IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20060211

State of North Dakota,

Plaintiff-Appellee,

- vs -

Verdane R. Georgeson,

Defendant-Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
NORTHEAST JUDICIAL DISTRICT
BENSON COUNTY CASE NO. 05-K-00135
THE HONORABLE LEE A. CHRISTOFFERSON, PRESIDING

APPELLANT'S BRIEF

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II. Did the Trial Judge's Cautionary Instruction to the Jury Before the 10:06 A.m. Recess, the Noon Recess and Before a Conference in Chambers, Meet the Requirements of N.d.c.c. 29-21-28 and North Dakota Standard Jury Instruction on Conduct of the Jury During Trial?

III. Was There Evidence and Testimony Sufficient to Convict Georgeson of the Offense of Gross Sexual Imposition?

NATURE OF THE CASE

On October 24, 2005, the Defendant Verdane R. Georgeson ("Georgeson") was charged in a Complaint/Information with Gross Sexual Imposition, a Class A Felony, involving his step-daughter, SK.

A preliminary hearing on the above charge was held on November 28, 2005. At the conclusion of that hearing, the Court found probable cause to believe the crime charged had been committed and a jury trial was scheduled for April 11 thru 13, 2006.

Georgeson, on March 10, 2006, made a motion to reset the trial date, a motion to suppress the video tape, and a motion in limine. On the 28th of March, 2006, the trial date was reset for May 4 thru 5, 2006. On March 29, 2006, an Order was entered suppressing the video tape.

On May 2nd, 2006, the Benson County States Attorney, James P. Wang made a motion to amend the Complaint/Information. An Order allowing the State to file an Amended Complaint/Information was issued on May 4, 2006 and an Amended Complaint/Information was then filed on May 5, 2006.

The jury on May 5, 2006 reached a verdict that found Georgeson guilty of the crime Gross Sexual Imposition. On May 10, 2006, a presentence investigation was ordered. A sentencing hearing was set for July 24, 2006, and on that date the trial judge signed a Criminal Judgment and Commitment.

On July 28, 2006, Georgeson timely filed an appeal. On the same date, a Notice of Filing of the Notice of Appeal was signed by the Benson County Clerk of Court.

STATEMENT OF THE FACTS

The State of North Dakota charged Verdane Georgeson ("Georgeson") under N.D.C.C. 12.1-20-02(a) with one count Class A Felony, Gross Sexual Imposition. To this charge Georgeson plead not guilty. Tr. P. 107, L. 7 - 12.

According to the Information:

(1). The Gross Sexual Imposition was alleged to have occurred between August of 1999 and September of 2001 in Georgeson's house in the City of Maddock, County of Benson, State of North Dakota.

(2). On one occasion, Georgeson purportedly had sexual contact with SK, by touching her breast.

(3). It was alleged that on another occasion, Georgeson placed his hand on the crotch of SK's panties. Tr. P. 372, L. 9 - 20.

Only Georgeson and SK were present at the times the sexual contact was to have occurred. No physical evidence was presented at the trial to show that the sexual contact actually occurred.

The first report about the sexual contact that allegedly occurred between August of 1999 and September of 2001, was made on June 13, 2005. This report was made by SK's father, Gary Kaul, after he received a call on June 12, 2005, informing him that SK had been sexually assaulted by Georgeson. Tr. P. 280, L. 20 - 22, P. 28, L. 15 - 19.

A law officer who helped the Benson County Sheriff's Office investigate the sexual assault of SK was Brock Baker. Mr. Baker is a special agent with the Bureau of Criminal Investigation. Tr. P. 261, L. 21 - 25; P. 262, L. 1 - 2 and P. 260, L. 22 - 23.

Georgeson met with Agent Baker who then arrested Georgeson. Tr. P. 267, L. 15 - 20 and P. 270, L. 7 - 10.

During the State's case, SK testified that:

1. When she was 8 years old, Georgeson took off her shirt and bra and fondled her breasts at his home in Maddock, North Dakota . Tr. P. 157, L. 25; P. 160, L. 11 and P. 161, L. 10 - 17.

