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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The State of North Dakota,	)	
	)	Supreme Court No. 20200029
	)	
Plaintiff and Appellee,	)	
	)	District Court No. 18-2018-CR-01417
	)	
vs.	)	
	)	
Christian Dion Tolbert,	)	
	)	
Defendant and Appellant.	)	

APPEAL FROM THE CRIMINAL JUDGMENT IN GRAND FORKS COUNTY DISTRICT COURT, NORTHEAST JUDICIAL DISTRICT, GRAND FORKS, NORTH DAKOTA JANUARY 27, 2020, THE HONORABLE JAY KNUDSON PRESIDING

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

[¶1] Was the trial court's decision to exclude Defendant's Exhibit 1 obvious error?

STATEMENT OF THE CASE

[¶2] The State largely agrees with the Appellant's statement of the case, but the State would like to clarify a few points regarding the motions that were filed in the case.

[¶3] The Appellant states in paragraphs seven and eight of his brief that a number a pretrial motions were made. On March 28, 2019, the State moved for a date certain trial (Index #38). On April 10, 2019, the State moved for a continuance and a date certain trial because one of the State's key witnesses, a detective from the State of Illinois who was attending law school, was not available for the original trial date because it conflicted with his law school final exams. (Index #40-#44). The State filed a motion under Rule 611 asking the Court to allow Detective Mays, who was travelling from Illinois, to testify out of order if the need arose. On September 13, 2019, the State filed a motion in limine asking the Court to limit jury selection to ninety minutes per side, and asking the Court to deviate from the jury selection procedure set forth in Rule 24(a)(1) of the North Dakota Rules of Criminal Procedure. (Index #62). On September 16, the defense filed a motion to allow Mr. Tolbert to appear in plain clothes. (Index # 71-72).

[¶4] The defense did not file a notice of its intent to offer evidence of the victim's sexual behavior or predisposition as is generally required under Rule 412(c) of the North Dakota Rules of Evidence.

STATEMENT OF THE FACTS

[¶5] Jane Doe was twelve years old in 2012 when she first met Christian Tolbert. (Jury trial transcript, page 161, lines 8-22). Jane Doe met Tolbert after he began dating Jane Doe's mother. (Jury trial transcript, page 162, line 6). Tolbert was "like a dad" to Jane Doe. (Jury trial transcript, page 163, line 4). Jane Doe's relationship with Tolbert changed when Tolbert "put his hands over the top of [Jane Doe's] pants." (Jury trial transcript, page 164, lines 9-10). Tolbert continued by touching Jane Doe's vagina underneath her clothing. (Jury trial transcript, page 164, lines 16-24). Tolbert had sex with Jane Doe after touching her vagina. (Jury trial transcript, page 165, line 1). Jane Doe was twelve years old when Tolbert first had sex with her. (Jury trial transcript, page 165, line 17).

[¶6] Tolbert continued to sexually exploit Jane Doe. At one point, Tolbert "put honey on his penis and he asked [Jane Doe] to suck it off." (Jury trial transcript, page 166, lines 5-9). Jane Doe specifically described other instances of sexual abuse in her testimony. Jane Doe testified that her mother and Tolbert got her drunk and Tolbert had sexual intercourse with Jane Doe. (Jury trial transcript, page 168, lines 4-18). Tolbert sexually exploited Jane Doe during a period of approximately 18 months, but there was a period of approximately six months where no contact occurred because of Tolbert's deployment. (Jury trial transcript, page 170, lines 11-12). Jane Doe testified that she had sex with Tolbert more than fifty times. (Jury trial transcript, page 206, lines 23-24) The sexual abuse stopped only when Jane Doe was removed from her home when she was fourteen years old. (Jury trial transcript, page 170, lines 22-24).

[¶7] In 2017, when Jane Doe was seventeen years old, she received a Facebook friend request from "Ialways Mindinmyown." (Jury trial transcript, page 173, lines 3-6,

line 17.) "Ialways" introduced himself as an eighteen year old named Damon. (Jury trial transcript, page 173, lines 13-15). Jane Doe told "Ialways" she was seventeen years old. (Jury trial transcript, page 173, line 23). Jane Doe and "Ialways" exchanged messages through Facbook. These messages were offered and received as Exhibit # 2 at trial. (Index # 82). "Ialways" sent a picture of himself to Jane Doe, and that picture was of Christian Tolbert. (Jury trial transcript, page 205, lines 2-3).

[¶8] Tolbert sent sexually charged messages to Jane Doe, a girl he knew to be seventeen years of age, including a message about whether she shaved her vagina. (Jury trial transcript, page 188, line 9). During the trial, Tolbert admitted to asking whether Jane Doe shaved her vagina. (Jury trial transcript, page 353, lines 10-12). When Jane Doe asked Tolbert what his favorite things about her were, Tolbert replied, "head, titties, toes, hair, sexy, you asking for it[.]" (Jury trial transcript, page 191, lines 9-10) (Exhibit 2, page 1076). Tolbert then asked Jane Doe, "will I ever see you again?" (Jury trial transcript, page 193, line 16) (Exhibit 2, page 1070). Tolbert asked Jane Doe, "did you ever cum?" (Jury trial transcript, page 194, line 6) (Exhibit 2, page 1069). Tolbert wrote to Jane Doe, "I want to lick you, make you moan loud and say daddy." (Jury trial transcript, page 195, lines 2-3) (Exhibit 2, page 1068). After telling Jane Doe that he "always loved big thighs and breasts" he asked her, "you want to fuck good, yes or no." (Jury trial transcript, page 196, lines 2-4) (Exhibit 2, page 1066). Tolbert continued, asking Jane Doe, "do you still get real wet and moan[?]" (Jury trial transcript, page 196, line 17) (Exhibit 2, page 1065). After a discussion about oral sex, and whether Jane Doe was good at it now, Tolbert told her, "Always stopped" and "wanted to cum in your mouth." (Jury trial transcript, page 197, lines 18-21) (Exhibit 2, page 1064). Jane Doe

and Tolbert discussed a night where Jane Doe, Jane Doe's mother, and Tolbert had intercourse together. Jane Doe asked Tolbert if he would do that again, and Tolbert replied, "Don't think your mom would join again, LOL." (Jury trial transcript, page 200 lines 13-14) (Exhibit 2, page 1061).

