ORIGINAL e-filed 20060340

IN THE SUPREME COURT OF NORTH DAKOTA

April 25, 2007

State of North Dakota, Plaintiff and Appellee, v. Shannon Renee Muhle, Defendant and Appellant.	Supreme Court No. 20060340 Cass County No. 05-K-04134

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

REPLY BRIEF OF APPELANT

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[¶ 3] STATEMENT OF THE ISSUES

I. Whether the trial court erred in admitting prior out of court statements into evidence.

STATEMENT OF THE CASE

[¶ 4] Shannon Renee Muhle was charged with one count of Abuse or Neglect of Child in violation of N.D.C.C. § 14-09-22 and one count of Gross Sexual Imposition in violation of N.D.C.C. § 12.1-20-03 on October 21, 2005. Muhle entered not guilty pleas on both counts. The case proceeded to trial on May 9, 2006. Muhle was tried jointly with her husband Andrew Muhle. Andrew Muhle was charged with two counts of Gross Sexual Imposition in violation of N.D.C.C. § 12.1-20-03 and one count of Abuse or Neglect of Child in violation of N.D.C.C. § 14-09-22. The jury entered a verdict of Guilty on all counts May 15, 2006. Current counsel was appointed as Muhle's defense counsel for purposes of this appeal November 20, 2006. Appellant filed a brief April 25, 2007. The state filed an Appelee brief May 21, 2007. This reply brief follows.

STATEMENT OF THE FACTS

[¶ 5] No additional facts are presented in this reply brief.

JURISDICTIONAL STATEMENT

[¶ 6] 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 reply is timely under N.D.R.App.P. 31(a).

LAW AND ARGUMENT

I. The trial court erred in admitting prior out of court statements into evidence.

[¶ 7] In its Appellate Brief the Defense argues that Crawford v. Washington, 541 U.S. 36 (2004), established the proper test to determine the admissibility of prior statements made by a witness.

A. Crawford is that appropriate test to determine admissibility of prior statements.

[¶ 8] The State argues that since the witnesses in fact did testify at trial, the Crawford test does not apply. The State cites footnote 9 from Crawford as support for this contention. That footnote reads:

> ... 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.

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

[¶ 9] At first glance it appears that footnote 9 severely hampers the defense's arguments. The footnote in Crawford indicates that statements can be admitted "so long as the declarant is present at trial to defend or explain it." Id. As the Defense pointed out in its appellant brief, the problem in the case at hand is that the witnesses were of such a young age that they could not possibly "defend or explain" the statements they made to police over one year prior. It is unlikely that young children who have been through this entire process would remember a conversation that was over a year old, much less be able to defend or explain their

comments at the time. Crawford contemplates the opportunity to cross examine a witness who can remember and intelligently defend or explain the content of their prior statement, unfortunately in this case, the young age of the children precluded this opportunity. Although the witnesses were available to testify at trial they could not possibly be appropriately cross examined on the substance of their prior statements. To that end Footnote 9 of Crawford is not satisfied, and therefore, Crawford remains the appropriate test to determine admissibility of prior statements.

B. The trial court erred by admitting out of court statements into evidence under N.D.R.Ev. 803(24).

[¶ 10] In the event that this Court agrees with the state that Crawford is not the appropriate test to determine the admissibility prior statements, the admission of prior statements is governed by N.D.R.Ev. 803(24). Generally, the Court reviews a trial court's evidentiary rulings under an abuse of discretion standard. State v. Christensen, 1997 ND 57, ¶5, 561 N.W.2d 631. A trial court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably, or if it misinterprets or misapplies the law. Id.

[¶ 11] N.D.R.Ev. 803(24) reads,

> An out-of-court statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child is admissible as evidence (when not otherwise admissible under another hearsay exception) if:
>
> (a) The trial court finds, after hearing upon notice in advance of the trial of the sexual abuse issue, that the time, content,

and circumstances of the statement provide sufficient guarantees of trustworthiness; and

(b) The child either:

(i) Testifies at the proceedings; . . .

N.D.R.Ev. 803(24). In determining the proper test for admissibility under N.D.R.Ev. 803(24) this Court cited the United States Supreme Court.

> In assessing the admissibility of a child's hearsay statement about sexual abuse under the Confrontation Clause, the United States Supreme Court has identified several factors to consider in deciding whether there are particularized guarantees of trustworthiness. Factors to consider include spontaneity and consistent repetition, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and a lack of motive to fabricate. Idaho v. Wright, 497 U.S. at 821-22. These factors are also the relevant ones under N.D.R.Ev. 803(24) for deciding whether prior statements have sufficient guarantees of trustworthiness.

State v. Messner, 1998 ND 151, ¶ 15 , 583 N.W.2d 109. In the case at hand sufficient guarantees of trustworthiness simply were not present.

1. Sufficient guarantees of trustworthiness were not present in the prior statement of K.E.

[¶ 12]The statement of K.E. is in no way spontaneous. At no time during his statement does K.E. spontaneously communicate even one sentence. Every single communication was prompted by a question from the interviewer. (Appendix 1-11).