2. In August of 2001, when SK was 10 years old, Georgeson placed his hand on her crotch. Tr. P. 164, L. 15 - 22 and P. 173, L. 9 - 21.

Other witnesses called during the State's case were:

1. Paula Condol, an employee of the Dakota Children's Advocacy Center. Ms. Condol interviewed SK. Tr. P. 128 - P. 142.

2. Deb Hanson, a licensed independent social worker. Ms. Hanson interviewed SK. Tr. P. 247 through P. 260.

3. Brock Baker, a special agent with the North Dakota Bureau of Criminal Investigation. Agent Baker assisted the Benson County Sheriff's Office in the investigation of this case. Tr. P. 260 through P. 276.

4. Gary Kaul, SK's father, testified:

a. He reported the sexual assault to law enforcement on June 13, 2005. Tr. P. 280, L. 15 - 23.

b. SK to this day hasn't told him what happened. Tr. P. 280, L. 13 - 15.

During the Defendant's case, the first witness called was the Defendant's wife, Kimberly Georgeson. Kimberly Georgeson is SK's mother. Mrs. Georgeson testified:

1. SK isn't always truthful and sometimes lies to get what she wants. Tr. P. 321, L. 7 - 15.

2. SK never told her Georgeson had inappropriately touched her. Tr. P. 316. L. 20 - 25.

3. She observed that Georgeson and SK got along.

4. How she and SK got along.

The second witness was Georgeson, who testified he never touched SK's breasts or put his hand on her crotch. Tr. P. 337, L. 22 - 25. P. 338, L. 1 - 5.

The jury returned a verdict finding Georgeson guilty of the crime of Gross Sexual Imposition. Tr. P. 378. L. 23 - 25. P. 379, L. 1 - 3.

ARGUMENT

ISSUE I.

DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR WHEN HE GAVE THE FOLLOWING PRELIMINARY INSTRUCTION TO THE JURY:

"THREE, AFTER THE PROSECUTION HAS PRESENTED ITS EVIDENCE, THE DEFENDANT MAY PRESENT EVIDENCE BUT IS NOT OBLIGED TO DO SO. THE BURDEN IS ALWAYS ON THE STATE TO PROVE EVERY ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT. THE LAW NEVER IMPOSES ON THE DEFENDANT IN A CRIMINAL CASE THE BURDEN OF CALLING ANY WITNESSES OR INTRODUCING ANY EVIDENCE."?

This issue is an appeal of a jury instruction. According to *State v. Stensaker*, 2007 ND 6:

"On appeal, jury instructions are fully reviewable." State v. Wilson, 204 ND 51, ¶ 11, 676 N.W.2d 98 (citing State v. Steffes, 500 N.W.2d 608, 611 (N.D. 1993)).

"Instructions are reviewed as a whole, and we determine 'whether they correctly and adequately inform the jury of the applicable law, even though part of the instructions when standing alone may be insufficient or erroneous.'" Id. (quoting State v. Hammeren, 2003 ND 6, ¶13, 655 N.W.2d 707). "We will reverse only if the instructions, as a whole, are (1) erroneous, (2) relate to a central subject in the case, and (3) affect a substantial right of the accused." Wilson, at ¶ 11 (citation omitted).

In any criminal case, only after the defense has rested, and the Defendant has not testified, should the trial judge instruct the jury that the Defendant is not required to produce any witnesses or evidence. Prior to the Defendant resting, the Defendant is a competent witness and can testify. North Dakota law states:

"In the trial of a criminal action or proceeding before any court or magistrate of this state, whether prosecuted by information, indictment, complaint, or otherwise, the defendant, at the defendant's own request and not otherwise, must be deemed a competent witness, but the defendant's neglect or refusal to testify does not create or raise any presumption of guilt against the defendant. Nor may such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place." N.D.C.C. § 29-21-11.

