ORIGINAL

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STATE OF NORTH DAKOTA
IN THE SUPREME COURT
SUPREME COURT NO. 20040093

State of North Dakota.	)	Crim. No. 08-03-K-02242
	)	
Plaintiff/Appellee.	)	
	)	
vs.	)	
	)	
Orvin McKinley Igou. III..	)	
	)	
Defendant/Appellant.	)	

BRIEF OF APPELLANT

Appeal from the District Court Jury Trial and
Verdict of December 19. 2003. and Criminal Judgment
and Sentencing Dated March 30. 2004
Before the Honorable Benny A. Graff

Cynthia Feland
Assistant States Attorney
514 E. Thayer Avenue
Bismarck. ND 58501
(701) 222-6672
ID#04804
Attorney for Appellee

Kent M. Morrow
Attorney at Law
411 N. 4th Street #6
Bismarck. ND 58501
(701) 255-1344
ID#03503
Attorney for Appellant

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STATEMENT OF THE FACTS

On September 21, 2000, Orvin Igou III ("Igou") was convicted in Nevada of the offense of Possession of Child Pornography. (Tr. p. 14, ll. 1-2). He moved back to North Dakota and registered as a sexual offender on May 13, 2002. (Tr. p. 14, ll. 12-13). He initially lived at 308 Boulevard Avenue, Apt. 6, in Bismarck, North Dakota. (Tr. p. 153, ll. 1-2). On December 10, 2002, Igou moved in Bismark to 211 West Rosser Avenue, Apt. 2. Aware of the requirement to notify the Bismarck Police Department of a change of address, he mailed a letter to them advising them of his change of address. (Tr. p. 154, ll. 10-15). He believed that the mailing of the notice constituted compliance with the reporting requirement. (Tr. p. 155, ll. 21-25).

Around January 1, 2004, Igou met a woman named M.T. (Tr. p. 156, ll. 1-7). They eventually began a relationship. (Tr. p. 156, ll. 11-15). He eventually met N.T., the daughter of M.T., and K.W., a friend of N.T. (Tr. p. 156, ll. 21-22; Tr. p. 157, ll. 9-13). On May 30, 2003, Igou went to M.T.'s house. M.T. and her children were discussing going camping at Sweet Briar. (Tr. p. 157, ll. 19-24). K.W. also went with. She needed to return to Bismarck early the next morning to complete her newspaper route. (Tr. p. 158, ll. 7-14). Everybody eventually went to bed in the tent and went to sleep. Around 2:45 a.m. Igou got up and drove K.W. and N.T. back to Bismarck. (Tr. p. 162, ll. 14-18). On the way into Bismarck, Igou advised the girls that he needed to stop at his apartment and take out his contacts. (Tr. p. 162, ll. 24-25). There was no talk of sexual matters by anyone. (Tr. p. 163, ll. 16-18). The girls accompanied Igou to his apartment. While they

looked at his hobby of necklace making, he took out his contacts and changed his shirt. Everyone then left the apartment. (Tr. p. 163, ll. 9-16). They had been there ten to fifteen minutes. (Tr. p. 163, ll. 21-22). He did not ask or solicit N.T. for sex. (Tr. p. 164, ll. 2-8). Igou drove to K.W.'s house, dropped her off and drove N.T. back to Sweet Briar. (Tr. p. 164, ll. 25; p. 165, ll. 1-3). He later drove N.T. back home. (Tr. p. 166, ll. 2-5). The following day, June 1, 2003, both K.W. and N.T. visited Igou at his work. (Tr. p. 166, ll. 6-19). On June 6, 2003, N.T. went to the Bismarck Police Department and reported that K.W. had been sexually assaulted by Igou and he had tried to solicit her for sex. He was arrested on June 10, 2003. (Tr. p. 167, ll. 15-18).

STATEMENT OF THE CASE

On June 12, 2003, Orvin Igou III ("Igou") was charged with Gross Sexual Imposition, Solicitation of Minor and Failure to Register as Sex Offender in Burleigh County District Court. On December 18, 2003, a jury trial was held in Burleigh County District Court. Following receipt of testimony and deliberations, the jury found Igou guilty of all charges.

On December 31, 2003, Igou filed a Notice of Appeal to the North Dakota Supreme Court.

ISSUES

1. **The evidence was insufficient to convict Igou of the charge of Gross Sexual Imposition.**

2. **The evidence was insufficient to convict Igou on the charge of Solicitation of Minor.**

3. **The evidence was insufficient to convict Igou on the charge of Failure to Register as Sex Offender.**

ARGUMENT

1. The evidence was insufficient to support the verdict of guilty on the charge of Gross Sexual Imposition.

Rule 29(a), North Dakota Rules of Criminal Procedure, provides that the Court on its own motion or the defendant's motion following the close of evidence on either side, shall enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. In the case before this court, Igou made such a motion. The trial court denied Igou's Rule 29 Motion.

