 2006 ND 211, ¶25, 722 N.W.2d 515 (citing State v. Hirschhorn, 2002 ND 36, ¶13, 640 N.W.2d 439. "A [district] court 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. The court must make specific findings of fact relevant to reliability and trustworthiness and explain how the facts support the court's conclusion of admissibility. Id. at ¶ 18.

¶29 In the present case, the introduction of the video of the forensic interview of K.L. should not have been introduced. The Court found that the time, content, and circumstances of the forensic interview provided trustworthiness to be admitted at trial. App. 18. However, the Court failed to acknowledge that K.L. must testify at trial, or be available to be cross-examined, and should testify in consistent with the forensic interview. The Court failed to acknowledge the minimal testimony provided by K.L., and combined with the confrontation clause being violated, the video should not have been introduced.

CONCLUSION

¶30 The Appellant respectfully requests this Court reverse the District Court's Judgment.

Dated 17th day of January, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Appellant brief contains 15 pages consisting of the cover page through the conclusion and signature block and complies with the page limits outlined in North Dakota Rules of Appellate Procedure Rule 32(a)(8)(A).

Dated 17th day of January, 2020.

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CERTIFICATE OF SERVICE

True and correct copies of ***BRIEF OF APPELLANT*** and ***APPENDIX OF APPELLANT*** was e-mailed to the following this 17th day of January, 2020:

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