ORIGINAL (e-filed)

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20060340

State of North Dakota, Plaintiff - Appellee, vs. Shannon Muhle, Defendant - Appellant.	)	Supreme Court No. 20060340 District Court File No. 09-05-K-04134

APPELLEE'S BRIEF

APPEAL FROM THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN E. MCCULLOUGH , PRESIDING

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[¶ 1] TABLE OF CONTENTS

TABLE OF CONTENTS ..... ¶ 1

TABLE OF AUTHORITIES ..... ¶ 2

STATEMENT OF THE ISSUES ..... ¶ 3

STATEMENT OF THE CASE ..... ¶ 8

STATEMENT OF THE FACTS ..... ¶ 10

LAW AND ARGUMENT ..... ¶ 17

CONCLUSION ..... ¶ 70

CERTIFICATE OF SERVICE ..... ¶ 71

[¶ 2] TABLE OF AUTHORITIES

Cases **Paragraph**

North Dakota State Cases

City of Jamestown v. Neumiller, 2000 ND 11 ¶ 5, 604 N.W.2d 441 ..... ¶ 19

State v. Blue, 2006 ND 134, 717 N.W.2d 558 ..... ¶ 66

State v. Charette, 2004 ND 187, 687 N.W.2d 484 ..... ¶ 20, 48

State v. Hatch, 346 N.W.2d 268, 277 (ND 1984) ..... ¶ 20

State v. Keller, 2005 ND 86 ¶ 50, 695 N.W.2d 703 ..... ¶ 19

State v. Klose, 2003 ND 39 ¶ 19, 657 N.W.2d 276 ..... ¶ 20

State v. Krull, 2005 ND 63, ¶ 14, 693 N.W.2d 631 ..... ¶ 20

State v. Messner, 1998 ND 151, ¶ 8, 583 N.W.2d 109 ..... ¶ 61

State v. Sevigny, 2006 ND 211, 722 N.W.2d 515 ..... ¶ 66

State v. Steiger, 2002 ND 79 ¶ 4, 644 N.W.2d 187 ..... ¶ 19

State v. Wilson, 2004 ND 51, ¶ 9, 676 N.W.2d 98 ..... ¶ 20

North Dakota Statutes

N.D.C.C. § 12.1-20-03 ..... ¶ 26

N.D.C.C. § 14-09-22 ..... ¶ 21

North Dakota Rules

N.D.R.Evid 803 (24) ..... ¶ 59, 61

N.D.R.Evid 803 (6) ..... ¶ 63

N.D.R.Evid 803 (4) ..... ¶ 63

N.D.R.Crim.P. 16(f)(4) ..... ¶ 49, 50

Other Authorities

Crawford v. Washington, 541 U.S. 36 (2004) . . . . . ¶ 60, 61, 64, 66, 68

Idaho v. Wright, 497 U.S. 805, 815-16, 110 S.Ct. . . . . ¶ 61

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed2d . . . . . ¶ 61

People v. Reed, 361 Ill.App.3d 995, 838 N.E.2d 328 . . . . . ¶ 61

[¶ 3] STATEMENT OF THE ISSUES

[¶ 4] 1. Whether the evidence presented at trial was sufficient to convict Shannon Muhle of the charged offenses.

[¶ 5] 2. Whether the court erred by failing to remedy the prejudice cause by the previously undisclosed testimony of G.E. at trial.

[¶ 6] 3. Whether certain statements made by the State in closing arguments impermissibly prejudiced the defendant.

[¶ 7] 4. Whether the trial court erred in admitting prior out of court statements into evidence.

[¶ 8] STATEMENT OF THE CASE

[¶ 9] The State is not dissatisfied with the Statement of Case contained in the Brief of Defendant/Appellant dated 25 April 2007.

[¶ 10] STATEMENT OF THE FACTS

[¶ 11] The State is not completely dissatisfied with the Statement of Facts contained in the Brief of Defendant/Appellant dated 25 April 2007, but it should be supplemented as follows:

[¶ 12] In defendant Shannon Muhle's Brief of Appellant at ¶10 a portion of the written transcript of K.E.'s taped statement on 31 August 2005 to Child Protection Investigator Tammy Anderson is set forth. However, it ends too early and omits additional relevant statements indicating that the defendant Shannon Muhle had engaged in sexual acts with G.E.