In an appeal challenging the sufficiency of the evidence, the defendant must show that the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt. ***State v. Knowels,*** 2003 ND 180, 671 N.W.2d 816; ***State v. Steen,*** 2000 ND 152, 615 N.W.2d 555, 561, citing ***City of Jamestown v. Neumiller,*** 2000 ND ¶5; 604 N.W.2d 441; ***State v. Pollack,*** 462 N.W.2d 119, 121 (N.D. 1990); and ***State v. Fasching,*** 461 N.W.2d 102, 103 (N.D. 1990). Only if the record presents no substantial evidence to support the verdict will a jury's determination be reversed. ***State v. Lund,*** 424 N.W.2d 645 (N.D. 1988).

Even though the uncorroborated testimony of a victim of gross sexual imposition can be sufficient to establish the elements of the crime, the testimony of K.W. was incredible and insufficient to substantiate proof beyond a reasonable doubt.

The victim, K.W., testified in a contradictory fashion regarding the sexual act committed by Igou. She initially said that Igou had had sexual intercourse with her. (Tr.

p. 38, ll. 14-17). She then proceeded to tell her friend, N.T., that she and Igou had not had sexual intercourse. (Tr. p. 40, ll. 24-25). Finally, she retracts her recantation and tells N.T. that she and Igou had had sex after all. (Tr. p. 41, ll. 21-24).

She recalled Igou was wearing brief underwear. (Tr. p. 38, ll. 4-7). Igou testified that he always wears boxer underwear. (Tr. p. 164, ll. 10-16). She testified that he had sex with her two times. (Tr. p. 38, ll. 15-17, ll. 20-22). She then testified, on cross examination, that they really had had sex three times. (Tr. p. 53, ll. 17-22).

In ***State v. Schill,*** 406 N.W.2d 660, 662 (N.D.1987), the Supreme Court stated that:

> "Although a child's uncorroborated testimony may be sufficient to sustain a conviction for child sexual abuse, the preferred practice obviously is to support that testimony with as much other evidence as possible. *See,* ***Berliner v. Barbieri,*** The Testimony of the Child Victim of Sexual Assault, 40:2 J.Soc.Issues 125, 133 (1984) for discussion of methods of corroborating child's testimony."

Igou urges the Court to re-examine the standard of total reliability on uncorroborated testimony of a victim, especially in cases such as this, without any supporting physical evidence, the length of delay in reporting, and the contradictory nature of the victim's testimony.

2. The verdict of guilty on the charge of Solicitation of Minor was not supported by sufficient evidence.

The trial judge gave the following jury instructions on the elements of proof for the charge of Solicitation of a Minor:

COUNT II: Solicitation of a Minor

1. That on or about May 31, 2003;

2. In Burleigh County, North Dakota,

3. The Defendant, Orvin Igou, III;

4. Wilfully;

5. Solicited N.T. to engage in a sexual act and

6. N.T. was a minor over the age of fifteen (15) years old.

Section 12.1-20-05, N.D.Cent.Code provides the definition of Corruption or Solicitation of Minors:

12.1-20-05. Corruption or solicitation of minors.

1. An adult who engages in a sexual act with another person or who causes another person to engage in a sexual act, is guilty of a class A misdemeanor if the other person is a minor fifteen years of age or older, or is guilty of a class C felony if the adult is at least twenty-two years of age and the other person is a minor fifteen years of age or older.

2. An adult who solicits a person under the age of fifteen years to

> engage in a sexual act or sexual contact is guilty of a class A misdemeanor.

Subsection 1 is clearly the only one that may have been applicable to Igou. The evidence was clearly non-existent that Igou engaged in any sexual act with N.T. N.T. did not testify at all that Igou ever engaged in or caused any other person to engage in a sexual act with her. The thrust of the charge of solicitation was that Igou solicited N.T. "With the intent to engage in . . . a sexual act with a minor . . . fifteen yeas of age or older." N.T. was born on January 20, 1988. She was fifteen years of age on May 31, 2003 (the date of the alleged offense). (Tr. p. 65, ll. 20-23).

N.T. clearly and unequivocally denied that Igou ever talked about having sex with her. (Tr. p. 75, ll. 18-25; p. 76, ll. 1). She also testified that Igou made a comment where "he asked me if I wanted to have sex, and then I said no I didn't, that I wanted my boyfriend to be the first. And then he said that was fine with me." (Tr. p. 81, ll. 1-2).

The central issue is whether Igou engaged in solicitation of N.T. North Dakota does not have a statutory definition of solicitation. Minnesota does provide a definition for used with its offense of solicitation of a child to engage in sexual conduct, in violation of Minn. Stat. § 609.352, subds. 1 and 2. That statute defines "solicit" as:

> "commanding, entreating, or attempting to persuade a specific person in person, by telephone, by letter, or by computerized or other electronic means."

