

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,

Plaintiff and Appellee,

v.

Christian Dion Tolbert,

Defendant and Appellant.

Supreme Court File No.
20200029

Grand Forks County File No.
18-2018-CR-01417

APPELLANT BRIEF

Appeal from the Criminal Judgment in Grand Forks County

District Court, North East Judicial District, Grand Forks, North Dakota

January 27, 2020, the Honorable Jay Knudson presiding

ORAL ARGUMENT REQUESTED

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant’s written arguments on their merits.

Transcript References:

The transcript of the jury trial conducted on 09/24/2019 through 09/27/2019 is referred to as [T.II] in this Brief.

STATEMENT OF THE ISSUE

[¶1] ISSUE I. Did the trial judge err when he refused to admit into evidence Defendant's Exhibit #1?

NATURE OF THE CASE

[¶2] The charges in this case were:

1. Continuous sexual abuse of a child – Defendant is at least 22 years of age – sex offenses.
2. Luring minors by computer – Defendant 22 or older, believes victim 15-17.

[¶3] The following documents were filed on 07/05/2018: Affidavit of Probable Cause, Information, and Warrant of Arrest.

[¶4] On 01/11/2019 twelve more documents were filed: Warrant of Arrest Served, Notice to Defendant and Consent to ITV, Affidavit of Service (Christian Tolbert), Proposed Order Prohibiting Contact (B.S.B.), Return of Service on Arrest Warrant for Christian Tolbert, Notice of Change of Assignment of Attorney, Affidavit of Service by Electronic Filing (Christian Tolbert), Appearance Bond Ordered, Scheduling Order, Certificate of Service (Defendant), Affidavit of Service (Christian Tolbert), Proposed Amended Order Prohibiting Contact.

[¶5] The defense filed a Discovery Request on 02/02/2019 and the State filed a Reciprocal Discovery Request on 02/13/2019.

[¶6] The Preliminary Hearing and Arraignment was held on 03/01/2019.

[¶7] A number of pretrial Motions were made and the Final Dispositional Conference that was held on 04/25/2019 continued the trial date.

[¶8] Additional Motions were made. The Jury Trial began on 09/24/2019 and ended on 09/27/2019.

[¶9] The jury found Defendant/Appellant Christian Tolbert (Tolbert) guilty of:

1. Continuous sexual abuse of a child.
2. Luring minors by computer.

[¶10] There was a presentence investigation filed on 01/10/2020.

[¶11] On 01/27/2020 on Count 1, Continuous sexual abuse of a child – Defendant is at least 22 years of age – sex offenses, Tolbert was sentenced to incarceration with the Department of Corrections and Rehabilitation for a term of 35 years with 10 years suspended for a period of 10 years, and during that 10 years he is to be under supervised probation. He received credit for time served in the amount of 383 days. On Count 2, Luring minors by computer – Defendant 22 or older, believes victim 15-17, Tolbert was sentenced to incarceration with the Department of Corrections and Rehabilitation for a term of 5 years with 1 year suspended for a period of five years, during the 5 years he is ordered supervised probation. Tolbert received credit for time served in the amount of 383 days and ordered Count 2 to run concurrent with Count 1.

[¶12] Also on 01/27/2020 Judgment was entered.

[¶13] The Notice of Appeal was filed on 02/04/2020.

[¶14] A Notice of Filing Notice of Appeal was filed on 02/04/2020.

[¶15] A second Notice of Appeal was filed on 02/06/2020.

[¶16] A Notice of Filing second Notice of Appeal was filed on 02/06/2020.

[¶17] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶18] The child involved in this case is M.B. When M.B. was 12 years old her mother started living with the Defendant/Appellant, Christian Dion Tolbert (Mr. Tolbert). Mr. Tolbert at that time was stationed at the Grand Forks Airforce Base.

[¶19] When Mr. Tolbert first moved in with M.B.'s mother, he and M.B. got along and it looked like they might develop a father-daughter relationship. Then they started to do physical things together. Mr. Tolbert testified that these physical things were limited to kissing and snuggling. M.B. testified these physical things also included vaginal and oral sex.

[¶20] About 2 years later Mr. Tolbert got out of the air force and left the Grand Forks area.

[¶21] When M.B. was 17 she started getting messages on her Facebook account from a man. The man identified himself as Damon Jackson who was 18 years of age and living in Moorhead, Minnesota. His Facebook identification was Ialways Mindinmyown.

[¶22] Damon Jackson's messages indicated he knew a lot about M.B.'s past. The past he knew about was when M.B. was 12 to 14 years of age and was involved with Mr. Tolbert. After a while it became apparent to M.B. that the man who identified himself as Damon Jackson was Mr. Tolbert.

[¶23] The Facebook discussions Mr. Tolbert had with M.B. involved specific sexual acts.

[¶24] During these Facebook discussions M.B. was seeing a counselor. M.B. told the counselor about the Facebook discussions and the sexual acts she had had in the past with

Mr. Tolbert. The counselor then contacted the Grand Forks police and they started to investigate M.B.'s case.

