

**ORIGINAL** (e-filed)

**20060330**

IN THE SUPREME COURT OF NORTH DAKOTA

**FILED**  
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February 6, 2007

	)	
State of North Dakota,	)	STATE OF NORTH DAKOTA
	)	
Plaintiff and Appellee,	)	
	)	Supreme Court No. 20060330
v.	)	
	)	Griggs County No. 20-05-K-47
Lucas Nathaniel Flatt,	)	
	)	
Defendant and Appellant.	)	
	)	

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APPEAL FROM THE DISTRICT COURT  
GRIGGS COUNTY, NORTH DAKOTA  
SOUTHEAST JUDICIAL DISTRICT  
THE HONORABLE JOHN E. GREENWOOD, PRESIDING

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**BRIEF OF APPELLANT**

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### **[ ¶ 3] STATEMENT OF THE ISSUES**

- I. Whether ameliorating changes in criminal statutes apply to pending prosecutions even in the alleged conduct occurred prior to the effective date of the legislation.
- II. Whether the failure to amend the information to include an essential element of the offense constitutes reversible error.
- III. Whether the failure of the jury to find an essential element of the offense beyond a reasonable doubt constitutes reversible error.
- IV. Whether the proper remedy in the case is arrest of judgment.

## STATEMENT OF THE CASE

[ ¶ 4] Flatt was charged with Gross Sexual Imposition through a complaint dated June 23, 2005. The State filed a criminal information dated July 25, 2005. (Appendix at 3-4.) On August 1, 2005, the North Dakota Legislature amended the Gross Sexual Imposition law under which Flatt was charged. Flatt proceeded to trial January 17, 2006. The jury returned a guilty verdict on January 17, 2006. At that time Flatt retained present counsel. A notice of substitution of attorney was filed February 14, 2006. Flatt filed a motion to dismiss on March 28, 2006. The trial court issued an order denying the motion to dismiss on July 26, 2006. (Appendix at 10-15.) Judgment was entered on November 1, 2006. (Appendix at 16-17.)

## STATEMENT OF THE FACTS

[ ¶ 5] Flatt was charged in Griggs County with Gross Sexual Imposition through a complaint dated June 23, 2005. The State filed a criminal information dated July 25, 2005. (Appendix at 3-4.) On August 1, 2005, the North Dakota Legislature amended the Gross Sexual Imposition law under which Flatt was charged.

[ ¶ 6] The Statute as enacted before August 1, 2005, reads, in pertinent part:

A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if . . . [t]he victim is less than fifteen years old . . . An offense under this section is a class A felony.

N.D.C.C. § 12.1-20-03 (effective date August 1, 1997). The statute as enacted subsequent to August 1, 2005, reads, in pertinent part.

A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if . . . the victim is less than fifteen years old . . . An offense under this section is a class AA felony if . . . the actor was more than five years older than the victim at the time of the offense. . . .An offense under this section is a class C felony if . . . the actor was at least four but not more than five years older than the victim at the time of the offense.

N.D.C.C. § 12.1-20-03 (effective date August 1, 2005). Furthermore, the State Legislature adopted additional language for N.D.C.C. § 12.1-20-01 with the effective date of August 1, 2005. That section reads, in pertinent part,

In sections 12.1-20-03 through 12.1-20-08: . . . When criminality depends on the victim being a minor, the actor is guilty of an offense only if the actor is at least four years older than the minor.

N.D.C.C. §12.1-20-01 (effective date August 1, 2005).

[ ¶ 7 ] Flatt pleaded not guilty to the charge as shown in the information and proceeded to trial. On January 13, 2006, the jury returned verdict indicating that they found Flatt “guilty of the crime of Gross Sexual Imposition, as charged in the Information.” (Appendix at 7.) At no time prior to the guilty verdict was the Information amended to reflect the statutory change that went into effect August 1, 2005.

[ ¶ 8 ] It should be noted that it appears that Flatt is greater than four years older than the victim, but not five years older. However, the issue of Flatt’s age in relation to the victim has not been proven beyond a reasonable doubt, nor submitted to the jury.

### **JURISDICTIONAL STATEMENT**

[¶ 9] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI, § 8, N.D.C.C. §§ 27-05-06 (4), 40-18-19, and N.D.R.Crim.P. 37. This Court has jurisdiction over this appeal under N.D. Const. art. VI, § 6, N.D.C.C. §§ 29-28-06 (1), and 29-28-06 (2). This appeal is timely under N.D.R.App.P. 4(b)(1)(A).

### LAW AND ARGUMENT

**I. Ameliorating changes in criminal statutes apply to pending prosecutions even if the alleged conduct occurred prior to the effective date of the legislation.**

[¶ 10] This appeal involves questions of law. Questions of law are reviewed under the de novo standard of review. State v. Genre, 2006 ND 77, ¶12, 712 N.W.2d 624.