[¶ 13] After the final portion of Tammy Anderson's interview with K.E. set forth in defendant Shannon Muhle's Brief of Appellant at ¶10 the interview did not end, but the transcript of the audiotape received in evidence, State's Exhibit 8, indicates it continued as follows:

TAMMY:	Okay. What, did you hear anything else?
K:	No.
TAMMY:	Okay. How many times did that happen?
K:	lots of times
TAMMY:	Okay
K:	Sometimes when my dad's (inaudible)
TAMMY:	Your dad has seen it too?

K: Yeah

TAMMY: Okay. Tell me again, what does your dad see?

K: (inaudible)

TAMMY: Who having sex? Who has your dad seen having sex?

K: My brother and my mom.

TAMMY: Okay. And when they have sex, tell me about what their sex is

K: Their sex is. I don't know what their sex is

TAMMY: okay. Are you getting tired?

K: Yeah.

TAMMY: Of talking. I can kind of tell. Okay. Well you know, you did a really nice job of explaining things to me understand. Okay.

K: Okay

TAMMY: And how bout if you go back to your classroom for a while and TIM and I will do some talking and we will talk to you again. Does that sound okay?

K: Okay

[¶ 14] In addition, the Statement of Facts contained in the Brief of Defendant/Appellant dated 25 April 2007 omits any reference to 1) the testimony of Dr. Alonna Norberg (Tr. p. 191-256) and 2) State's Exhibit #12, Dr. Norberg's eight (8) page report of examination of S.M. on 1 September 2005.

[¶ 15] As part of a physical examination, Dr. Norberg took a history from S.M.

for purposes of medical treatment and diagnosis. As part of the history, S.M. described to Dr. Norberg in graphic detail sexual acts involving S.M.'s father, Andrew Muhle. S.M.'s statements to Dr. Norberg include references to the involvement of defendant Shannon Muhle.

[¶ 16] State's Exhibit #12 on what is labeled page 2 of 8 contains the following references to defendant Shannon Muhle:

> I asked her "When you are on Daddy's bed and this is happening is anyone else in the room?" and she replied "just me and my daddy and sometimes my mommy." I asked, "Where is your mommy?" and she replied, "in bed with us." I asked, "What is your mommy doing in bed with you?" and she replied, "she plays the game with us." I asked, "What kind of game?" and she replied, "the sex game."

State's Exhibit #12 on what is labeled page 3 of 8 contains the following references to defendant Shannon Muhle:

> I asked her what she was doing and she said "daddy's penis kisses." ... "Mommy does not want me to look." She paused for a few moments and then she said, "Mommy is in the room but she covers my eyes sometimes." I did not say anything and we paused for a moment again and she then spontaneously said, "Mommy does not like me to see the finale." I said, "What is the finale?" and she responded "that is when everything explodes." I asked her "What do you mean by explodes?" and she said, "that is when Daddy explodes." I asked her "What do you mean by explodes?" and she said . "Daddy's pee explodes." I asked her "What

happens then?" and she said, "then we go have a big cake and a party." I asked her "What are you wearing when you play the sex game?" and she stated, "Daddy takes my clothes off before we get in the bathtub." I asked her "When you and Daddy are playing this game are your clothes on or off or something else?" and she said, "off." I asked her "are your panties on or off" and she said, "off." I asked her "What is Daddy wearing?" and she said "nothing." She then spontaneously added, "Mommy doesn't have clothes on too." I asked her "Can you tell me what else happens in the games you play?" and she said, "we watch movies, scary movies." I asked her "When do you watch those scary movies?" and she said, "in Daddy's bedroom." I asked her "What happens in the movies?" and she said, "there are monsters, but sometimes there are princesses and they are wriggling all over and they love each other." She was quiet for a long time and playing with a blanket that was on her lap and then she said, "Mommy watches Daddy put his penis in my hole in the movie." I asked her "S_____ can you show me what hole you are talking about and she pulled up her examining gown and pointed to her vaginal area and then she took her finger and stuck her butt out toward me and pointed to her anus. I asked S_____ "What hole are you talking about, your butt or your pussy?" and she said "both." I asked her "What happens when he does that?" and she said, "he wiggles." I asked her "How does that feel?" and she said "It tickles and owies" I asked S_____, "Do you know what bleeding is? and she said, "it is when I get a bloody nose." I asked "do you ever get a

bloody nose?" She said "yes." I asked her "Do you ever have any bleeding from any other spot on your body?" and she said, "yah, from my butt." I asked her "When do you see that bleeding from your butt?" and she said, "when we play games." I asked, "When you play what games?" and she said, "when I play the sex game with Daddy and Mommy." I asked her "How long do you have that blood on your bottom?" and she said, "Daddy kisses it." "Do you ever tell your mommy about your owies?" She replied, "mommy is with us."