In the case now before the Court, the trial judge instructed the jury that the Defendant didn't have to produce any witnesses or evidence without first inquiring whether the Defendant was going to testify. The problem with such an instruction is it gives an adverse inference when the Defendant testifies. This adverse inference is that the jury will think that the Defendant had to testify, to rebut evidence produced by the

State. or they will wonder why the Defendant is testifying when he didn't have to take the stand.

A Defendant's failure to testify in a criminal case is discussed in 4.01 Defendant's Failure to Testify, and paragraphs of numbers 3.05 - 3.08, in the Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit. Copies 4.01, Defendant's Failure to Testify, and 3.05, Description of Charge; Indictment Not Evidence; Presumption of Innocense: Burden of Proof (Single Defendant, Single Count) are attached. 4.01 is marked Exhibit 1; 3.05 is marked Exhibit 2; both exhibits are made a part of this Brief.

According to the headings in 4.01 and 3.05 both instructions are to be used as Final Jury Instructions. (emphasis added). The Committee Comments on 4.01 recommends the trial court, outside the presence of the jury, inquire of the Defendant whether he elects to testify and whether or not this instruction is desired.

In the case now before the Court, the trial judge, without first inquiring whether the Defendant was going to testify, decided to inform the jury that the Defendant didn't have to produce any witnesses or evidence in his preliminary instructions.

The "Note" on the use of 3.05. refers to the following:

[There is no burden upon a defendant to prove that [he] [she] is innocent.] [Accordingly, the fact that [a] defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict.][2]

According to note 2, the above language should be used only if the Defendant requests it.

A Defendant's right against self incrimination is set out in the United States

Constitution in the Fifth Amendment:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." (emphasis added)
The Fourteenth Amendment makes the Fifth Amendment applicable to all states.

In the North Dakota Constitution, the Defendant's rights against self incrimination appear in Article I § 12:

"In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." (emphasis added)

The constitutional protection against compelled testimony shouldn't be used against a defendant in a jury instruction, when the Defendant is going to testify.

A defense the prosecution may assert is found in 1.09 Outline of a Trial in the Manuel of Model Criminal Jury Instructions for the District Court of the Eighth Circuit. A copy of 1.09 Outline of Trial is attached, marked Exhibit 3 and made a part of this

Brief. According to 1.09's notes on the use. unless the Defendant requests that the language be omitted, a jury can be instructed that a Defendant doesn't have to present evidence testify, or call other witnesses.

Should the prosecutor raise such an argument, response is simple. The defendant's constitutional right to not testify shouldn't be used against him in a jury instruction when the Defendant is going to testify. At a later time in the trial, any jury instruction given about a Defendant's not having to testify, call other witnesses, or produce evidence before a Defendant has had an opportunity to present his case may create an advise inference when the Defendant testifies.

An error in trial that effects a Defendant's constitutional rights effects a Defendant's substantial rights.

Rule 52(b) North Dakota Rules of Criminal Procedure:

"Rule 52 Harmless Error and Obvious Error.

(b) Obvious error. Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

Therefore, on appeal, the Supreme Court can consider any jury instruction that effects a Defendant's constitutional rights.

The purpose of a jury charge and who is to give that charge are set out in *Lakeside v. Oregon*, 98 S.Ct. 1091 (1978):

"The very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof. To instruct them in the meaning of the privilege against compulsory self-incrimination is no

different." Id. at 1095.

"It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial." Id. at 1096.

Therefore, according to *Lakeside*, it is the obligation of the trial judge, during a criminal trial, to protect a Defendant's constitutional rights and not give any jury instruction on a Defendant not having to testify, call witnesses, or produce evidence until the Defendant has rested and didn't testify.

ISSUE II.

DID THE TRIAL JUDGE'S CAUTIONARY INSTRUCTION TO THE JURY BEFORE THE 10:06 A.M. RECESS, THE NOON RECESS, AND BEFORE A CONFERENCE IN CHAMBERS, MEET THE REQUIREMENTS OF N.D.C.C. 29-21-28 AND NORTH DAKOTA STANDARD JURY INSTRUCTION ON CONDUCT OF THE JURY DURING TRIAL?