[¶ 11] The law is well settled that when the legislature makes an ameliorating change to a criminal statute, it applies retroactively to pending prosecutions. State v. Cummings, 386 N.W. 2d 468, 472 (N.D. 1986); State v. Shafer-Imhoff, 2001 ND 146, ¶ 45, 386 N.W.2d 468. In Cummings, the defendant was charged with Driving Under Suspension. Cummings at 470. Cummings committed the offense on June 15, 1985, after passage of the 1985 amendment to the Driving Under Suspension statute, but prior to its effective date of July 1, 1985. Id. Cummings pleaded guilty and was sentenced after the 1985 amendment had taken effect. Id. The trial judge sentenced Cummings to the greater penalty mandated by the prior statute. In overturning the trial court's decision, this Court



held, “[U]nless otherwise indicated by the Legislature, an ameliorating amendment to a criminal statute is reflective of the Legislature’s determination that the lesser punishment is the appropriate penalty for the offense.” Id. at 472.

The Court reasoned,

Nothing is gained by imposing a more severe punishment after the Legislature has determined that a lighter penalty is appropriate. The excess punishment can serve no other purpose than to satisfy a desire for vengeance. a legislative motivation we will not presume.

Id.

[ ¶ 12 ] It is worth noting that the State agreed with Flatt’s analysis that the ameliorating statute was applicable in the Flatt prosecution. (Appendix at 9.)

**II. The failure to amend the information to include an essential element of the offense constitutes reversible error.**

[ ¶ 13 ] “An information must contain a written statement of the essential elements of the offense.” State v. Gwyther, 1999 ND 15, ¶ 15, 589 N.W.2d 575. Under N. D. R. Crim. P. 7(c), an information must be a “plain, concise, and definite written statement of the essential facts constituting the offense charged.” State v. Frankfurth, 2005 ND 167, ¶ 7, 704 N.W.2d 564. North Dakota has legislatively established the term "element of an offense" to mean the following:

- a. The forbidden conduct;
- b. The attendant circumstances specified in the definition and grading of the offense;
- c. The required culpability;

d. Any required result; and

e. The nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue.

N.D.C.C. § 12.1-01-03(1).

[ ¶ 14] In this case, the criminal information, as presented, failed to accurately state the “elements of the offense” by omitting a necessary factor of “the forbidden conduct,” and by indicating that the crime of Gross Sexual Imposition in this case constituted a class A felony, when in fact the grading of the offense would be determined by the age of the actor in relation to the victim.

[ ¶ 15] The essential elements of the crime of Gross Sexual Imposition prior to amending the statute were the following: 1) a person who engages in a sexual act with another or causes another to engage in a sexual act, and 2) that the victim be less than fifteen years old. N.D.C.C. § 12.1-20-03 (effective date August 1, 1997). In fact, these two elements were contained in the information and found to be true, beyond a reasonable doubt, by the jury.

[ ¶ 16] However, by the time the trial started, these were not the only essential elements for a crime of Gross Sexual Imposition as manifested in this case. The statute as amended contained an additional essential element. The essential elements for the statute as amended include the following: 1) a person who engages in a sexual act with another or causes another to engage in a sexual act, 2) that the victim be less than fifteen years old, and 3) that the actor be more than five years older than the victim in order to constitute a AA felony, or that the

actor be at least four but not more than five years older than the victim at the time of the offense order to constitute a C felony. N.D.C.C. § 12.1-20-03 (effective date August 1, 2005). Under the new statute, even if elements one and two are present, it is no crime if the actor is less than four years older than the victim at the time of the offense. N.D.C.C. § 12.1-20-01(2) (effective date August 1, 2005).

[ ¶ 17] Because the criminal information failed to list the additional element of age, it did not charge Flatt with a crime. A defective information cannot be “cured” through proper jury instruction or other means short of amendment. Frankfurth, 2005 ND 167, ¶ 25, 704 N.W.2d 564 . In Frankfurth the defendant was arraigned under an information purporting to charge him with Gross Sexual Imposition under N.D.C.C. § 12.1-20-03. Id. at ¶ 2. The information alleged, “The defendant engaged in a sexual act at a time when the victim was unaware that a sexual act was being committed on her.” Id. In his appeal, Frankfurth argued that the information lacked an essential element of the offense, specifically that Frankfurth had knowledge of his victim’s unawareness that a sexual act was being perpetrated on her. Id. at ¶ 3. Frankfurth asserted that because that essential element of the crime was missing from the information, the information was defective and failed to charge a crime. Id. The Court held that that Frankfurth’s knowledge of the victim’s unawareness was “an essential element of the offense charged and could not be inferred.” Id. at ¶ 10. The Court continued “Because it [the essential element] was missing from the information, the criminal information was

defective. Id. Ultimately the Court upheld the trial court's decision to arrest judgment due to the fact that the information was defective. Id. at ¶ 29.