State's Exhibit #12 on what is labeled page 4 of 8 contains the following references to defendant Shannon Muhle:

Before she left the room I asked, "What is Daddy's name?" and I asked her "What is Mommy's name?" and she replied "Shannon."

[¶ 17] LAW AND ARGUMENT

[¶ 18] Issue 1: Whether the evidence presented at trial was sufficient to convict Shannon Muhle of the charged offenses.

[¶ 19] A challenge regarding the sufficiency of the evidence is reviewed in a light most favorable to the verdict. State v. Keller, 2005 ND 86, ¶ 50. 695 N.W.2d 703. The determination is "whether a rational trier of fact could have found the essential elements of the crime were established beyond a reasonable doubt." Id. (citing State v. Steiger, 2002 ND 79. ¶ 4, 644 N.W.2d 187). All inferences are drawn in favor of the verdict. Id. (citing City of Jamestown v. Neumiller, 2000 ND 11. ¶ 5, 604 N.W.2d 441). This Court will reverse a jury's verdict only if "after viewing the evidence and all reasonable evidentiary inferences in the light most favorable to the verdict, no rational factfinder

could have found the defendant guilty beyond a reasonable doubt." Id. (citing City of Jamestown v. Neumiller, 2000 ND 11, ¶ 5, 604 N.W.2d 441).

[¶ 20] This Court will not weigh conflicting evidence and will not judge credibility of witnesses. State v. Charette, 2004 ND 187, ¶ 7, 687 N.W.2d 484 (citing State v. Klose, 2003 ND 39, ¶ 19, 657 N.W.2d 276). A jury may reach a verdict of guilt beyond a reasonable doubt even if there is conflicting testimony or other explanations of the evidence. State v. Krull, 2005 ND 63, ¶ 14, 693 N.W.2d 631 (citing Charette, 2004 ND 187, ¶ 7, 687 N.W.2d 484). "A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty." State v. Wilson, 2004 ND 51, ¶ 9, 676 N.W.2d 98 (quoting State v. Hatch, 346 N.W.2d 268, 277 (N.D.1984)).

[¶ 21] In Count One defendant Shannon Muhle was charged with Abuse or Neglect of Child in violation of N.D.C.C. § 14-09-22. That statute makes it an offense for the parent of a child to willfully fail "to provide proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical,

mental, or emotional health, or morals."

Evidence submitted at the jury trial tending to prove Count One included:

[¶ 22] 1) State's Exhibit #12 containing the statements of S.M. to Dr. Norberg reflecting defendant's Shannon Muhle's involvement in the "sex game" which defendant Andrew Muhle played with S.M..

[¶ 23] 2) S.M.'s live testimony indicating that defendant Shannon Muhle was present in the room when defendant Andrew Muhle played a "private game" with S.M.

(Tr. p. 67-69), and,

[¶ 24] 3) State's Exhibit #6 (audio tape played for jury) containing Tammy Anderson's interview of S.M. on 31 August 2005 indicating that defendant Shannon Muhle was present in the room and watched when defendant Andrew Muhle played the "secret game" with S.M.

[¶ 25] Drawing all inferences in favor of the guilty verdict and viewing the foregoing evidence in a light most favorable to the guilty verdict, a rational factfinder could have found the defendant guilty beyond a reasonable doubt. There is no reason to disturb the jury's verdict on Count One.

[¶ 26] In Count Two defendant Shannon Muhle was charged with Gross Sexual Imposition in violation of N.D.C.C. § 12.1-20-03. That statute provides that "[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...." Evidence submitted at the jury trial tending to prove Count Two included:

[¶ 27] 1) State's Exhibit #8 (audio tape played for jury) containing Tammy Anderson's interview of K.E. on 31 August 2005 indicating that defendant Shannon Muhle had engaged in sex with G.E.

[¶ 28] 2) G.E.'s live testimony indicating that he had practiced having sex with defendant Shannon Muhle. (Tr. p. 115-116)

[¶ 29] Drawing all inferences in favor of the guilty verdict and viewing the foregoing evidence in a light most favorable to the guilty verdict, a rational factfinder could have found the defendant guilty beyond a reasonable doubt. There is no reason to disturb the jury's verdict on Count Two.

