

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Nos. 20190329

District Court No. 30-2019-CR-561

State of North Dakota,)
)
Plaintiff and Appellee,)
)
v.)
)
Tara Lynn Soucy,)
)
Defendant and Appellant.)

BRIEF OF THE APPELLEE

APPEAL FROM CRIMINAL JUDGMENT IN THE MORTON COUNTY DISTRICT
COURT [OCTOBER 22, 2019)

MORTON COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE GAIL HAGERTY, PRESIDING

ORAL ARGUMENT IS REQUESTED

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North Dakota Supreme Court Cases:

<u>Knudson v. Director, North Dakota Dep't. of Transp.</u> , 530 N.W.2d 313, 316 (N.D. 1995)	¶3
<u>Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.</u> 969 F.2d 1384, 1388 (2d Cir. 1992)	¶7
<u>State v. Alvarado</u> , 2008 ND 203, 757 N.W.2d 570	¶3
<u>State v. Bergstrom</u> . 2006 ND 45, 710 N.W.2d 407	¶7
<u>State v. Christensen</u> , 1997 ND 57, 561 N.W.2d 631	¶3
<u>State v. Hatlewick</u> , 2005 ND 125, 700 N.R.2d 717	¶3
<u>State v. Ramsey</u> , 2005 ND 42, 692 N.W.2d 498	¶3

Other Authorities:

N.D.R.Ev.Rule 201	¶¶ 6,9
N.D.R.Ev. Rule 403	¶ 9

Reason for requesting oral argument: The Appellee is requesting oral argument to explain the intricacies of not only the underlying facts but also the argument presented in this brief.

STATEMENT OF THE ISSUES

[¶1] Was it reversible error for the trial judge to refuse to take judicial notice of the father of the twins' conviction for Contributing to the Deprivation of a Minor?

STATEMENT OF THE CASE AND FACTS

[¶2] The State brought criminal charges against Tara Soucy on June 14th 2019, by filing a complaint in the Morton County District Court. The Complaint alleged two counts of Child Neglect, one alleged to have occurred on May 28th 2019 in Morton County and the second alleged to have occurred on May 29th 2019 in Morton County. Count one involved Ms. Soucy's juvenile twin children. Count II involved only one of the juvenile twins. Ms. Soucy waived her right to a preliminary hearing, and the felony counts were bound over for trial. Trial occurred on October 22nd 2019 in Morton County. Ms. Soucy was represented by counsel at trial. The State called several witnesses, including law enforcement, an individual who at the time of the events worked with Social services, and civilian witnesses who called the police. Tara Soucy testified on her own behalf, and was ultimately found to be not guilty in Count I but Guilty of Count II, by a jury of her peers. During the cross examination of Mandan Police Officer Jessica Kraft, Ms. Soucy's attorney at the time questioned Officer Kraft about another individual involved in the case. That other individual is Avalino Lopez, the Father of the Twins, who was also charged initially with child neglect for the incident on May 29th 2019. Mr. Lopez, plead to a lesser offense of Contributing to the Deprivation or Delinquency of a Minor. Ms. Soucy did not call Mr. Lopez as a witness at trial, despite having obtained an order that he be transported to appear as a witness. Ms. Soucy ultimately appealed.

STANDARD OF REVIEW

[¶3] The Standard of review of a Trial Court’s evidentiary ruling is for abuse of discretion.

‘We review a trial court’s evidentiary ruling under an abuse-of-discretion standard.’ State v. Hatlewick, 2005 ND 125, ¶9, 700 N.R.2d 717. ‘A trial court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably or if it misinterprets or misapplies the law.’ Id. (quoting State v. Ramsey, 2005 ND 42, ¶8, 692 N.W.2d 498). ‘we apply this deferential standard of review to provide the trial courts with greater control in the admissibility of evidence.’ State v. Christensen, 1997 ND 57, ¶5, 561 N.W.2d 631 (citing Knudson v. Director, North Dakota Dep’t. of Transp., 530 N.W.2d 313, 316 (N.D. 1995)).

State v. Alvarado, 2008 ND 203, 757 N.W.2d 570.