According to *Stensaker*:

"On appeal, jury instructions are fully reviewable." State v. Wilson, 204 ND 51, ¶ 11, 676 N.W.2d 98 (citing State v. Steffes, 500 N.W.2d 608, 611 (N.D. 1993)). "Instructions are reviewed as a whole, and we determine 'whether they correctly and adequately inform the jury of the applicable law, even though part of the instructions when standing alone may be insufficient or erroneous.'" Id. (quoting State v. Hammeren, 2003 ND 6, ¶13, 655 N.W.2d 707). "We will reverse only if the instructions, as a whole, are (1) erroneous, (2) relate to a central subject in the case, and (3) affect a substantial right of the accused." Wilson, at ¶ 11 (citation omitted).

In the case now before the court, the trial judge, during the jury selection and just

before the first recess at 10:06 a.m.. gave the following instruction:

"Let's . . . We've been at it awhile and about this time everybody needs a break. So we're going to take a break. This is our first break. Now I am going to talk to you, Ms. Brossart, okay about the second matter and being in conjunction with the first matter of the birth of the grandchild. I just want to alert you and give you a bit of a cautionary instruction. Now you know a little bit about - - not much but you know a little bit about the case, and this would be a great time for you to be jawing about it out in the halls, and I don't want you to do that, okay? Because you may not know much or have strong feelings, but somebody else might and they may impact you out in the hallway. You can talk politics - - well maybe not politics because I don't want any disputes out there. You know. the outlet or the whatever it is. anything you want, but don't talk about this case or the issues that surround it. okay, during the break, because you've already answered questions and some of these people out here in the audience are with you. They haven't answered any questions. They may have a strong feeling about something or another. So I just ask you not to do that. And this will go on and on throughout the whole trial if you're selected. We'll have a jury, I'm sure, by noon and so you'll know whether you're on the jury or not. But just honor that. I appreciate it. Okay, we'll stand in a short recess for about ten minutes, and, Ms. Brossart. if you'll just stay there and then we'll talk." This instruction appears to be given only to persons in the jury box. Tr. P. 49, L. 19 - 25 and P. 50, L. 1 - 20.

Then at the noon recess, the trial judge gave the following admonishment to the prospective jury:

"I think we are going to take our noon break, Mr. Wang. because there's only one restaurant in town. I want to get you there. I want you to not talk about the case . . . ."

After the trial jury is selected and sworn in. another break occurs because of a conference in chambers. Tr. P. 103. L. 24 - 25. P. 104, L. 1 - 25, P. 105, L. 1 - 25 and P. 106, L. 1 - 14. No Admonition is given to the jury before this conference. After the conference in chambers, the court session begins with the preliminary jury instructions. Tr. P. 106, L. 22 - 23. The Admonition on the Conduct of the Jury During Trial appears in the Transcript. Tr. P. 114, L. 2 - 25.

The trial judge's duty to admonish the jury is set out in N.D.C.C. 29-21-28:

"The jurors also, at each adjournment of the court, whether permitted to separate or required to be kept in charge of officers, must be admonished by the court that it is their duty not to converse among themselves nor with anyone else on any subject connected with the trial. nor to form or express any opinion thereon, until the case is finally submitted to them."

In this case, all breaks in the court proceedings in the transcript, are called recesses. Therefore, the question is whether or not there is a deference between the words recess and adjournment.

According to the Black's Law Dictionary, Fifth Edition at page 38, adjournment is defined as:

"A putting off or postponing of business or of a session until another time or place. The act of a court, legislative body, public meeting, or officer, by which the session or assembly is dissolved, either temporarily or finally, and the business in hand

dismissed from consideration, either definitely or for an interval. If the adjournment is final, it is said to be sine die. See also Recess."