[¶ 30] Issue 2: Whether the court erred by failing to remedy the prejudice cause by the previously undisclosed testimony of G.E. at trial.

[¶ 31] On 31 August 2005 Tammy Anderson interviewed both K.E. and G.E. At that time K.E. said that G.E. had sex with S.M. (State's exhibit #6) At that time G.E. did not say anything about having sex with defendant Shannon Muhle. (Tr. p. 126)

[¶ 32] Five (5) days before the jury trial scheduled to start on 9 May 2006 the State interviewed K.E. and G.E. at the residence of his foster parents. At that interview K.E. no longer indicated that G.E. had sex with S.M. At that interview G.E. indicated to the prosecutor that he had had sex with defendant Shannon Muhle.

[¶ 33] No one present at the interview made a written record of either K.E.'s or G.E.'s interview. The State did not create a written record of its interview with G.E.

[¶ 34] The State did notify counsel for both defendant Andrew Muhle or Shannon Muhle before trial of the fact that K.E.'s testimony would now change from what he had said to Tammy Anderson on 31 August 2005.

[¶ 35] The State did not otherwise notify counsel for either defendant Andrew Muhle or Shannon Muhle before trial of the fact that G.E. might now testify that he had had sex with defendant Shannon Muhle.

[¶ 36] On the first day of the jury trial G.E. testified on direct examination that he had had sex with defendant Shannon Muhle. (Tr. p. 111-112)

[¶ 37] When Det. Tim Runcorn was cross-examined by counsel for defendant Shannon Muhle, Runcorn agreed that G.E. did not say anything about having sex with his mother when Tammy Anderson interviewed G.E. on 31 August 2005. (Tr. p. 126)

[¶ 38] When Det. Tim Runcorn testified on redirect examination he agreed that

G.E. did not tell him and Tammy Anderson the same things G.E. testified to in court. (Tr. p. 128)

[¶ 39] When Tammy Anderson was cross-examined by counsel for defendant Andrew Muhle, Anderson agreed that G.E. made no mention of having sex with his mother when she interviewed G.E. on 31 August 2005. (Tr. p. 144)

[¶ 40] When Tammy Anderson was cross-examined by counsel for defendant Shannon Muhle, Anderson agreed that G.E. really didn't make any disclosure on 31 August 2005 and G.E. didn't say anything about having sex with his mother. (Tr. p. 150)

[¶ 41] At the start of the next day of the jury trial counsel for defendant Andrew Muhle argued to the Court that the State had committed a Rule 16 violation; said that the Court had three (3) options, namely, mistrial, continuance or an instruction to disregard G.E.'s testimony; and asked that the Court instruct the jury to disregard G.E.'s testimony. (Tr. p. 172-176)

[¶ 42] Counsel for defendant Shannon Muhle agreed with counsel for defendant Andrew Muhle; he agreed that the State had committed a clear violation of Rule 16; he identified two (2) options, namely, mistrial or instructing the jury to disregard G.E.'s testimony; and he said that he was fine with either of his identified options. (Tr. p. 176-177)

[¶ 43] Counsel for the State stated what he had done and not done; stated the reasons for his actions; explained that the State too had been surprised by G.E.'s testimony about K.E. having sex with S.M.; noted this issue was not raise by counsel for the defendants on the previous day; noted that there was no request to depose the children before the jury trial; noted that G.E.'s testimony had been impeached; disagreed that there

had been a Rule 16 violation; raised the possibility of a Brady violation; and argued that the State had not committed such a violation because the State had not hidden G.E.'s inconsistent statement from defense counsel. (Tr. p. 177-185)

[¶ 44] Before the trial court judge ruled on the requests of counsel for defendant Andrew Muhle and defendant Shannon Muhle, counsel for defendant Shannon Muhle called Marlene Sorum to testify. She stated that she worked for Cass County Social Services; she had been present at the interview of G.E. five (5) days before the trial; she did not take any notes; and she did not remember anyone taking notes. (Tr. p. 268)

[¶ 45] The trial court judge denied the requests for either a mistrial or an order directing the jury to disregard G.E.'s testimony. (Tr. p. 269-271)

[¶ 46] In closing argument counsel for defendant Shannon Muhle argued that consistency equals credibility; pointed out that G.E. didn't incriminate his mother when Tammy Anderson interviewed him; pointed out that K.E. retracted anything he had earlier said happened between G.E. and his mother five (5) days before trial; and found it very interesting that on the same day that K.E. retracted his statement the State got "this mountain of evidence coming from G.E." (Tr. p. 396-400)

[¶ 47] In this appeal defendant Shannon Muhle argues that the State committed a Rule 16 violation.