[¶25] The Grand Forks police wanted to talk to Mr. Tolbert to hear his side of M.B.'s story. The Grand Forks police located Mr. Tolbert in Waukegan, Illinois. They sent the information they had about M.B.'s case to the Waukegan, Illinois police. The Waukegan police then contacted Mr. Tolbert and had him come in for questioning. After the questioning they allowed Mr. Tolbert to leave.

[¶26] The Waukegan police then sent the Grand Forks police a report and a taped copy of the interview. The Grand Forks police went over the report and tape and decided to get a warrant for Mr. Tolbert's arrest. The warrant charged Mr. Tolbert with Count 1 - Continuous Sexual abuse of a child – Defendant is at least 22 years of age and Count 2 – Luring Minor by computer – Defendant is at least 22 or older.

[¶27] Mr. Tolbert was arrested. The trial began on 09/24/2019 and ended with a verdict of guilty on each count on 09/27/2019.

ISSUE I. Did the trial judge err when he refused to admit into evidence Defendant's Exhibit #1?

ARGUMENT

[¶28] During the trial Defendant's attorney tried to cross examine M.B., the alleged victim, about the creative writing she had done in her past about fanaticized sexual activities, T. II P. 220 L. 19 to P. 223 L. 4:

“Q Okay. Do you ever write or do any creative writing?

A Now, no. I haven't been doing that for years.

Q I'm sorry.

A I haven't done that for years.

Q Okay. Not within the past year?

A Yeah, no.

Q Okay.

MR. FISCHER: Permission to approach the witness, Your Honor?

THE COURT: You may.

MS. NEUFELD: May we approach, Your Honor?

THE COURT: Yes, you may. (Discussion held at the bench between the Court and counsel.)

MS. NEUFELD: Those are communications between the victim and her ex-boyfriend in their personal engagement that are protected in 412.

THE COURT: Mr. Fischer?

MR. FISCHER: Again, I would argue that Rule 412 covers sexual behavior. This does not describe sexual behavior. It's creative writing.

MS. NEUFELD: No, she is sexting with an ex-boyfriend who she was dating at the time.

THE COURT: Okay. This is not going in. First of all, it's not relevant in this case. And even if it was, Rule 412, this is the kind of information that 412 specifically prohibits from being used in a case involving sexual misconduct. This is evidence of sexual predisposition, so it's excludable under 412.

MR. FISCHER: Your Honor, I would argue that this is creative writing, this is not showing -- it's very clear from the context, especially if you look on the third page where the individual she's corresponding with says you need to write sex stories, you're good at it, or good porn scenarios or something. This does not describe actual events, this does not describe actual sexual behavior.

THE COURT: No. It might not be but that's what's going to happen, that's what's going to happen if we let this in. It will be looked at as sexual predisposition and that does not come in under 412 so the objection is sustained. If you want to the mark this as an exhibit and you can offer it, I won't receive it, but you can offer it for the record if you want to do that.

MR. FISCHER: I will. Let's see. Can I just manually make it Defense Exhibit 1 at this time and offer it?

THE COURT: The Clerk will have an exhibit sticker. (Defendant's Exhibit 1 was marked for identification.)

THE COURT: Are you offering this Defendant's Exhibit 1?

MR. FISCHER: Yes, Your Honor.

MS. NEUFELD: State is objecting, Your Honor.

THE COURT: Objection is sustained. Exhibit 1 is not going to be received by the Court but it'll be part of the record as an exhibit not received.”

[¶29] The North Dakota Rules of Evidence that the Court applied in it’s denial of Defendant’s attorney’s cross examination and Defendant’s Exhibit #1 was 412 (a)(2):

“(a) **Evidence Generally Inadmissible.** The following evidence is not admissible in any criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and
- (2) evidence offered to prove any alleged victim's sexual predisposition”

[¶30] Defendant’s attorney’s arguments to the trial court about Exhibit #1 (Docket #84) and his cross examination was that 412 (a)(2) is not applicable to a creative writing. Such

Docket ID #82 – Plaintiff’s Exhibit 2 is a copy of Facebook messages, #83 is Plaintiff’s Exhibit 1 – Video Interview, and #84 is Defendant’s Exhibit 1 facebook message (Not Received). These are documents that were sealed at the trial hearing, found as Docket ID #82, #83, and #84, have not been redacted. In an abundance of caution for confidentiality, the documents have been excluded from the Appendix and referred to in the brief as numbered and labeled in the Docket.

an argument should have been, but was not made mentioning North Dakota Rules of Evidence 608 (b)(1).

“(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. However, in the discretion of the court, if probative of truthfulness or untruthfulness, they may be inquired into on cross-examination of the witness

(1) concerning the witness' character for truthfulness or untruthfulness”

[¶31] In this case the cross examining that Defendant’s attorney was doing of the alleged victim is set out above in paragraph [28]. That trial court’s ruling on that cross examination should have been made according to N.D.R.Ev. 608(b)(1) and not according to N.D.R.Ev. 412 (a)(2).

[¶32] In order for Defendant/Appellant Tolbert to get the cross examination issue before the North Dakota Supreme Court on this appeal he must argue that the trial court’s ruling ending his cross examination of the alleged victim, M.B., was a constitutional error affecting his substantial right.