[¶9] Throughout the Facebook conversation, Tolbert and Jane Doe discussed past sexual encounters, and future plans to engage in sexual activities. Tolbert told Jane Doe, "[w]ould you still call me daddy while I'm making you good?" (Jury trial transcript, page 201, Lines 10-11) (Exhibit 2, page 1060). Tolbert, when speaking to a girl he knew was seventeen years old, asked her to "show me how your body is built now that you're older." (Jury trial transcript, page 202, lines 8-9) (Exhibit 2, page 1058).

[¶10] During cross-examination, defense counsel, on multiple occasions, attempted to explore unrelated, irrelevant sexual behavior of the victim. The district court allowed the defense to examine the victim, over the state's objection, about her earlier sexual abuse. (Jury trial transcript, page 213 line 10 to page 216, line 10).

[¶11] Defense counsel attempted to cross-examine Jane Doe about messages she sent to another individual, that were completely unrelated to the abuse perpetrated by Tolbert. Defense Exhibit #1 (index #94) contains messages between Jane Doe and that other person, and they are sexual in nature. The Court agreed that the messages were inadmissible, stating, "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. (Jury trial transcript, page 221, lines 17-22).

[¶12] After Jane Doe finished testifying, the State called Officer Misialek. Officer Misialek was on duty on December 6, 2017. (Jury trial transcript, page 232, line 13). Officer Misialek was the first officer to respond in this case. Jane Doe reported to Officer Misialek that her mother's boyfriend, Christian Tolbert, had sexually abused her when she was a child. (Jury trial transcript, page 234, lines 3-8). The case was then assigned to Detective Conley and the investigations bureau. (Jury trial transcript, page 235 line 14).

[¶13] Detective Buzzo with the Grand Forks Police Department testified to his role in the investigation. Detective Buzzo obtained search warrants to get messages and information from Facebook, so that the messages between Tolbert and Jane Doe could be preserved and recovered. (Jury trial transcript, page 245, lines 15-20).

[¶14] The State next called Sergeant Mays of the Waukegan Police Department in Waukegan, Illinois. Sgt. Mays was asked to assist the Grand Forks Police Department because Tolbert was in the Waukegan area at the time. Sgt. Mays reviewed Detective Conley's reports to familiarize himself with the case. (Jury trial transcript, page 260, lines 16-19). Sgt. Mays reviewed the Facebook messages sent between Tolbert and Jane Doe. (Jury trial transcript, page 262, lines 1-3). When Sgt. Mays first contacted Tolbert and explained the reason for the call, Tolbert said, "On, no, this can't be happening, or something to that effect." (Jury trial transcript, page 264, lines 10-11). Sgt. Mays testified that Tolbert, when he showed up for the interview, matched the photograph sent to Jane Doe from Ialways Mindinmyon's Facebook profile. (Jury trial transcript, page 264, lines 13-17).

[¶15] Tolbert admitted to being in a relationship with Jane Doe's mother for about one year. (Jury trial transcript, page 269, lines 20-21). Sgt. Mays testified, "[W]e started talking to him about the allegations that were made by [Jane Doe] he initially denied those allegations and then progressively throughout the interview he started divulging more information as far as what happened." (Jury trial transcript, page 269 line 22-page 270, line 1). Tolbert initially denied a sexual relationship took place. After being confronted with the Facebook messages that were admitted as State's Exhibit 2, Tolbert changed his story and admitted to engaging in sexual activities with Jane Doe. (Jury trial transcript, page 271, lines 2-7). Tolbert admitted to having sex three or four times with Jane Doe. (Jury trial transcript, page 271, line 7). Tolbert admitted to engaging in sexual intercourse with Jane Doe and her mother. (Jury trial transcript, page 282, lines 17-19). Tolbert also admitted that Jane Doe was thirteen years old at the time of their sexual relationship. (Jury trial transcript, page 270, lines 9-10). After his interview with the Waukegan Police Department, Tolbert left his residence and didn't return. (Jury trial transcript, page 284, lines 8-12). State's Exhibit 1, a video of the interview with Tolbert, was offered and received into evidence. (Jury trial transcript, page 274, lines 10-11). State's Exhibit 1 was played for the jury. (Jury trial transcript, page 275, line 2; page 278 line 8).

[¶16] The State next called Detective Conley. Detective Conley testified to his investigation. Detective Conley testified that he suggested to Jane Doe that she could continue speaking with Tolbert on Facebook. (Jury trial transcript, page 298, lines 16-17). Detective Conley did not tell Jane Doe what to say in the Facebook Messages, other than saying, "hi" or "how have you been." (Jury trial transcript, page 323, lines 14-15).

Detective Conley testified that he sent preservation letters to Facebook for the "Ialways Mindinmyown" account used by Tolbert. However, Detective Conley was not able to get any data from the "Ialways Mindinmyown" account because it had been deleted or erased. (Jury trial transcript, page 300, line 22).

[¶17] Tolbert chose to testify. Tolbert testified that he lived with Jane Doe's mother. (Jury trial transcript, page 330, line 23-24). Tolbert testified that he and Jane Doe were "pretty close." (Jury trial transcript, page 332, line 22). Tolbert and Jane Doe spent a lot of time playing video games together. (Jury trial transcript, page 332, lines 22-24). Tolbert admitted to kissing Jane Doe "on more than one occasion" and admitted "there was hugging and cuddling which was inappropriate for [their] age difference." (Jury trial transcript, page 333, lines 6-8). Tolbert admitted to kissing Jane Doe when Jane Doe was thirteen years old. (Jury trial transcript, page 347, line 24). In his testimony, on direct examination, Tolbert denied having sexual intercourse with Jane Doe. (Jury trial transcript, page 333 line 24 to page 334, line 13).