[¶ 48] Essentially the same argument was considered and rejected by the North Dakota Supreme Court in State v. Charette, 2004 ND 187, 687 N.W.2d 484.

[¶ 49] In Charette the defendant argued that the State had an obligation to disclose the content of witness Candace Swenning's proposed testimony. The North Dakota Supreme Court noted:

Rule 16(f)(1) requires only "statements" be disclosed by the prosecution. "Statement" is defined quite technically and tends to emphasize formal, written, or recorded declarations. See N.D.R.Crim.P. 16(f)(4). There is no indication Candace Swenning made a formal "statement" regarding the identification of the victim's property. Rather, the prosecution spoke with Candace Swenning to gain a sense of whether she might be able to identify her grandmother's possessions at trial. The fact the State did not formally record these pre-trial interactions, disclose the results of these conversations, or highlight that Candace Swenning may attempt to identify her grandmother's possessions at trial, does not equate to a per se violation of Rule 16(f)(1).

[¶ 50] In this case there was no formal "statement," as that term is defined in N.D.R.Crim.P. 16(f)(4), of G.E. to disclose. The State interviewed G.E. to get a sense of what he might testify to at the jury trial. Because there was no formal "statement" to disclose, the trial court judge correctly ruled that there was no Rule 16 violation.

[¶ 51] Issue 3: Whether certain statements made by the State in closing arguments impermissibly prejudiced the defendant.

In closing argument the prosecutor stated as follows:

But, first, with regard to this crime, I would like to note the following: We've specifically alleged that at least one incident took place in August of 2005, and why are — why are we alleging that in this case? Well basically, ladies and gentlemen, it's based on the statement of S.M. to Dr. Norberg in this case. You'll recall State's Exhibit 12, Dr. Norberg's

examination report, you'll recall how Dr. Norberg found a small cut 5 millimeters in length, 2 to 3 millimeters deep. She actually talked with S.M. and asked S.M. when this happened and she said Saturday. S.M. today is still a young child, a 5-year-old child. Those of you who will recall your experiences with young girls know that it's very difficult for children to be very specific with regard to dates. And of course that's another aspect of course about all of the counts that we charged in this case. You'll note that we really didn't try to pin down, we didn't try to charge either defendant with committing a specific act on a specific date. And I think you can — you could hear why when S.M., K.E., and G.E. testified in this case. That's simply something that's very difficult for children to specify. The have problems with time in general. Even knowing what time it is. You'll recall when children learn to even tell time with their watch. It's not something they're born with. But, frankly, given the nature of their allegations, given the nature of what they say happened to them, give the nature of the repeated acts that occurred in this case, it simply isn't possible for them to be specific with regard to the date. Consider for example law enforcement interviewing an adult victim of repeated offense over a long period of time. Could the adult specify the specific dates on which each offense occurred? The specific day of the week, the specific month? No, it would be extremely difficult. For example, if any investigator asked any adult tell me all the occasions on which you engaged in sexual intercourse with your partner within the past

year, what adult would be able to specify to an investigator the specific date on which they engaged in, for example, consensual relations with their partner? Almost impossible. Certainly impossible for children. It's why in this case we charged the defendants with having committed at least one count of the offense in a broad window of time. Based on their testimony, it happened once, it happened more than once. We submit that the State certainly has not overcharge the defendant in this case. We haven't charged the defendant with every occasion on which these acts took place partly because we can't be more specific about the date. To that extent it seems to me that in charging this case we've been more than fair to the defendants. (Tr. p. 369-371) (paragraph breaks omitted)

[¶ 52] There was no objection to any of the foregoing closing argument at the jury trial by either counsel for defendant Andrew Muhle or defendant Shannon Muhle.

[¶ 53] On appeal defendant Shannon Muhle now contends that the last three (3) sentences of the preceding closing argument constitute an improper closing argument.

[¶ 54] The State denies that there was anything improper in the foregoing argument when it is considered in the context of the State's entire argument.

[¶ 55] The State was simply trying to explain why the case was charged as it was and why it was not possible to be more specific as to dates. The State was trying to anticipate an argument that the State had not proved beyond a reasonable doubt when the offenses occurred.