ARGUMENT

I. The District Court Did Not Abuse It's Discretion In Declining To Take Judicial Notice Of A Non-Codefendant's Criminal Judgment

[¶4] The District Court did not abuse the discretion granted to in in evidentiary rulings when it declined to take judicial notice at the time Ms. Soucy's attorney, Yancy Cottrill sought it. Mr. Cottrill was cross-examining Officer Jessica Kraft with regards to the involvement of the victim's father in the incident from May 29th 2019. The following exchange occurred between Mr. Cottrill, Officer Kraft and the Court;

Q. And Mr. Lopez was charged with child neglect in relation to this incident; is that correct?

A. It is.

Q. And do you know if he plead guilty to that charge?

A. I believe he -- it was dropped down to a different charge.

Q. Are you aware what that charge was?

THE COURT: It's okay if you're not able to answer the questions. If you just don't know, that's fine.

THE WITNESS: I'm drawing a blank right now. I can't remember

MR. COTTRILL: May I approach, Your Honor?

THE COURT: No. This isn't probably the way you'd get that evidence in.

MR. COTTRILL: Can you take judicial notice?

THE COURT: Not at this point. You may present that evidence in some way that you figure out later but not at this point, no.

MR. COTTRILL: Sure. All right.

[¶5] Mr. Cottrill never attempted to introduce Mr. Lopez’s Criminal judgment again in any form, nor did Mr. Cottrill ever call Mr. Lopez as a witness for the Defense. When Ms. Soucy testified she was never asked by her attorney about Mr. Lopez’s criminal judgment. Mr. Cottrill sought to admit some type of evidence of Mr. Lopez’s judgment, however there was no information that the State is aware of that was supplied to the Court of exactly what Mr. Cottrill sought to introduce, as evidenced by the fact that the parties had to stipulate that Mr. Cottrill was attempting to get judicial notice of the judgment.

[¶6] Rule 201 of the North Dakota Rules of Evidence sets forth the rules regarding judicial notice. Rule 201(a) provides that the rule governs judicial notice only of adjudicative facts, which the comments explain as “the facts of the particular case before the courts, facts that are normally the subject of proof by formal introduction of evidence.” (N.D.R.Ev. 201 and comments). The first question then is whether the criminal judgment of another individual, who is charged with an offense arising from the same incident, but not charged as a codefendant is an adjudicative fact. Normally the criminal conviction of another individual is relevant only in impeachment of a witness, or in an affirmative defense such as alleging self-defense. In such cases, another’s criminal judgment would be an adjudicative fact. Here however it should not be considered an adjudicative fact. While a criminal judgment would be evidence that would normally be the subject of proof by formal introduction of evidence this would only have been relevant in a situation where Mr. Lopez testified as a witness. Without his testimony evidence of his judgment would not be a fact of the particular case before the Court.

[¶7] The Criminal Judgment and judicial notice thereof that Avalino Lopez plead guilty to contributing to the deprivation of a child, would have not altered the outcome of the case.

The Court could only have taken judicial notice of the offense to which Mr. Lopez plead, from the judgment, not the specific factual basis for the plea. The Court in State v. Bergstrom, provided “The court may only take judicial notice of the evidence as presented, and not for the truth of the matters asserted by the evidence.” 2006 ND 45 ¶18, 710 N.W.2d 407. Further the Court in Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., provides “A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” 969 F.2d 1384, 1388 (2d Cir. 1992)(internal citation omitted). Meaning that in relation to this case the Court could at most take judicial notice of the fact that there was a criminal judgment, and the offenses listed. A review of the transcript, as outlined above, appears to indicate that the defense sought the admission of Mr. Lopez’s criminal judgment to establish that the lesser offense he plead guilty to was contributing to the deprivation or delinquency of a minor. The sequence of questions leading up to the issue before this Court relates to only what the offense was, as it had already been established by testimony that Mr. Lopez plead to a lesser offense related to child neglect, from events on May 29th 2019.

