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IN THE SUPREME COURT

20070074

STATE OF NORTH DAKOTA

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MAY 16 2008

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellant,	)	
	)	
-vs-	)	
	)	
Tilmer Everett,	)	Supreme Ct. No. 20070074
	)	
Defendant-Appellee,	)	District Ct. No. 08-06-K-1026
.....	)	SA File No. F 363-06-05

**BRIEF OF PLAINTIFF-APPELLANT**

**APPEAL FROM THE CRIMINAL JUDGMENT**

Burleigh County District Court  
 South Central Judicial District  
 The Honorable Bruce A. Romanick, Presiding

Cynthia M. Feland  
 Assistant, Burleigh County State's Attorney  
 Courthouse, 514 East Thayer Avenue  
 Bismarck, North Dakota 58501  
 Phone No: (701) 222-6672  
 BAR ID No: 04804  
 Attorney for Plaintiff-Appellant

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**STATEMENT OF THE ISSUES**

- I. Whether a Comment in the State's Closing Argument constituted a Statement Regarding Everett's Failure to Testify at Trial.
- II. Whether the District Court's failure to admonish the jury prior to a recess constitutes reversible error.
- III. Whether there was sufficient evidence presented at trial to sustain the jury verdict of guilty.

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**STATEMENT OF THE CASE**

In May of 2006, the defendant, Tilmer Paul Everett (hereinafter Everett) was charged with one count of Gross Sexual Imposition, (Class AA Felony) by complaint and pled not guilty to the offense.

On December 5-7, 2006, a jury trial was conducted with Everett being found guilty of the offense.

Everett's version of the facts of the case as set out in his original brief is for the most part correct and additional facts, as they relate to each issue, shall be brought out in the brief.

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**ARGUMENT**

**I. Whether a Comment in the State’s Closing Argument constituted a Statement Regarding Everett’s Failure to Testify at Trial**

It is a fundamental principle of constitutional law that a prosecutor may not comment on a defendant's failure to testify in a criminal case. State v. His Chase, 531 N.W.2d 271, 273 (N.D.1995). “A comment on the silence of a defendant is an improper comment on the right to remain silent in violation of the Fifth and Fourteenth Amendments of the [United States] Constitution.” State v. Ebach, 1999 ND 5, ¶ 15, 589 N.W.2d 566. See also, N.D. Const. Art. I, § 12; N.D.C.C. § 29-21-11.

In State v. Schmidkunz, 2006 ND 192, ¶ 7, 721 N.W.2d 387, this Court has held that:

“In controlling the scope of closing argument, the district court is vested with discretion, and absent a clear showing of an abuse of discretion, we will not reverse on grounds the prosecutor exceeded the scope of permissible closing argument. Unless the error is fundamental, a defendant must demonstrate a prosecutor's comments during closing argument were improper and prejudicial. In order to be prejudicial, the improper closing argument must have “stepped beyond the bounds of any fair and reasonable criticism of the evidence, or

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any fair and reasonable argument based upon any theory of the case that has support in the evidence.”

Argument by counsel must be limited to the facts in evidence and the inferences that properly flow from those facts. State v. Ebach, 1999 ND 5, ¶ 15. 589 N.W.2d 566.

In the present case, the prosecutor stated in her closing argument:

“But what didn't we hear? You know, when he's [Everett] making a statement, Tilmer Everett, about what happened, we hear a lot about how she [Linder] wanted this. How she [Linder] was the aggressor. How she [Linder] laid back on the couch. How she [Linder] took off her clothes. How she [Linder] spread her legs. Well, I have to ask you. Would you think with the fact that as soon as the SANE nurse looks, she can see this injury. I mean, it's not something unnoticeable. It's not something that took a magnifying glass to look at. It's right there. It's right there. Well, how come Mr. Everett never mentioned it? How come he [Everett] didn't tell the police, well, she had an injury before that has nothing to do with it. It was consensual. And how could you stand to engage in that kind of an act consensually if you already had that kind of an injury? This is a painful injury. This hurts. I mean, there were things that she [SANE nurse] didn't do in that exam because she [SANE nurse] didn't want to hurt her [Linder]. This is a



1 raw, open wound. Yet he [Everett] says nothing. Nothing  
2 about it.”

3  
4 Trans. of Trial, Pp. 491-492.

5 Everett’s asserts that when the prosecutor made the statement during  
6 closing argument, she did so in violation of Everett’s right to remain silent.