[¶ 56] Defendant Shannon Muhle alleges the prosecutor was communicating to the jury various subliminal messages. Those messages are quite inventive, but only

plausible with a stretch of the imagination and after taking the prosecutor's three (3) sentences out of context.

[¶ 57] The reason why neither defense counsel objected to the State's closing argument at trial is that there is nothing objectionable.

[¶ 58] Issue 4: Whether the trial court erred in admitting prior out of court statements into evidence.

[¶ 59] Before the jury trial the State filed a Motion to Determine Admissibility of Child's Statement about Sexual Abuse pursuant to N.D.R.Evid. 803(24). On 1 May 2006 an evidentiary hearing on the motion was conducted before the trial court judge.

[¶ 60] As a result of the testimony presented at the evidentiary hearing, the trial court judge issued a fourteen (14) page Memorandum Opinion and Order Regarding Admissibility of Child's Statements about Sexual Abuse dated 9 May 2006. In his Order the trial court judge made detailed findings, considered the implications of Crawford v. Washington, 541 U.S. 36 (2004) and determined that the statements of S.M. and K.E., as redacted, would be admissible as long as they testified.

[¶ 61] The Memorandum Opinion and Order states with regard to the Crawford issue as follows:

> Before proceeding to the a (sic) consideration of the factors, however, the Court must address Andrew Brice Muhle's contention concerning the Confrontation Clause. The Sixth Amendment to the United State's Constitution provides, in pertinent part, that a criminal defendant shall have the right "to be confronted with the witnesses against him...." U.S. Const. amend. VI. At the time of the enactment of Rule

803(24) of the North Dakota Rules of Evidence, the prevailing test to determine whether such a rule met constitutional muster was the test enunciated in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597. This test allowed for an unavailable witness's out-of-court statement to be admitted at trial so long as it had an adequate indicia of reliability, i.e., it fell within a "firmly rooted hearsay exception," or bore "particularized guarantees of trustworthiness." 448 U.S. at 66. The Ohio v. Roberts test was specifically cited by the United States Supreme Court in the case allowing the admissibility of out-of-court statement of child victims of sexual abuse. Idaho v. Wright, 497 U.S. 805, 815-16, 110 S.Ct. 3139, 31-46-47, 111 L.Ed.2d 638, ___. Further, the North Dakota Supreme Court specifically recognized the decision in Idaho v. Wright, as providing the legal basis for the four factors (spontaneity and consistency of repetition, mental state of declarant, use of terminology, and lack of motive to fabricate) recited above. State v. Messner, 1998 ND 151, ¶¶ 12 & 15, 583 N.W.2d 109, 112 (citing Idaho v. Wright, 497 U.S. 805).

Recently, however, the United States Supreme Court has rejected the Ohio v. Roberts test as the analytical framework to decide Confrontation Clause questions. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. Under Crawford out-of-court testimonial statements where the declarant is unavailable for trial will not be admitted unless the defendant has had a prior opportunity to cross-examine that declarant. 541 U.S. at 60, 124 S.Ct. at 1370, 158 L.Ed.2d at

___. Thus, the Confrontation Clause issue is no longer determined by an consideration of whether the out-of-court statement carries with it adequate indicia of reliability. Id. For constitutional purposes, the factor set forth in Idaho v. Wright, and adopted in State v. Messner, no longer control. Therefore, an analysis of the children's statements under Crawford is required.

There is no dispute that each of the three statements were obtained out of court. Clearly the statements are testimonial in nature. See Crawford, 541 U.S. at 52-53, 124 S.Ct. at 1364-65 (stating that statements taken by law enforcement officers in response to structured questions and in the course of investigations are testimonial); People v. Reed, 361 Ill.App.3d 995, 838 N.E.2d 328 (Ill. App. Ct. 2005) (holding statements by child of alleged sexual abuse governed by Illinois version fo Rule 803(24) must meet Crawford test in order to be admissible). There is no indication that the defendant has had the opportunity to cross-examine any of the children. Therefore, if any of the children are unavailable at the trial of this matter, then that child's statement will not be received into evidence.