[¶8] Mr. Cottrill had asked Officer Kraft about Mr. Lopez having been charged with child neglect arising from the May 29th incident. Officer Kraft testified that Mr. Lopez plead to a lesser offense. Officer Kraft states she cannot remember the exact offense, and the Defense attempts various methods to introduce what the offense Mr. Lopez plead to was. The Appellant argues that had the Court taken judicial notice of Mr. Lopez’s judgment then Ms. Soucy “could have argued that the crime she was charged with committing on May 29, 2019 was all Mr. Lopez’ fault.” (Brief of Appellant, at ¶25). However, Ms. Soucy through counsel did argue that it was Mr. Lopez’ fault. Introduction of the judgment for purposes of clarifying

the offense's name served no purpose other than naming an offense. The fact that the judgment wasn't judicially noticed did not prevent the Defense from arguing that this was not Ms. Soucy's fault but was Mr. Lopez's. The Jury, through Mr. Cottrill's questioning of Officer Kraft, was made aware that Mr. Lopez had admitted to not taking proper care of his child on May 29th 2019. The jury would have had enough information to take that into account if the jury deemed it appropriate. There is no indication that the lack of judicial notice impacted any substantial right of Ms. Soucy in any way. The district Court did not abuse its discretion in this instance because its decision did not impact the case in any significant way.

[¶9] The Defense Attorney never properly requested the Court take judicial notice of Avalino Lopez's criminal judgment the closest was "can you take judicial notice." This is a question not a proper request that the Court take judicial notice. There was no information provided to the Court of the fact to be noticed, that is evidenced by the need for the stipulation of the parties. Rule 201(c)(2) of the Rules of Evidence require taking of judicial notice only if a party requests it and the Court "is supplied with the necessary information." There was no copy of the judgment provided to the Court, not even a case number. The Court had no information provided to it other than the name Avalino Lopez, and that it arose from May 29th. The fact that there was no real information provided to the Court means that the request to take judicial notice wasn't proper, and the Court declining to take notice at the time was not an abuse of discretion.

[¶10] The Judgment would have been subject to objections based on Rule 403 of the rules of evidence. The probative value of the evidence would have been substantially outweighed by a danger of confusing the issues, needlessly presenting cumulative evidence and misleading

the jury. The issue could have then been seen as whether the defendant could have committed an offense that another also committed, instead of the guilt of the defendant independent of the guilt of any other non-party. In addition with the limited notice as outlined by Bergstrom, the State may have then had to present evidence to clarify exactly what it was that Mr. Lopez admitted to in order to avoid unfair prejudice by the jury only having the name of the offense. Further judicial notice would have allowed the State to argue that there has already been an acknowledgement by Ms. Soucy that her children were deprived, and then argue that she caused that deprivation.

CONCLUSION

[¶11] The District Court For all the foregoing facts and argument, the State of North Dakota respectfully requests this Court find that the District Court did not abuse its discretion in declining to take judicial notice of a non-witnesses criminal judgment, in that the District Court in no way acted arbitrarily, capriciously, or unreasonably, nor did it misinterpret or misapply the law.

Respectfully submitted this 12th day of February, 2020.

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)	District Court No. 30-2019-CR-00561
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Plaintiff/Appellee,)	
)	
-vs.-)	CERTIFICATE OF COMPLIANCE
)	
Tara Lynn Soucy,)	
)	
Defendant/Appellant.)	

[¶ 1] This Appellee’s Brief complies with the page limit of 38 pages as set forth in Rule 32(a) (8) (A) of the North Dakota Rules of Appellate Procedure, as it only has 11 pages.

Dated this 12th day of February, 2020.

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CERTIFICATE OF SERVICE

[¶1] The undersigned hereby certifies that on the 12th day of February, 2020, a true and correct copy of the **BRIEF OF THE APPELLEE, CERTIFICATE OF SERVICE, CERTIFICATE OF COMPLIANCE** in PDF form was filed with the Clerk of the North Dakota Supreme Court with a copy served upon the Defendant/Appellant by Electronic Service through the Court electronic file and serve system to her attorney on appeal at the following address;

Benjamin C. Pulkrabek
E Service: Pulkrabek@lawyer.com

Dated this 12th day of February, 2020.

/s/ Chase R. Lingle

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