[¶18] Tolbert admitted to creating and using the "Ialways Mindinmyown" Facebook account. (Jury trial transcript, page340, lines 12-15). Tolbert admitted to using his fake Facebook account to contact Jane Doe. (Jury trial transcript, page 340, line 19). Tolbert admitted that nobody else used the "Ialways Mindinmyown" Facebook account. (Jury trial transcript, page 350, line 18-page 351 line 3). Tolbert testified that he "knew what [he] was doing was wrong when [he] contacted [Jane Doe]." (Jury trial transcript, page 341, lines 18-20). Tolbert then testified that the messages were mere fantasy. (Jury trial transcript, page 342, lines 7-11). Tolbert admitted to seeking nude photos from Jane Doe. (Jury trial transcript, page 342, lines 19-20). Tolbert admitted that he asked Jane

Doe to send him pictures of her vagina, knowing that she was only seventeen years old. (Jury trial transcript, page 354, lines 9-12).

[¶19] On cross-examination, Tolbert admitted to making several false statements. For example, Tolbert admitted to lying about serving in the Marine Corps. (Jury trial transcript, page 346, lines 5-14). Tolbert also admitted to lying about his online identify when he used the Facebook profile of "Ialways Mindinmyown." (Jury trial transcript, page 351, 7-8). Tolbert was thirty-two years of age when he was communicating with Jane Doe on Facebook, and admitted that he lied about being an eighteen-year-old in an effort to communicate with seventeen-year-old Jane Doe. (Jury trial transcript, page 351, lines 15-19; Jury trial transcript, page 369, lines 10-13).

[¶20] Tolbert admitted that when he was twenty seven years old, he found thirteen-year-old Jane Doe attractive. (Jury trial transcript, page 348, lines 18-22).

[¶21] Tolbert agreed that he admitted to law enforcement officers that he had sex with Jane Doe and her mother, but said that he didn't make the admission willingly. (Jury trial transcript, page 355, lines 10-24). Tolbert also admitted, that when he was thirty two years old, he sent a message to seventeen-year-old Jane Doe that he wanted to lick her. (Jury trial transcript, page 373, line 4-6). Tolbert admitted that he asked Jane Doe, "show me something sexy." (Jury trial transcript, page 373, 19-21). Tolbert admitted that he asked for a picture of Jane Doe coming out of the shower. (Jury trial transcript, page 374, lines 8-11). Tolbert admitted to telling Jane Doe, "I want to lick you, make you moan loud and say daddy eat my pussy while your toes curl. Love the fact that you don't shave. I love hair." (Jury trial transcript, page 374, lines 12-16).

STANDARD OF REVIEW

[¶22] Generally, this Court reviews a district court's decisions on the admissibility of evidence under the abuse of discretion standard. This Court, in Krogstad, wrote, "We review a district court's evidentiary decisions for an abuse of discretion, and we will not reverse a decision unless it is arbitrary, capricious, or unreasonable, or a misinterpretation or misapplication of the law." State v. Krogstad, 2020 ND 78, ¶11, 941 N.W.2d 574 (citing State v. Wegley, 2008 ND 4, ¶12, 744 N.W.2d 284). This Court applies the abuse of discretion standard "to provide the trial courts with greater control in the admissibility of evidence." State v. Alvarado, 2008 ND 203, ¶9, 757 N.W.2d 570 (quoting 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)).

[¶23] Tolbert argues that the district court committed obvious error by not admitting Defense Exhibit 1 under Rule 608, even though Tolbert's trial counsel did not raise Rule 608 as an argument in support of the Exhibit's admissibility.

[¶24] "Issues not raised to the district court will not be addressed for the first time on appeal unless the alleged error rises to the level of obvious error under N.D.R.Crim.P. 52(b)." State v. Henes, 2009 ND 42, ¶7, 763 N.W.2d 502

[¶25] This Court has the ability to notice 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." N.D.R.Crim.P. 52(b) The explanatory notes to Rule 52 provide:

> Generally, it may be said that the defendant has the burden of showing that a technical error has affected his substantial rights, but that if the error was fundamental, or of such a character as would normally prejudice substantial rights, the burden is on the prosecution to demonstrate its harmlessness.
> Subdivision (b) provides that obvious errors affecting substantial rights may be noticed even though they were not brought to the attention of the court. But the power to notice obvious error, whether at the request of

> counsel or on the court's own motion, is one the courts should exercise cautiously and only in exceptional circumstances. The power should be exercised only where a serious injustice has been done to the defendant.

N.D.R.Crim.P. 52 (Explanatory note) (emphasis added).

[¶26] "This Court cautiously exercises its authority to notice obvious error and does so only in exceptional circumstances in which a party has suffered a serious injustice. To establish obvious error, the defendant must show: (1) error; (2) that is plain; and (3) affects substantial rights." State v. Henes, 2009 ND 42, ¶8, 763 N.W.2d 502 (citing State v. Kautzman, 2007 ND 133, ¶15, 738 N.W.2d 1; State v. Kruckenberg, 2008 ND 212, ¶15, 758 N.W.2d 427)(internal citations omitted).

ORAL ARGUMENT REQUESTED

[¶27] Tolbert's counsel has requested oral argument. The State would join that request. Rule 28(h) of the North Dakota Rules of Appellate Procedure states, "Any party requesting oral argument must include in their brief a short statement explaining why oral argument would be helpful to the court." Tolbert has raised an obvious error argument with respect to Rule 608. In Wegley, this Court wrote that an obvious error analysis requires an examination of the entire record. State v. Wegley, 2008 ND 4, ¶14, 744 N.W.2d 284. While the State has done its best to summarize the record at trial, the State is not able to document everything that happened at trial in its brief. Consequently, if the Court has questions about the record, the State may be able to answer questions the Court has about the record at oral argument.