Minn. Stat. §609.352, subd. 1(c).

Under a plain reading of the solicitation statute - Section 12.1-20-05(1),

N.D.Cent.Code - two elements are required: 1) intent to engage in sexual conduct; and 2) the act of solicitation. Cf. ***State v. McGrath,*** 574 N.W.2d 99, 101 (Minn. App. 1998); ***State v. Koenig,*** 649 N.W.2d 484, 488 (Minn. App. 2002).

Solicitation is an inchoate activity. *See* **Black's Law Dictionary**, 761 (6th Ed. 1990)(defining inchoate crimes as "[a]n incipient crime which generally leads to another crime. . .." "Incipient" means "beginning to come into being or to become apparent." **Webster's New Collegiate Dictionary** (1980). N.T. testified once that talk of sex did occur and on one occasion that no such talk occurred. The totality of the circumstances may have authorized a finding that Igou solicited N.T. for <u>some</u> sex-oriented purpose. There is no evidence to support a finding that this purpose was to engage in a sex act . . ." *See* ***State v. Baldwin,*** 291 N.W.2d 337 (Iowa, 1980). There is nothing to indicate, or prove beyond a reasonable doubt, that sex-oriented purpose of Igou's comment was to achieve a sexual act specifically described in Section 12.1-20-02(3), N.D.Cent.Code. There was no evidence of any non-verbal conduct or actions by Igou following the comment that would support an inference of an intent to engage in a sexual act.

The conviction for solicitation of a minor must be reversed.

3. <u>The conviction for Failure to Register as Sexual Offender was not supported by sufficient evidence</u>.

The trial court instructed the jury on the following essential elements of the offense of Failure to Register as a Sex Offender:

COUNT III: Failure to Register as a Sex Offender:

1. Sometime between April 1, 2003, and June 11, 2003, in Burleigh County,

North Dakota, the defendant, Orvin Igou III, relocated to a new address in Bismarck, North Dakota;

2. That Orvin Igou III was a person required to register as a sexual offender;

3. That within 10 days of relocation by the defendant;

4. He willfully failed to register with local Bismarck authorities.

The only element (albeit the most important) that the State failed to prove beyond a reasonable doubt was the final element, i.e., that Igou willfully failed to register with Bismarck authorities.

Section 12.1-32-15(6) outlines the individuals' responsibilities to register a new address within ten days of obtaining a new address. The individual is required to "inform in writing, . . . the law enforcement agency with whom the person last registered of the person's new . . . address."

The evidence showed that Igou did notify the Bismarck Police Department of his change of address. He was aware of his obligation to send a change of address. (Tr. p. 154, ll. 9-12). He did notify the police by mailing a letter advising them of his new address. (Tr. p. 154, ll. 13-25). Section 12.1-32-15, N.D.Cent.Code does not required that a person physically go to the local police department. Igou was never advised by anyone when he first registered that he had to physically notify of a change of address. (Tr. p. 155, ll. 3-11). Igou felt that he was in compliance with the notification requirement. (Tr. p. 155, ll. 24-25). The local registrant for the Bismarck Police Department testified that she would accept a handwritten letter notifying of a change of address. (Tr. p. 26, ll. 21-23). Jonathan Byers with the Attorney General's Office

confirmed that such a method of notification was acceptable. (Tr. p. 22, ll. 16-22).

A letter mailed is presumed to be received within three days if mailed. Section 31-11-03(24), N.D.Cent.Code. The State did not refute this presumption. The mailing of a change of address notice was made by Igou and was sufficient.

A companion issue is whether Igou willfully failed to register as a sexual offender. "Willfully" is defined as either intentionally, knowingly, or recklessly. Section 12.1-02-02(4), N.D.Cent.Code. The evidence is quite clear and uncontradicted that Igou did not intentionally or knowingly fail to register.

Recklessly is defined as:

Igou's mailing of a written notice to the Bismarck Police Department of a change of address was not reckless. It was not in "conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of any relevant facts as risks. . .". Once could argue that he ignored the risk that, once mailed, the letter may not be delivered by the post office. However, he, like millions of others during the day, trust the postal service to deliver what they mailed. Is their conduct reckless in so trusting? The State's testimony that they have never had anyone else report a change of address in a similar manner is simply not sufficient to constitute proof beyond a reasonable doubt.

CONCLUSION

The convictions of Igou were not supported by sufficient evidence. They must be reversed.

Dated this ___ day of June, 2004.

Kent M. Morrow ID#03503
Attorney for Appellant
411 N. 4th Street #6
Bismarck, ND 58501
(701) 255-1344

CERTIFICATE OF SERVICE BY MAIL

On the ___ day of June, 2004, a true copy of the foregoing Brief of Appellant and Appendix to Brief of Appellant was mailed to:

Cynthia Feland
Assistant States Attorney
514 E. Thayer Avenue
Bismarck, ND 58501

Kent M. Morrow