The State has indicated it intends upon calling all three of the children as witnesses at trial. In all likelihood, therefore, the children will be available for the trial. As a result, the Court anticipates that there should not be a Confrontation Clause problem. However, a final ruling on this constitutional issue will have to await trial to ensure that the

declarants are actually available.2

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2 If, for any reason, one or more of these children are not available at trial, then there would be a Confrontation Clause issue as to that child's statement. Further, this **constitutional** basis for excluding the statement would trump the provisions of Rule 803(24)(b)(ii). N.D.R.Evid. 803(24)(b)(ii) (providing that the out-of-court hearsay may be admitted even if the child is unavailable as a witness so long as there is corroborative evidence). Therefore, even if the (sic) there might be sufficient guarantees of trustworthiness and corroborative evidence, (and hence proper admissibility under the Rule) if a child is unavailable, the Confrontation Clause will require exclusion of that child's statement.

[¶ 62] At the jury trial witnesses Tim Runcorn (Tr. p. 119- 123) and Tammy Anderson (Tr. p. 132) authenticated audiotapes of her interviews of victims S.M. and K.E. on 31 August 2005. The audiotapes of Anderson's interviews with S.M. and K.E., as redacted, were then received in evidence and played to the jury.

[¶ 63] At the jury trial Dr. Alonna Norberg testified that she examined S.M. on 1 September 2005. Through her testimony the State laid the evidentiary foundation for the receipt in evidence of her report of examination of S.M. under 1) N.D.R.Evid. 803(6), the business records exception to the rule against hearsay, and, 2) N.D.R.Evid 803(4), the statements made for purposes of medical treatment or diagnosis exception to the rule against hearsay. (Tr. p. 212-214)

[¶ 64] On appeal defendant Shannon Muhle alleges a violation of her Sixth

Amendment right to confront her accusers. She fundamentally misconstrues the U.S. Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004).

[¶ 65] In order to understand Crawford, it is useful to review the facts of it. The prosecution offered in evidence against Crawford an out-of-court statement of his wife. Law enforcement had interviewed her. She gave a statement to law enforcement. The prosecution thought that some of her statement was inculpatory. She did not testify at the trial because of the state marital privilege. Under Washington law the privilege did not extend to a spouse's out-of-court statements admissible under a hearsay exception. The prosecution offered the statement of Crawford's wife under Washington's hearsay exception for statements against penal interest. The out-of-court statements of Crawford's wife to law enforcement were received in evidence and the result since has befuddled lawyers nationwide.

[¶ 66] In State v. Sevigny, 2006 ND 211, 722 N.W.2d 515, the North Dakota Supreme Court discussed an alleged Confrontation Clause violation in a case in which the declarant of an out-of-court statement testified:

> In State v. Blue, 2006 ND 134, ¶ 7, 717 N.W.2d 558, we clarified when a witness testifying to a child's out-of-court statements about sexual abuse violates a defendant's constitutional right to confront his accuser. We held an out-of-court testimonial statement may not be admitted into evidence when the child is unavailable to testify unless the defendant has had an opportunity to cross-examine the child. Id. at ¶ 8. We also said,
>
> > If a defendant has an opportunity to cross-examine the witness at trial, the admission of testimonial statements

> would not violate the Confrontation Clause. The core constitutional problem is eliminated when there is confrontation. Crawford makes clear that, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements . . . ."
>
> Id. at ¶ 23 (citations omitted) (quoting Crawford v. Washington, 541 U.S. 36, 59-60 n.9 (2004)). In this case, S.S. and S.J.M. both testified at the trial and Sevigny had the opportunity to cross-examine both children. We conclude Sevigny's Sixth Amendment rights were not violated.

State v. Sevigny, 2006 ND 211, ¶29, 722 N.W.2d 515.

[¶ 67] In the instant case the facts are essentially same. S.M. and K.E. both testified and were subject to cross-examination. Because S.M. and K.E. testified and they were subject to cross-examination, defendant Andrew Muhle was not denied an opportunity to be confronted with the witnesses against him.

[¶ 68] It would be nice if the next time the United States Supreme Court issues a landmark decision, then it did not tuck such an important aspect of its opinion into a footnote. It is worth reading a little more of footnote 9 in Crawford. The Court states:

> ... Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimony.... The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (Citations omitted.)

Crawford v. Washington. 541 U.S. 36, 59-60 n.9 (2004)

[¶ 69] There was no denial of a Sixth Amendment right to confront witnesses in this case because S.M. and K.E. both testified and were subject to cross-examination.

[¶ 70] CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the defendant's convictions.

Respectfully submitted, this 25th day of May, 2007.

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[¶71] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on this 25th day of May, 2007, upon:

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