In Black's Law Dictionary, Fifth Edition, at page 1141, recess is defined as:

"In the practice of the courts, a short interval or period of time during which the court suspends business, but without adjourning. The period between sessions of court. A temporary adjournment of a trial or a hearing that occurs after a trial or hearing has commenced."

From the above definitions it appears there is a difference between adjournment and recess. This distinction appears to be eliminated by Black's Law Dictionary, Fifth Edition, at page 39, definition of adjourn:

"To put off; defer; recess; postpone. To postpone action of a convened court or legislative body until another time specified, or indefinitely; the latter being usually called to adjourn *sine die*. To suspend or recess during a meeting, legislature or assembly, which continues in session Suspending business for a time, delaying."

During a jury trial, when the court takes a recess, this ends any proceeding between the Court and jury until the Court reconvenes in front of the jury. Therefore any control the trial judge has over that jury is limited to any instructions the court may have given the jury prior to the start of that recess.

State v. Julson, 202 N.W.2d 145 (N.D. 1972) approved, as a sufficient admonition, the trial judge's practice of giving the complete admonition to the entire jury panel at the start of the term and following it at future breaks in the trial by stating the following to the jury:

"Members of the jury, bear in minds the Court's usual admonition."

In the case now before the Court, at the first recess. the admonition the trial judge appeared to be giving, was only to those in the jury box. That admonition fails to contain all of the language contained in the North Dakota Jury Instruction No. 5, entitled Conduct of a Jury During Trial. A copy of the jury instruction entitled Conduct of a Jury During Trial is attached, marked Exhibit 4, and made a part of this brief.

During the noon recess, the trial judge again, only told the jury "don't talk". This language falls short of *Julson*. "Members of the jury, bear in mind the Court's usual admonition."

After the jury was sworn in, and before the jury was given the preliminary instructions, there was a conference in the Court's chambers. *State v. His Chase*, 531 N.W.2d 271 (N.D. 1995), allowed an abbreviated admonition to the jury before an in chambers conference. However, no admonition of any kind was given before the conference in chambers.

The trial judge, at Tr. P. 114, L. 5 - 25 and P. 115, L. 1 - 15, finally gave the jury the instruction on Conduct of a Jury During Trial. This did not occur until the Court had recessed the proceedings on three separate prior occasions. This instruction finally fully informed the jury of how they were to conduct themselves during trial.

In *State v. West*, 223 N.W. 705 (N.D. 1929), a motion made after the State rests, outside of the hearing of the jury was found not to be an adjournment.

The difference between *West* and the case now before the Court is that in *West* the jury had been properly admonished before the motion was made. In this case, the jury

had not been properly admonished before the 10:06 a.m. recess. the noon recess. and the conference in chambers.

To insure fairness during a jury trial, the trial judge should admonish the jurors on the Conduct of a jury During Trial before the first recess in the trial. In this case. the judge allowed three recesses before he gave the standard jury instruction on Conduct of a Jury During Trial. The trial judge failed to follow the requirements of N.D.C.C. § 29-21-28 and this error entitles the Defendant to a new trial.

ISSUE III.

WAS THERE EVIDENCE AND TESTIMONY SUFFICIENT TO CONVICT VERDANE GEORGESON OF THE OFFENSE OF GROSS SEXUAL IMPOSITION?

After the Defendant rested, the Defendant made a rule twenty-nine motion for judgment of acquittal. Tr. P. 342, L. 5 - 10. It was denied. Georgeson now requests this Court to grant him an acquittal based on insufficient evidence.

Georgeson believes there is not sufficient evidence to convict him of the crime of Gross Sexual Imposition. The standard of review for insufficiency of the evidence is a strict standard of review that only allows a motion for judgment of acquittal to be granted, if the evidence is insufficient to sustain a conviction of the offenses charged. *State v. Ohnstad*, 359 N.W.2d 827 (N.D. 1987).

CONCLUSION

For the above reasons, the case should be remanded to the trial court for a new trial.

DATED at Mandan, North Dakota, this 8 day of February, 2007.

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