Argument

1. Summary of the argument

[¶28] At trial, the defense sought to introduce Facebook messages between Jane Doe and another person. These messages were irrelevant. They did not make a fact at issue more or less likely to be true. The defense did not properly notice its intent to introduce these messages under Rule 412. The messages were properly excluded under Rule 412. The district court did not commit obvious error by not considering, *sua sponte*, a Rule 608 analysis.

2. Defense Exhibit 1 was properly excluded because it was irrelevant.

[¶29] Tolbert's trial counsel attempted to offer Facebook messages between Jane Doe and another person. The trial court excluded the messages, stating, "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." (Jury trial transcript, page 221, lines 17-22). The district court specifically found that the evidence was not relevant.

[¶30] "Evidence is relevant if: (a) if has any tendency to make a fact more or less probable that it would be without the evidence; and (b) the fact is of consequence in determining the action." N.D.R.Ev. 401. The explanatory notes to Rule 401 state: "The language of Rule 401 is intended to reflect the realization that stringent legal standards cannot be meaningfully applied to govern determinations of relevancy and, consequently, that the area is one best left to the wide discretion of the trial court." N.D.R.Ev. 401 (explanatory note). "The test to determine whether evidence is relevant or irrelevant is whether the evidence would reasonably and actually tend to prove or disprove any matter of fact in issue." State v. Thompson, 2010 ND 10, ¶ 10, 777 N.W.2d 617 (quoting State

v. Osier, 1999 ND 28, ¶19, 590 N.W.2d 205; State v. Buckley, 325 N.W.2d 169, 172 (N.D.1982)).

[¶31] Defense exhibit 1 was not relevant. Defense Exhibit 1 would prove that Jane Doe engaged in sexual communications with another person. That fact is not "of consequence in determining the action." N.D.R.Ev. 401(b). Whether Jane Doe engaged in sexual communications with another person could not help the jury in determining whether Tolbert sexually exploited Jane Doe.

[¶32] The district court properly prevented defense counsel from unnecessarily and publicly exploring Jane Doe's sexual messages with a person unrelated to the case. The messages were not related to Tolbert. Tolbert is not referenced in the messages. To allow this type of exploration into a victim's other sexual history would necessarily result in a chilling effect of victims reporting crimes. This type of unnecessary and unwarranted exploration into a victim's sexual history is exactly the reason Rule 412 was enacted.

[¶33] The explanatory notes to Rule 401 say that questions of relevance are "best left to the wide discretion of the trial court." N.D.R.Ev. 401 (explanatory note). The trial court properly exercised its wide discretion in excluding the irrelevant Facebook messages.

3. Defense Exhibit 1 was properly excluded under Rule 412.

    a. Rape shield laws serve an important function. Rape shields should not be weakened.

[¶34] Rape shield statutes and rules of evidence have been found, in other courts, to serve important interests. A Connecticut rape shield law was found to promote

important policies, including, "protecting the victim's sexual privacy and shielding her from undue harassment, encouraging reports of sexual assault, and enabling the victim to testify in court with less fear of embarrassment.... Other policies promoted by the law include avoiding prejudice to the victim, jury confusion and waste of time on collateral matters." State v. Collin, 105 A.3d 309, 331 (Conn. App. Ct. 2014). A Colorado court also recognized these important interests in analyzing a rape shield law, stating that the law "is a rational attempt by the legislature to protect the complainant from harassment and humiliation and to encourage victims of sexual assaults to report the crime[.]" People v. Conyac, 2014 COA 8M, ¶164, 361 P.3d 1005, as modified on denial of reh'g (Mar. 27, 2014). A New Mexico court used similar reasoning in analyzing a rape shield law. "In shielding alleged victims from exposing their sexual history, rape shield laws protect alleged victims from harassment and encourage them to report and testify." State v. Stephen F., 2007-NMCA-025, ¶9, 152 P.3d 842, aff'd and remanded, 2008-NMSC-037, ¶9, 188 P.3d 84.

[¶35] The United States Supreme Court analyzed a "rape shield" law from the State of Michigan in Michigan v. Lucas, 500 U.S. 145, 146 (1991). The Supreme Court wrote, "[l]ike most States, Michigan has a 'rape-shield' statute designed to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior." Michigan v. Lucas, 500 U.S. 145, 146 (1991). The Supreme Court analyzed the balance between the need to protect victims of sexual exploitation and sexual violence and the defendant's rights to confront their accusers.

> Assuming, *arguendo,* that the trial court was correct, the statute unquestionably implicates the Sixth Amendment. To the extent that it operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse witnesses and present

> a defense is diminished. This does not necessarily render the statute unconstitutional. [T]he right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.

Michigan v. Lucas, 500 U.S. 145, 149 (1991) (quoting Rock v. Arkansas, 483 U.S. 44, 55, (1987); Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

[¶36] The Supreme Court recognized that a criminal defendant's rights to confront his accusers can be limited. "The Michigan statute represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. The statute also protects against surprise to the prosecution." Michigan v. Lucas, 500 U.S. 145, 149–50 (1991). The United States Supreme Court has recognized the important purposes served by Rule 412.

[¶37] Rape shield laws are important, and it would be a mistake to weaken them. Rape shields encourage victims to report their abuse to law enforcement. Testifying in a sexual abuse trial is traumatic enough. Adding the humiliation of having their sexual history examined in a public jury trial would do nothing to help the fact-finding mission of the trial while subjecting the victim to unnecessary embarrassment. Rape shields should be reinforced, not weakened.

b. The district court properly excluded Defense Exhibit 1 because its introduction was prohibited by Rule 412.