[ ¶ 18] This Court affirmed the dismissal in Frankfurth, despite the fact that all elements were ultimately presented to a jury and found to be proven beyond a reasonable doubt. Here, Flatt has never had all elements placed before a jury. An essential element, the element of age, was missing from the information and all subsequent documentation. The Court should accordingly reverse the conviction.

[ ¶ 19] Undoubtedly the State will argue that the motion for dismissal was untimely. Rule 12(b), N.D. R. Crim. P., allows, and Rule 34, N.D. R. Crim. P., requires, arrest of judgment when no offense is charged. Frankfurth, 2005 ND 167, ¶ 12, 704 N.W.2d 564. Rule 12(b)(3)(B), N. D. R. Crim. P., states:

The following motions must be raised before trial: . . . a motion alleging a defect in the indictment, information or complaint – but at any time while the case is pending, the court may hear a claim that the indictment, information or complaint fails to invoke the court's jurisdiction or to state an offense.

Flatt did not make a pretrial motion claiming that the information failed to state an offense. In fact it was not until two months after the verdict that a motion for a dismissal was made. Flatt contends that because he had not yet been sentenced, his case was still pending. Therefore his motion to dismiss should not be denied as untimely.

[ ¶ 20] In the alternative, Flatt argues that his motion to dismiss should not be considered untimely under N. D. R. Crim P. 52. "Rule 52, N.D. R. Crim. P., allows appellate court review of obvious errors or defects affecting substantial

rights, regardless of whether they were brought to the trial court's attention.”  
Frankfurth, 2005 ND 167, ¶ 22, 704 N.W.2d 564. In order for an error to be noticed and corrected by an appellate court, a four-prong error test must be satisfied. Cotton v. United States, 535 U.S. 625, 631 (2002). The test requires (1) error; (2) that is plain; which (3) affects substantial rights; and (4) seriously affects the fairness, integrity, or reputation of judicial proceedings. Id. To affect the "substantial rights" of a defendant, an obvious error must have been prejudicial or have affected the outcome of the proceedings. State v. Krull, 2005 ND 63, 693 N.W.2d 631, P6.

[ ¶ 21] In the case at hand, the failure of any party to amend the information is clearly plain or obvious error, fulfilling the first two prongs of the test. That failure, which was reproduced in the jury trial and even the jury instructions, affects substantial rights. Flatt had a right to have every element laid out properly in the information so that he could properly defend himself. Because the element of age could fairly easily be proven, one could argue that omission is not prejudicial. See Krull, 2005 ND 63, P6, 693 N.W.2d 631. However, the outcome of the trial would certainly have been different -- Flatt would not have been found guilty of a Class A felony. Nothing cuts to the core of the "fairness, integrity and reputation" from prong four of the Cotton test as our notion that every man is presumed innocent until proven guilty beyond a reasonable doubt by a jury of his peers. Therefore, even under a Rule 52, N.D.R.Crim.P. obvious error analysis, this conviction should be reversed.

**III. The failure of the jury to find an essential element of the offense beyond a reasonable doubt constitutes reversible error.**

[ ¶ 22] Because amelioration amendments to the Criminal Code apply to acts that occurred prior to the effective date of the amendment, in pending cases, the charging documents in this case are flawed. Because the verdict in this case was based on flawed charging documents the verdict in this case is invalid and must be arrested.

[ ¶ 23] A defendant has a due process right to have every element of a crime decided beyond a reasonable doubt by a jury if that element would increase the maximum possible penalty for the crime. United States v. Booker, 543 U. S. 220 (2005); Apprendi v. New Jersey, 530 U.S. 466 (2000). “[U]nder the Due Process Clause of the Fifth Amendment, . . . any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Jones v. United States, 526 U.S. 227, 243 (1999). The Due Process Clause of the Fourteenth Amendment protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. State v. Vogel, 467 N.W.2d 86, 89 (ND 1991). “No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.” N.D.C.C. §12.1-01-03.

[ ¶ 24] In the case at hand the jury’s verdict was given in accordance with the flawed criminal information. The jury instructions indicate that the jury never considered the difference in age as a factor of Gross Sexual Imposition in this

case. (Appendix at 5-6.) Under the heading “essential elements of the offense” in the jury instructions, the trial court lists only the following two elements:

- 1) On or about December 27<sup>th</sup>, 2004, in Griggs County, North Dakota, the Defendant, Lucas Flatt, willfully engaged in a sexual act with Jill Doe; and,
- 2) Jill Doe was less than fifteen years old.

