

ORIGINAL (e-filed)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20070027

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

State of North Dakota,)
)
Plaintiff/Appellee)
)
vs.)
)
James Eugene Wegley,)
)
Defendant/Appellant)

JUL 05 2007

STATE OF NORTH DAKOTA

Supreme Court No. 20070027

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT,
WILLIAMS COUNTY

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[¶1] **TABLE OF AUTHORITIES**

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State v. Hirshkorn, 202 ND 36, ¶18, 640 N.W.2d 439 ¶3

State v. Messner, 1998 ND 151 ¶15, 583 N.W.2d 109 ¶3

Other Authorities

N.D.R.Evid 609 ¶6

[¶2] RESPONSE TO STATES ARGUMENT

[¶3] Mr. Wegley continues to assert that the District Court erroneously allowed the testimony of the Social worker in this case without the proper guarantees of trustworthiness and reliability. The Social Worker was allowed to testify to the statements made by P.S. particularly in regard to a diagram that she and P.S. discussed and labeled during their forty five minute forensic interview. (Tr. Pg. 316-331) This ruling was made without reviewing the tape to ensure trustworthiness and reliability as required by this court under Hirshkorn v. State, 202 ND 36, ¶18, 640 N.W.2d 439. (Tr. Pg. 11-12, 117, 208-210, 252-254) “A trial Court should not as did the trial court here, merely quote the terms of the rule and order the testimony admitted, but should make specific findings of the facts relevant, to reliability and trustworthiness and explain how these facts support the conclusion of admissibility. Id., ¶18 “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... N.D.R.Ev. 803(24)” State v. Messner, 1998 ND 151 ¶15, 583 N.W.2d 109.” The factors that need to be considered are as follows; 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.

[¶4] As argued in the Appellants original brief the minor child did not spontaneously offer any information regarding any sexual contact between herself and Mr. Wegley. The Minor child witnessed her mother attack her grandfather and

according to testimony when asked specific questions by her mother during the violent episode she nodded her head in the affirmative. The minor child was told by her mother that she was going to visit with a Social Worker and specifically what that meeting was for. The minor child was then placed in a room with a woman she did not know and asked questions for forty five minutes. There was testimony that stated the minor child answered many of the questions asked of her by the Social Worker by saying "I don't know". When the child did not verbalize answers to direct questioning about touching of her private parts the Social Worker had her point to the diagram they had labeled together.

[¶5] The mental state of the Declarant, (P.S.) is questionable to the degree that she is young child in a closed room with a stranger. There was no mention of P.S. and her use of terminology. It appears that P.S. spoke very little of any happenings in regard to what allegedly took place. The child's head nod to her mother during the violent altercation between her mother and grandfather is not reliable. Kandi stated that she was screaming and repeatedly hitting Mr. Wegley and in the midst of this highly volatile situation she stated to the child, "he was touching you" and the child nodded her head in the affirmative. Because of the extreme situation in which this took place the child's head nod should have been disallowed.

[¶6] Mr. Wegley continues to assert that the District Court erred in its denial of Defense Counsel's Motion to exclude evidence of a previous conviction. The Defense asserted at trial and Mr. Wegley continues to assert that Rule 609 governs the use of such evidence for impeachment purposes. Defense counsel asserted that

under rule 609 the probative value of the evidence would need to outweigh its prejudicial affect to the accused and in this case the prejudicial effect was too great. Defense counsel further asserted that rule 609(b) of the N.D.R.Ev. indicates that evidence of a conviction is not admissible if a period of ten years has passed since the date of the conviction or of the release from any confinement imposed for the conviction, whichever is the later date. Mr. Wegely's prior conviction was over thirty years prior to the current charge and should not have been allowed to be used even for impeachment purposes. The District Court erred by not granting Defense counsel's Motion to exclude testimony of Mr. Wegely's prior conviction.

[*7] Mr. Wegely continues to assert that the District Court erred in denying defense counsel's Motion of acquittal based on insufficient evidence to prove the elements of the crime charged. The state asserts that in a few minutes time while one parent was present in the home and the other parent was just out the front door of the home Mr. Wegely went to the bedroom where P.S. was in order to willfully engage in sexual contact with P.S. This is simply not believable, nor is it supported by the evidence. Mr. Wegely's explanation makes so much more sense. He checked on his granddaughter and bent over to give her a kiss and as such, his hand was on the bed to brace himself, when he felt that his hand was stuck or tangled in blankets. Mr. Wegely states he was trying to remove his hand from the blankets. Even if his hand was near the area of private parts which is disputable as the definitions used throughout trial seemed to vary as to who was testifying, it was an accidental situation not one in which there was a purpose to satisfy any sexual or aggressive

desires. If, in fact, Mr. Wegley was attempting to engage in sexual contact to satisfy a sexual or aggressive desire would he really do so in the presence of P.S.'s parents? There was no evidence that stated he was sneaking into the room as asserted by the State in their response. The testimony of Kandi stated she saw him by the kitchen and Mr. Wegley then walked toward the bedroom, where P.S. was watching television, and she followed him. There was no testimony that states he snuck into the room. He didn't even close or lock the door to the room. It is highly unlikely that he went into that room to have sexual contact with his granddaughter. Kandi testified she followed him and then stood at the door briefly and then entered the room. Every move made by Mr. Wegley was in the open to be seen by his daughter.

[¶8] CONCLUSION

[¶9] For the reasons set forth above, Mr. Wegley asks that his verdict be overturned for a for a lack of sufficient evidence to uphold the verdict, as such the Court should overturn the verdict and order the case dismissed with prejudice. In the alternative that his verdict be vacated and he be granted a new trial.

Respectfully submitted this 2nd day of July, 2007.

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[¶9] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by electronic means on this 2nd day of July, 2007, to:

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