[¶38] Rule 412 closely resembles Rule 412 of the Federal Rules of Evidence. Prior to the enactment of Rule 412, the State of North Dakota had a statutory framework for protecting rape victims from unnecessary and unwarranted harassment. "North Dakota's statutory rape shield was first enacted in 1975." Marah deMeule, Privacy Protections for the Rape Complainant: Half A Fig Leaf, 80 N.D.L. Rev. 145, 155 (2004).

"North Dakota expanded its statutory shield in 1993 to include issues of the complainant's manner of dress at the time of the alleged crime." Marah deMeule, Privacy Protections for the Rape Complainant: Half A Fig Leaf, 80 N.D.L. Rev. 145, 158 (2004). The statutory protections included in Sections 12.1-20-14, 12.1-20-15, and 12.1-20-15.1 were superseded by Rule 412.

> The purpose of rape shield rules is essentially to avoid inferences of bad sexual character being used to cast doubt on an alleged victim's claim of sexual assault. They are designed to restrict the introduction of evidence regarding the complainant's prior consensual sexual behavior to situations in which the evidence is both relevant to a defendant's defense and not unduly prejudicial or inflammatory. These statutes shield victims of rape or sexual abuse from the humiliation of having their sexual conduct, unrelated to the charges pending, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt. These laws are designed to deter the unwarranted and unscrupulous foraging for character-assassination information about the victim; they do not permit introduction of evidence of the victim's past sexual conduct to cast the victim as promiscuous or of low moral character.

Susan L. Thomas, J.D., Purpose of rape shield statute, 75 C.J.S. Rape § 96. The purpose of Rule 412, and the earlier statutory versions of North Dakota's rape shield is to protect people like Jane Doe from being publicly questioned about their irrelevant sexual history.

[¶39] The State of North Dakota enacted its rape shield rule "to safeguard [victims] from invasion of privacy, potential embarrassment and sexual stereotyping associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders." N.D.R.Ev. 412, Explanatory Note.

The North Dakota Supreme Court in Chase, wrote:

> Evidence of an alleged victim's sexual behavior generally is inadmissible. A limited exception exists for evidence of sexual behavior between the

> alleged victim and the accused offered to prove consent. N.D.R.Ev. 412(b)(2). A party intending to use such evidence must file a written motion at least fourteen days before trial and the court must conduct an in camera hearing on the motion. N.D.R.Ev. 412(c). "Failure to provide written notice of intent to offer evidence [...] is reason alone for the court to deny admissibility of the evidence." State v. Jensen, 2000 ND 28, ¶10, 606 N.W.2d 507. Chase offered no reasonable explanation for failing to comply with the fourteen day notice requirement.

State v. Chase, 2015 ND 234, ¶9, 869 N.W.2d 733. Tolbert did not file a notice of his intent to introduce materials subject to Rule 412. That alone, according to Chase, should be sufficient to exclude Defense Exhibit 1.

[¶40] In this case, there is no justification under Rule 412 to admit Defense Exhibit 1. There are three exceptions to the general rule. None of the exceptions applies to this case. First, Rule 412(b)(1)(A) allows the trial court to admit evidence that would otherwise be excluded under Rule 412, if the evidence is "offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence." There was no semen, injury, or other physical evidence, so this exception would not apply. Rule 412(b)(1)(B) allows evidence otherwise excluded by the general rule if the evidence is offered to prove consent, or if offered by the prosecutor. The victim in this case was a minor, so consent is not a possibility. "Consent is not an issue when a defendant is charged with engaging in a sexual act with a person less than fifteen years old." State v. Reinart, 440 N.W.2d 503, 506 (N.D. 1989). The last exception to the general rule is "evidence whose exclusion would violate the defendant's constitutional rights." N.D.R.Ev. 412(b)(1)(C). The constitutional rights analyzed under Rule 412(b)(1)(C) are typically the Sixth Amendment Confrontation Clause and the Fifth Amendment Due Process Clause.

[¶41] The Due Process Clause and the Confrontation Clause are subject to reasonable limitations. The Eighth Circuit, in Pumpkin Seed, analyzed the balance between Rule 412 and the Confrontation Clause and the Fifth Amendment's Due Process Clause. "In determining the admissibility of a victim's other sexual behavior under Rule 412(b)(1)(C), we start with the premise that defendants have a constitutional right under the Fifth and Sixth Amendments to introduce evidence in their defense." United States v. Pumpkin Seed, 572 F.3d 552, 559 (8th Cir. 2009). Citing to the United States Supreme Court's decision in Michigan v. Lucas, the Eighth Circuit recognized that the right to confront one's accusers "is not without limitation." United States v. Pumpkin Seed, 572 F.3d 552, 560 (8th Cir. 2009). The key inquiry in the analysis, wrote the Eighth Circuit, is whether a district court's exclusion of evidence was "arbitrary or disproportionate to the purposes that its exclusion was designed to serve." United States v. Pumpkin Seed, 572 F.3d 552, 560 (8th Cir. 2009).

[¶42] In this case, the district court recognized that Defense Exhibit 1 was irrelevant and it was prohibited under Rule 412, so it was not arbitrary. Further, it was not disproportionate. In the Eight Circuit's Frederick case, the Eighth Circuit also weighed the probative value of the evidence in its balancing test, writing, "We find that Frederick's rights under the Confrontation Clause were not violated by the district court's decision to disallow him from asking the girls about prior instances of sexual abuse because the probative value of the evidence was minimal, in large part because Frederick's offer of proof failed to demonstrate that the prior accusations were false." United States v. Frederick, 683 F.3d 913, 919–20 (8th Cir. 2012).

[¶43] The probative value of Defense Exhibit 1 is minimal. It would have shown that Jane Doe engaged in a sexual conversation with another person, but would not have contradicted the State's evidence. It did not address the actual crimes with which Tolbert was charged.