[¶33] The type of error by the court in this case claimed by Defendant/Appellant Tolbert is found in N.D.R. Crim. P. 52(b):

“Obvious error. An obvious error or defect that affects substantial rights may be considered even though it was not brought to the court’s attention.”

[¶34] According to State v. Schneider, 270 N.W.2d 787 (N.D. 1978):

“Rule 52, N.D.R.Crim.P., applies only when an error has been made by the trial court. If the trial court has erred,

“. . . three types of error may be assigned for review by the appellate court. These are (1) harmless error or error not prejudicial to the defendant; (2) reversible error or error that was prejudicial and to which objection was made in the trial court; and (3) obvious error or error so fundamental that a new trial or other relief must be granted even though the action was not

objected to at the time.’ Comments to Rule 52, N.D.R. Crim.P. [See Wright, Federal Practice and Procedure, Criminal § 851 (1969)]. In this case, no objection was made at trial to the patrolman's testimony. We must determine whether the error was "(1) harmless error" or "(3) obvious error".

In *State v. Carmody*, [253 N.W.2d 415](#) (N.D.1977), we reaffirmed *State v. Hilling*, [219 N.W.2d 164](#), 172 (N.D.1974), in which this court adopted the harmless error test enunciated in *Chapman v. California*, [386 U.S. 18](#), [87 S. Ct. 824](#), [17 L. Ed. 2d 705](#) (1967), *reh. den.* 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967). In *Chapman*, *supra* 386 U.S. at 24, [87 S. Ct. 824](#), 828, it was held that federal constitutional errors do not automatically require reversal if it is shown that they were harmless, and "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt". See *Carmody*, *supra* 253 N.W.2d at 418; *Hilling*, *supra* 219 N.W.2d at 172; and Comments to Rule 52, N.D.R.Crim.P.

The beneficiary of a constitutional error has the heavy burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained". *Chapman*, *supra* 386 U.S. at 24, [87 S. Ct. at 828](#). See *Carmody*, *supra* 253 N.W.2d at 418.”

[¶35] The standard of review of an error affecting constitutional rights, according to Schneider is:

“To determine the effect of the error on Schneider's constitutional rights we must consider "the entire record and the probable effect of the actions alleged to be error in light of all the evidence". *State v. Allen*, [237 N.W.2d 154](#), 162 (N.D.1975), citing *State v. Johnson*, [231 N.W.2d 180](#), 185 (N.D.1975); and Comments to Rule 52, N.D. R.Crim.P.”

[¶36] In North Dakota Defendants in criminal cases Defendants have rights under the Sixth Amendment of the United States Constitution and Article 1 §12 of the North Dakota Constitution to cross examine witnesses against them.

[¶37] Rule 412 of the N.D.R.Ev. has placed limitation on criminal Defendant’s right of cross examination of victim’s sexual behavior or predisposition. This case involves the issue of the victim’s sexual predisposition and whether or not her writings of fantasy

stories about sexual acts and events that have never occurred should be included as part of her predisposition.

[¶38] Nowhere in Rule 412 of the N.D.R.Ev. does the word fantasy appear. Therefore, a reasonable interpretation of Rule 412 would be that it deals only with acts that have occurred in the past or could occur in the future and not with fantasy that will never occur.

[¶39] Defendant/Appellant Tolbert's attorney made it clear that he didn't think 412 applied to Defendant's Exhibit #1 (Docket #84) because Defendant's Exhibit #1 involved only fantasy. The trial judge in his ruling on Defendant's Exhibit #1 used Rule 412 (a)(2) and decided fantasies are a part of a victim's predisposition.

[¶40] The above judge's ruling never considered N.D.R.Ev. 608 (b)(2). Under that rule Defendant's Exhibit #1 could have been admitted. Even if it was not the Defendant's attorney should have been allowed to cross examine the victim to determine whether the fantasy stories she wrote about sex and sexual acts had had any effect on what she wrote in her messaging and/or testified to in this case.

CONCLUSION

[¶41] From the above and forgoing reasons this case should be remanded to the District Court for a new trial. At that trial Defendant's Exhibit #1 (Docket #84) must be admitted into evidence.

Dated this 22nd day of May, 2020

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**CERTIFICATE OF
COMPLIANCE**

[¶1] This Appellant’s Brief and Appendix complies with the pages limit of 38 for the Brief and 100 pages for the Appendix set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, as the Brief consists of 13 pages and Appendix consists of 97 pages.

Dated this 22nd day of May, 2020

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CERTIFICATE OF SERVICE

[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Appendix

Appellant's Brief

By email at the below address upon:

Andrew Eyre

Grand Forks County States Attorney

sasupportstaff@gfcounty.org

North Dakota Supreme Court

supclerkofcourt@ndcourts.gov

And by placing a true and correct copy of said items in a sealed envelope with USPS mail to:

Christian Tolbert

C/O North Dakota State Penitentiary

P.O. Box 5521

Bismarck, ND 58506-5521

Dated this 22nd day of May, 2020

/S/ Cassy Larson

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