Id. The jury verdict form further indicates that the verdict was based on the flawed information. The verdict form states, in part, “we, the Jury, . . . do find the Defendant . . . GUILTY of the crime of Gross Sexual Imposition, as Charged in the Information.” (Appendix at 7.) Both Documents reveal the fact that the Jury never even considered the amended factors of Gross Sexual Imposition. By comparison, the jury in Frankfurth actually did consider all the relevant factors during the course of the trial. Frankfurth at ¶24. In Frankfurth the State argued that dismissal was improper “because Frankfurth’s substantial rights were not affected by the defective information.” Id. The State cited as support the fact “the jury convicted Frankfurth after being properly instructed on all essential elements of the offense.” Id. In rejecting the State’s argument the Court held “a defective information cannot be ‘cured’ through proper jury instruction or other means short of amendment.” Id., ¶ 25. In Frankfurth the Court arrested judgment based solely on the fact that the information was defective. even though, the jury’s verdict was based on the proper elements. The facts in the present case are even more extreme. In the present case not only was the information defective, but the jury never even considered the proper elements in coming to its verdict. Because the jury did not

find all the elements of Gross Sexual Imposition beyond a reasonable doubt, the Jury Verdict must be reversed.

[ ¶ 25 ] The State argued that Flatt's reliance on Booker and Apprendi is misplaced. The State argued that these cases stand for the proposition that "a defendant has a due process right to have every element of a crime decided beyond a reasonable doubt by a jury if that element would increase the maximum possible penalty for a crime." Apprendi, 530 U.S. at 476. The State argues that because Flatt was between four and five years older than the victim, the amended statute serves to reduce the penalty for Flatt's crime from an A felony to a C felony, therefore the attendant facts do not have to be proven beyond a reasonable doubt. The State's analysis is flawed. Flatt was found guilty, beyond a reasonable doubt, of two elements of Gross Sexual Imposition. Those elements are the following: 1) sexual act, 2) victim under fifteen. If those two elements are considered in light of the amended statutes N.D.C.C. § 12.1-20-03 and N.D.C.C. § 12.1-20-01, it is clear that the crime Flatt was convicted of in court was ameliorated to be no crime at all. Under the amended statutes the two elements shown to be true in Flatt's case do not constitute a crime. Accordingly the punishment for that "non-crime" is ameliorated to be no punishment at all. Any evidence indicating that Flatt is greater than four years older than the victim in this case must be presented to a jury and found beyond a reasonable doubt in accordance with Booker and Apprendi.

**IV. The proper remedy is dismissal of case.**



[ ¶ 26] Because the information in this case was flawed and the jury verdict was based on that flawed information, the proper remedy in this case is dismissal of the case or arrest of judgment. The effect of an order arresting judgment is to place a defendant in the same situation in which he was before the information was filed. N.D.C.C. §29-25-05. Therefore, the defendant may be re-prosecuted under a new information as if there had been no prior proceedings

[ ¶ 27] The State argues that State v. Schafer-Imhoff, 2001 ND 146, ¶ 16, 386 N.W.2d 468, stands for the proposition that the proper remedy to the enactment of an ameliorating statute is to simply adjust the sentence of the defendant in accordance with the newly enacted statute. However, Schafer-Imhoff is distinguishable from the present case in that the ameliorating change in Schafer-Imhoff only ameliorated the penalty for Driving Under Suspension. Id. The essential elements of the crime remained unchanged. Accordingly, in Schafer-Imhoff the only change that could possibly be made would be to use the less stringent penalty the legislature set out. Since the elements of the crime remained unchanged, there was no reason to arrest the verdict of the court. However in the present case, the ameliorating amendment not only served to lessen the penalty for Gross Sexual Imposition in certain cases, it also served to add an additional element to the crime of Gross Sexual Imposition in every case where criminality was based on the victim's age. This additional element raises a question of fact concerning an essential element of the crime of Gross Sexual Imposition. It would be

inappropriate for the trial court to merely adjust the level of the offense without a finding of the presence of the additional element made by a jury.

**CONCLUSION**

[ ¶ 28] For all of the foregoing reasons, Flatt ask this Court to reverse his conviction and remand for new trial.

Dated this the 6th day of February, 2007.

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[¶ 29] CERTIFICATE OF SERVICE

A copy of this document and the Appendix to Brief of Appellant in pdf format were e-filed with the North Dakota Supreme Court and served upon Jonathan R. Byers, pursuant to Administrative Order 14 on the 21st day of February, 2006. Specifically, this document and the Appendix to Brief of Appellant were electronically filed and served as follows:

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