[¶44] Rule 412(a) provides that evidence offered to prove that "a victim engaged in other sexual behavior or evidence offered to prove a victim's sexual predisposition" is not admissible involving sexual misconduct.

[¶45] At the district court, defense counsel argued that the messages contained in Defense Exhibit 1 were not "sexual behavior" or evidence of the "victim's sexual predisposition." Defense counsel stated, "Again, I would argue that Rule 412 covers sexual behavior. This does not describe sexual behavior. It's creative writing." (Jury trial transcript, page 221, lines 12-14). First, it is important to recognize that Rule 412 prohibits an examination of the victim's "sexual behavior" rather than the victim's "sexual acts" or "sexual contacts." The messages exchanged in Defense Exhibit 1 unquestionably refer to "sexual behavior."

[¶46] "Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears." State v. Bearrunner, 2019 ND 29, ¶5, 921 N.W.2d 894 (See N.D.C.C. § 1-02-02). The drafters of Rule 412 chose to prohibit discussions of the victim's sexual behavior, rather than the victim's "sexual acts" or "sexual contacts." The language of Rule 412, in choosing the word "behavior", excludes more information than if the rule just prohibited questioning with regard to a victim's sexual acts or sexual contacts.

[¶47] Rule 412 of the Federal Rules of Evidence is substantially similar to the North Dakota Rule. The Explanatory Notes to North Dakota's Rule 412 says, "Rule 412 is derived from Fed.R.Ev. 412." The North Dakota Supreme Court has consistently looked to federal interpretations of federal rules when the North Dakota rules are similar to the federal rules. In Farzaneh, this Court wrote, "Although we are not bound by the interpretation of federal rules by the federal courts in construing our state rules, we have consistently deemed it appropriate to consider federal interpretations when the state procedural rule under consideration is substantially the same as the federal rule." State v. Farzaneh, 468 N.W.2d 638, 641 (N.D. 1991). The notes of the advisory committee on rules to Federal Rule 412 states: "In addition, the word 'behavior' should be construed to include activities of the mind, such as fantasies of dreams." The federal rule, upon which the North Dakota Rule is based, includes activities of the mind and fantasies within the definition of "behavior."

[¶48] Wolak, an employment case from the Second Circuit, considered, in part, whether the district court erred by "allowing inquiry into [the victim's] out-of-work sexual behavior." Wolak v. Spucci, 217 F.3d 157, 158 (2d Cir. 2000). At the trial, the defense was allowed to ask Wolak "about two parties at which pornographic videos were shown while she was present, and two or three other occasions on which she watched sexual acts as they were performed." Wolak v. Spucci, 217 F.3d 157, 159 (2d Cir. 2000). Like Tolbert, the defendant in Wolak tried to argue for a narrow definition of sexual behavior and sexual predisposition. The Second Circuit, citing to the advisory committee notes to Rule 412, decided otherwise, writing, "Because viewing pornography falls

within Rule 412's broad definition of behavior, defendants' extensive questions were subject to the Rule." Wolak v. Spucci, 217 F.3d 157, 159 (2d Cir. 2000)

[¶49] In this case, Tolbert's trial counsel argued, in support of the admissibility of Defense Exhibit 1: "Again, I would argue that Rule 412 covers sexual behavior. This does not describe sexual behavior. It's creative writing." (Jury trial transcript, page 221, lines 12-14). Tolbert's appellate counsel argues that Rule 412 does not apply to fantasies, writing in paragraph 38 of his brief: "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."

[¶50] This Court should adopt a broad interpretation of "sexual behavior." Doing so would help strengthen our rape shield rule that was enacted specifically to prevent unnecessary and irrelevant questioning of victims of sexual exploitation. This Court should look to the Federal Rules, upon which North Dakota's Rule 412 is based. "Behavior of the mind" is a behavior. Fed.R.Ev. 412, advisory committee notes. The typing and sending of a message is a behavior, and the messages were unquestionably sexual. Consequently, under Rule 412(a)(1), Defense Exhibit 1 was properly excluded.

[¶51] The district court in this case, however, chose to analyze the messages under Rule 412(a)(2), which prohibits "evidence offered to prove a victim's sexual predisiposition." The district court said, "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." (Jury trial transcript, page 221, lines 17-22).

[¶52] The State does not believe "predisposition" is defined in the North Dakota Century Code, so we must look to the ordinary definition. The Cambridge Dictionary defines "predisposition" as "the state of being likely to behave in a particular way or to suffer from a particular disease." Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/predisposition Black's Law Dictionary defines "predisposition" as "a person's inclination to engage in a particular activity[.]" Black's Law Dictionary, Third Pocket Edition, Page 554.

[¶53] A Virginia Federal Court explained that Rule 412's standard barring evidence of sexual predisposition "is designed to exclude evidence relating to the alleged victim's mode of dress, speech, or lifestyle, and other evidence that does not directly refer to sexual activities or thoughts, but that the proponent believes may have a sexual connotation for the factfinder. Sheffield v. Hilltop Sand & Gravel Co., Inc., No. 3:95CV148, 1995 WL 490479 (E.D. Va. Aug. 15, 1995).

[¶54] In this case, trial counsel's argument, with regard to the Facebook messages, was that the messages were creative writing, or mere fantasy, not a behavior or predisposition. However, looking to the federal courts and the federal rules, upon which our Rule 412 is based, shows that behavior and predisposition should have a broad definition. Trial counsel offered the messages in Defense Exhibit 1 to show that Jane Doe behaved in a particular way in the past and to raise an inference that she behaved similarly with Tolbert. This predisposition evidence is prohibited by Rule 412.

4. It was not obvious error to exclude Defense Exhibit 1 under Rule 608.

[¶55] Tolbert argues that the district court committed obvious error when it didn't consider, *sua sponte*, whether Rule 608 would allow defense counsel to question Jane Doe about conduct that Rule 412 specifically prohibits.

a. The district court did not err in failing to consider Rule 608 in its ruling on the admissibility of Defense Exhibit 1.

