

Filed 9/15/20 by Clerk of Supreme Court

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

2020 ND 198

State of North Dakota,

Plaintiff and Appellee

v.

Christian Dion Tolbert,

Defendant and Appellant

No. 20200029

Appeal from the District Court of Grand Forks County, Northeast Central Judicial District, the Honorable Jay D. Knudson, Judge.

AFFIRMED.

Per Curiam.

Andrew C. Eyre, Assistant State's Attorney, Grand Forks, ND, for plaintiff and appellee.

Benjamin C. Pulkrabek, Mandan, ND, for defendant and appellant.

State v. Tolbert
No. 20200029

Per Curiam.

[¶1] Christian Tolbert appeals from a criminal judgment after a jury found him guilty of continuous sexual abuse of a child and luring minors by computer. Tolbert argues the district court obviously erred when it did not admit an exhibit under N.D.R.Ev. 608 and instead excluded the exhibit as irrelevant under N.D.R.Ev. 401 and inadmissible under N.D.R.Ev. 412. The exhibit contained text messages of a sexual nature between the victim and an unrelated third party. We conclude the district court did not abuse its discretion excluding the exhibit under N.D.R.Ev. 401 and 412.

[¶2] To establish obvious error, the defendant must show there was: “(1) error, (2) that is plain, and (3) affects substantial rights.” *State v. Gresz*, 2006 ND 135, ¶ 7, 717 N.W.2d 583. We conclude Tolbert did not show it was error for the district court not to admit the evidence on a basis not raised, and did not commit obvious error because Tolbert has failed to establish the court abused its discretion by not admitting the evidence under N.D.R.Ev. 608. *State v. Thompson*, 2010 ND 10, ¶ 26, 777 N.W.2d 617 (when the defendant fails to establish error, the court cannot commit obvious error). We summarily affirm under N.D.R.App.P. 35.1(a)(4) and (7).

[¶3] Jon J. Jensen, C.J.
Lisa Fair McEvers
Gerald W. VandeWalle
Jerod E. Tufte
Daniel J. Crothers