[¶ 13] The Statement of K.E. did not contain consistent repetition. The statement made by K.E. did not even have the opportunity to demonstrate consistent repetition. For the most part the interviewer would ask K.E. a question then move on to another question. (Appendix 1-11). Because of this it is

impossible to consider consistent repetition a sufficient guarantee of trustworthiness as it relates to this interview.

[¶ 14] The mental state of the declarant did not offer additional guarantees of trustworthiness in relation to K.E.'s statement. Throughout the interview there is no indication that K.E.'s mental state changed when the subject of sexual activity was raised. K.E. answered the questions presented to him regardless of the subject. (Appendix 1-10). Because there is no relevant, perceptible change in K.E.'s mental state during the interview, it cannot be said that his mental state offered additional guarantees of trustworthiness.

[¶ 15] The sexual terminology used by K.E. was appropriate for a child of his age. At the time of the interview K.E. was 6 years old. The sexual terms he used in his interview were "sex," "balls," "penis," "vagina," "gross stuff," and "pop goes the weasel." (Appendix 6-10). It cannot be considered unusual for a 6 year old to use terms such as these. Furthermore, K.E.'s statements about sex indicate that K.E. was inexperienced and confused about the workings of sex. For example, K.E. describes his sister and father having sex as "putting their balls together." (Appendix at 6-7). Certainly in order to be considered to show sufficient guarantees of trustworthiness, a statement would have to be more detailed and factually accurate than the one provided by K.E.

[¶ 16] The Defense concedes that there seems to be no apparent motive for K.E. to fabricate his statements.

[¶ 17] Taken together, one can see that four of the five prongs put forth in Idaho v. Wright offered no guarantees of trustworthiness. Because K.E.'s statement did not offer sufficient guarantees of reliability in the area of spontaneity, consistent repetition, mental state of the declarant and terminology, it was an abuse of discretion for the trial court to admit them into evidence.

2. Sufficient guarantees of trustworthiness were not present in the prior statement of S.E.

[¶ 18]The statement of S.E. is in no way spontaneous. At no time during his statement does S.E. spontaneously communicate even one sentence. Every single communication was prompted by a question from the interviewer. (Appendix 12-26).

[¶ 19] The Statement of S.E. did not contain consistent repetition. The statement made by S.E. in fact is fraught with inconsistencies. (Appendix 18-26). For example in reference to a secret game S.E. states that she plays a secret game with her mom and dad. (Appendix at 20). She then states that if she told about the secret game her daddy would get in trouble from her mother. (Appendix at 21). Then states that her mom is downstairs when she plays the secret game. (Appendix at 24). S.E.'s statement is very hard to follow between pages 16-26. S.E. seems to be responding to the interviewer as though S.E. is supposed to come up with the "right" answers to the interviewers questions. There is certainly nothing in the statement that indicates S.E. words have a high level of consistent repetition. On the contrary S.E. seems to be all over the place during her statement. Because of

this it is impossible to consider consistent repletion a sufficient guarantee of trustworthiness as it relates to this interview.

[¶ 20] The mental state of the declarant did not offer additional guarantees of trustworthiness in relation to S.E.'s statement. Throughout the interview there is no indication that S.E.'s mental state changed when the subject of sexual activity was raised. S.E. answered the questions presented to her regardless of the subject. (Appendix 12-26). Because there is no relevant, perceptible change in S.E.'s mental state during the interview, it cannot be said that his mental state offered additional guarantees of trustworthiness.

[¶ 21] The sexual terminology used by S.E. was appropriate for a child of her age. At the time of the interview S.E. was 4 years old. The sexual terms she used in his interview were "butt," "pussy," "penises," and "kiss." (Appendix 15-26). It cannot be considered unusual for a 4 year old to use terms such as these. The terminology used by S.E. offered no additional guarantees of trustworthiness.

[¶ 22] Lack of motive to fabricate did not offer additional guarantees of trustworthiness in relation to S.E.'s statement. Although there does not seem to be a strong motive to fabricate evidence, S.E. in her statement seemed to be trying to please her interviewer by offering the "right" responses to the questions she was presented. This is not unusual for a child of S.E.'s age, and certainly is a valid reason for not considering lack of motive to fabricate as an additional guarantee of trustworthiness of S.E.'s prior statement.

[¶ 23] Taken together, one can see that five of the five prongs put forth in Idaho v. Wright offered no guarantees of trustworthiness. Because S.E.'s statement did not offer sufficient guarantees of reliability in the area of spontaneity, consistent repetition, mental state of the declarant, terminology, and lack of motive to fabricate it was an abuse of discretion for the trial court to admit them into evidence.

CONCLUSION

[¶ 24] For all of the foregoing reasons, Muhle asks this Court to overturn her conviction.

Dated this the 8th day of June, 2007.

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[¶ 25] 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 Mark R. Boening, pursuant to Administrative Order 14 on the 8th day of June, 2007. Specifically, this document and the Appendix to Reply Brief of Appellant were electronically filed and served as follows:

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