[¶56] Tolbert argues, in paragraph 40 of his brief: "The above judge's ruling [regarding Defense Exhibit 1] never considered N.D.R.Ev.608(b)(2). Under that rule Defendant's Exhibit 1 could have been admitted. Event 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."

[¶57] Tolbert's trial counsel never mentioned Rule 608 in his argument regarding whether Defense Exhibit 1 should be admitted. Tolbert now argues that the district court judge should have considered a rule of evidence not brought forth by counsel.

> Just as judges are not expected to be ferrets, obligated to engage in unassisted searches of the record for evidence to support a litigant's position, neither are they expected to be psychics, with the ability to divine a party's true intentions in mislabeled and misleading documents. The parties have the primary duty to bring to the court's attention the proper rules of law applicable to a case.

State v. Goulet, 1999 ND 80, ¶10, 593 N.W.2d 345 (see Lindell v. North Dakota Workers Compensation Bureau, 1998 ND 174, ¶17, 584 N.W.2d 520; Berg v. Ullman ex rel. Ullman, 1998 ND 74, ¶44, 576 N.W.2d 218 (Neumann, J., dissenting) (internal citations omitted). Judges are neither ferrets nor psychics; judges are umpires. An umpire cannot tell if a pitch is a ball or a strike until the ball is thrown. A judge cannot rule on an

objection or a matter considering a rule of evidence until the objection is made or a rule of evidence is brought to her attention.

[¶58] Tolbert argues, in paragraph 40 of his brief, that Defense Exhibit 1 could have been admitted under Rule 608(b)(2). The State disagrees.

[¶59] Rule 608(b) says, in part, "Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." N.D.R.Ev. 608. Defense Exhibit 1 was extrinsic evidence, and it was not a criminal judgment. Consequently, under the general provisions of Rule 608(b), Defense Exhibit 1 would be inadmissible because it is "extrinsic."

[¶60] "'Extrinsic' evidence is generally defined as evidence other than that adduced during cross examination of the witness being impeached. In other words, although the evidence is addressed to impeach the credibility of *this* witness, it is introduced through *another* witness, or through a document, a recording, or some other item introduced independently." Paul F. Rothstein & Edward J. Imwinkelried, Just What Evidence of Witness Misdeeds Does Federal Evidence Rule 608(b) Exclude?-Imwinkelried vs. Rothstein, 49 Creighton L. Rev. 121, 124 (2015). The extrinsic evidence preclusion is designed to prevent mini-trials over an issue of credibility.

[¶61] Defense Exhibit 1 was not a criminal conviction, so it would not be admissible under Rule 609. Defense Exhibit 1 was not related to Jane Doe's character for truthfulness. It contained sexual messages written by Jane Doe. Further, it is extrinsic evidence specifically prohibited by Rule 608(b). This Court, in Dahlen, wrote, "Likewise, the trial court did not err in ruling that the evidence is inadmissible

under Rule 608(b), N.D.R.Ev. The rule plainly states that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, may not be proved by extrinsic evidence." Dahlen v. Landis, 314 N.W.2d 63, 71 (N.D. 1981). Under the plain language of Rule 608, and under this Court's interpretation of Rule 608, Defense Exhibit 1 is inadmissible extrinsic evidence.

[¶62] Under Rule 608(b), the Court can allow cross-examination regarding specific instances of conduct "if they are probative of the character for truthfulness or untruthfulness." The line of questioning in this case regarding Defense Exhibit 1 had nothing to do with Jane Doe's character for truthfulness. Rather, the line of questioning sought to uncover Jane Doe's sexual history, which is forbidden under Rule 412.

b. Even if the district court did err, the error was not "plain"

[¶63] "Plain error is error that is 'clear' or 'obvious' and affects the defendant's 'substantial rights.' Appeals, 39 Geo. L.J. Ann. Rev. Crim. Proc. 856, 882 (2010). "An alleged error does not constitute obvious error unless it is a clear deviation from an applicable legal rule under current law." State v. Wegley, 2008 ND 4, ¶14, 744 N.W.2d 284.

[¶64] The district court did not err in excluding Defense Exhibit 1. The district court followed Rule 412, Rule 403, and Rule 608 in excluding the exhibit. The exhibit was prohibited by Rule 608 because it was extrinsic evidence and it did not address character for truthfulness. Dahlen v. Landis, 314 N.W.2d 63, 71 (N.D. 1981).

[¶65] Defense Exhibit 1 was prohibited by Rule 412 because the exhibit was evidence of Jane Doe's unrelated sexual behavior or disposition. Defense Exhibit 1 was prohibited under Rule 401 because it was not relevant; It did not make a fact at issue

more or less likely to be true. The district court did not commit plain error. The Court's decision to exclude Defense Exhibit 1 complies with Rule 401, Rule 412, and Rule 608.

c. If the district court did err in failing to consider Rule 608, the error did not effect a substantial right, and was, in fact, harmless

[¶66] No substantial right of Tolbert was impacted, and a review of the entire record in this case shows that the exclusion of Defense Exhibit 1 did not impact the result of the proceeding.

> To affect substantial rights, a plain error must have been prejudicial, or have affected the outcome of the proceeding. Analyzing obvious error requires examination of the entire record and the probable effect of the alleged error in light of all the evidence. Even if a defendant establishes obvious error affecting substantial rights, the decision to correct the error lies within our discretion, and we will exercise that discretion only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

State v. Wegley, 2008 ND 4, ¶14, 744 N.W.2d 284.

[¶67] In this case, Tolbert was charged with continuous sexual abuse of a minor and luring. Jane Doe testified that Tolbert had sex with Tolbert more than fifty times. (Jury trial transcript, page 206, lines 23-24). Sgt. Mays testified that Tolbert admitted to having sex with Jane Doe, saying, "[s]o I believe that changed when I confronted him with the Facebook correspondence that he had with [Jane Doe], and then at that point he relayed to us that, it went from he kissed [Jane Doe] or [Jane Doe] kissed him to she grabbed his penis and then it progressed to she gave him oral and then it progressed to that they had sex three to four times." (Jury trial transcript, page 271, lines 2-7). Tolbert admitted to engaging in sexual intercourse with Jane Doe and her mother. (Jury trial transcript, page 282, lines 17-19). Tolbert also admitted that Jane Doe was thirteen years old at the time of their sexual relationship. (Jury trial transcript, page 270, lines 9-10).

Tolbert admitted that he sent messages to Jane Doe using the "Ialways Mindinmyown" Facebook profile. (Jury trial transcript, page 350, line 18 to page 351, line 3). Tolbert admitted that he was thirty-two years old when he sent the sexually charges messages, and that he knew Jane Doe was a minor. (Jury trial transcript, page 351, lines 11-20). Tolbert admitted to communicating, with seventeen-year-old Jane Doe, about whether she shaved her vagina. (Jury trial transcript, page 353, lines 10-18). Defendant admitted to asking for photographs of Jane Doe's vagina. (Jury trial transcript, page 354, lines 5-12). Tolbert admitted to messaging Jane Doe, "liked when I licked your ass too." (Jury trial transcript, page 368, lines 4-6). Tolbert admitted to being attracted to Jane Doe when Jane Doe was thirteen years old. (Jury trial transcript, page 369, 16-17). After a discussion about oral sex, and whether Jane Doe was good at it now, Tolbert told her, "Always stopped" and "wanted to cum in your mouth." (Jury trial transcript, page 197, lines 18-21) (Exhibit 2, page 1064). Tolbert admitted to messaging Jane Doe, "I want to lick you so bad." (Jury trial transcript, page 372, line 22 through Page 373 line 6). Tolbert admitted to messaging Jane Doe, "I want to lick you, make you moan loud and say daddy eat my pussy while your toes curl. Love the fact that you don't shave. I love hair." (Jury trial transcript, page 374, lines 12-16).

This Court, in Wangstad, wrote:

> When analyzing obvious error, we examine the entire record for the probable effect of the alleged error in light of all the evidence. This Court has also noted the following regarding obvious error: Even if the defendant meets his burden of establishing obvious error affecting substantial rights, the determination whether to correct the error lies within the discretion of the appellate court, and the court should exercise that discretion only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. An alleged error does not constitute obvious error unless there is a clear deviation from an applicable legal rule under current law.

State v. Wangstad, 2018 ND 217, ¶14, 917 N.W.2d 515 (citing State v. Patterson, 2014 ND 193, ¶4, 855 N.W.2d 113; State v. Anderson, 2003 ND 30, ¶8, 657 N.W.2d 245; State v. Olander, 1998 ND 50, ¶14-16, 575 N.W.2d 658) (internal citations omitted).

[¶68] After reviewing the entire record in this case, the victim's testimony, the defendant's admissions to the facts supporting the charge, the defendant's video interview, the Facebook messages, and the defendant's admissions during his cross-examination, the effect of Defense Exhibit 1 would be minimal. Even if the jury got to examine Jane Doe's Facebook messages with another person, that would not have contradicted the other evidence in this case, and that would not have established reasonable doubt as to Tolbert's guilt of the crimes charged. This Court's Wegley decision states, "To affect substantial rights, a plain error must have been prejudicial, or have affected the outcome of the proceeding." State v. Wegley, 2008 ND 4, ¶14, 744 N.W.2d 284. Defense exhibit 1 would not have affected the outcome of the trial.

CONCLUSION

[¶69] Defense exhibit 1 was properly excluded under Rule 412. Our rape shield rules were enacted to protect victims of sexual assault from unnecessary harassment. It would be a mistake to chip away at the shield given to victims of sexual assault. Children who have had to endure the trauma of sexual exploitation and abuse should be afforded the reasonable protection offered by Rule 412. Victims of sexual exploitation should not be forced to endure questioning regarding irrelevant encounters.

[¶70] Defense exhibit 1 was properly excluded as irrelevant. Defense Exhibit 1 was properly excluded because it did not make a fact at issue more or less likely to be true.

[¶71] The district court did not commit any error, let alone obvious error, by not considering a Rule 608 analysis with regard to its ruling on Defense Exhibit 1. Rule 608 was not raised at the trial court. Further, even if the district court did consider a Rule 608 analysis, Defense Exhibit 1 would not be admissible because it is irrelevant extrinsic evidence that has nothing to do with character for truthfulness.

[¶72] The State asks this Court to affirm.

[¶73] Respectfully submitted this 18th day of June, 2020.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The State of North Dakota,	)	
	)	Supreme Court No. 20200029
Plaintiff and Appellee,	)	
	)	District Court No. 18-2018-CR-01417
vs.	)	
Christian Dion Tolbert,	)	
Defendant and Appellant.	)	

CERTIFICATE OF COMPLIANCE

[¶1]The State of North Dakota, by and through Assistant State's Attorney Sarah Gereszek hereby certifies that the attached brief complies with the page limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The electronically filed brief contains 33 number of pages.

Dated this 18th day of June, 2020.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The State of North Dakota,	)	
	)	Supreme Court No. 20200029
	)	
Plaintiff and Appellee,	)	
	)	District Court No. 18-2018-CR-01417
	)	
vs.	)	
	)	
Christian Dion Tolbert,	)	
	)	
Defendant and Appellant.	)	

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

The undersigned, being of legal age, being first duly sworn deposes and says that on the18th day of June, 2020, she served true copies of the following documents:

Brief of Appellee
Certificate of Compliance

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Subscribed and sworn to before me this 18th day of June, 2020.

Notary Public

JENNIFER ALVSTAD
Notary Public
State of North Dakota
My Commission Expires March 26, 2021

jka