7 In State v. Myers, 2006 ND 242, ¶ 13, 724 N.W.2d 168, this Court  
8 concluded that a prosecutor’s statement was taken out of context. See, e.g.,  
9 State v. Ebach, 1999 ND 5, ¶ 15, 589 N.W.2d 566 (prosecutor’s statement  
10 merely drew attention to the inconsistency of accounts of what happened and  
11 was not a statement regarding defendant’s silence before testifying). “Rather  
12 than commenting on Myers’s failure to testify at trial or exercising a right to  
13 remain silent, the prosecutor’s statement refers to Myers’s failure in his  
14 voluntary assertions to law enforcement before being given Miranda warnings  
15 to deny that it was his motel room where the drugs and drug paraphernalia  
16 were found.” State v. Myers, 2006 ND 242, ¶ 13, 724 N.W.2d 168. This  
17 court concluded that the “prosecutor’s statement was a comment about the  
18 evidence and was not an improper reference to Myers’s silence.” *Id.* at ¶ 14.

19  
20  
21 Here, as in Myers, the prosecutor’s comments were based on statements  
22 made and the lack of an explanation provided by Everett in his opening  
23 statement. Trans. of Trial, Pp. 146-177. The statements attributed to Everett  
24 and his lack of a complete explanation are as follows:

25  
26 I didn't ask her to come upstairs with me or nothing. But I  
27 said, we got to be quiet because I can't have nobody in here. I

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got three people in there. Two -- a couple in one room, and then another girl in my room that was sitting there watching TV. I said, hell, you can sleep in my room. I'll sleep on the couch. So she stays in that room. There is three sober -- completely sober people in that apartment at that time. I mean, Freda went in there to get a light. I went in there, went in the kitchen for matches. Now what happens? She goes like this to me, quietly (indicating). Just come here. And I went over there. And she lays down by herself. She lays herself down by herself. Puts hair back, lays down, and then I grab her belt, like this. I said, how do you do this? And then I had half a G, but it just had the corners left. I had half a G, so I didn't even take her nothing off. I just touched that belt. That's it. And I said, how do you do this? And I had a shot of --half a G. I put it on top of the TV. Just quick, I looked back, she was naked halfway down. She took everything off herself. Then she went like this to me with four fingers this time. Come here quietly, because we can't make noise. There is three sober people in the house. So I go over there. When I got closer, she spreads her legs. I didn't have to do nothing. Nothing at all. All this story that they got is all mixed up, because I'll tell you why. The reason why is they got Brian Alberts' name. We had consensual sex. And I told that to the cops. And in those

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reports they're trying to say I denied it. But I didn't deny it. I had sex with her, and they got DNA checked on me.

Trans. of Trial, Pp. 167-168.

As the prosecutor's statements in her closing argument were made in response to statements made by Everett at trial, said statements were not a reference to Everett's post-arrest silence. Thus, the district court did not abuse its discretion in its control of the scope of closing argument as there was no violation of Everett's right against self-incrimination.

**II. Whether the District Court's failure to admonish the jury prior to a recess constitutes reversible error.**

Everett argues the district court committed reversible error by failing to admonish the jury before two recesses, as required by N.D.C.C. § 29-21-28, which provides:

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.

The first recess in question occurred at the close of the prosecution's case. the following exchange took place:

THE COURT: State -- do you have another witness?  
MS. FELAND: No, Your Honor. The State would rest.

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THE COURT: Okay. Then we'll take a recess for sure. We will take 15 minutes, so 20 after. Take the Jury out. We will meet with the parties.

(The Jury is excused from the courtroom at 3:04 p.m.)

Trans. of Trial, p. 418, lines 8-16.

The second recess occurred in the middle of the defense's case, the following exchange took place:

MR. SCHWARZ: Your Honor, there is one other witness. I need to speak with him before I call him. I did not get a chance to talk with him just before came in.

THE COURT: How long?

MR. SCHWARZ: Five, ten minutes at the max.

THE COURT: All right. I'll give you that leeway, being we switched over. Just so everybody knows, I'd like to be done in two days. but it looks like it's going to take us into tomorrow. To be quite honest, Jury, if we get done with a couple of witnesses, it would be 5 o'clock before you got the case, and who knows how long you'll deliberate. I'd just as soon not lock you up until all hours of the morning. I'll bring you in tomorrow and then we will do closing arguments tomorrow and give it to the Jury. If we're finished with all of the witnesses today, I'm not sure how many witnesses Mr. Schwarz will have because of the change from Mr. Everett representing

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himself to Mr. Schwarz, I'm giving him some leeway to talk to witnesses to make sure everything is -- he's got enough opportunity. So we'll take another -- it might be minutes, you know. Be as quick as you can, Mr. Schwarz.

MR. SCHWARZ: I will.

THE COURT: You're more comfortable in the Jury room. You can use the restroom. So we will take another ten-minute recess, but we will send you home today as soon as we are done with witnesses and come back tomorrow. Okay. Thank you.

(The Court is in recess from 3:55 p.m. until 4:09 p.m.)

Trans. of Trial, Pp. 442-444.

In State v. Myers, 2006 ND 242, ¶ 17, 724 N.W.2d 168, the North Dakota Supreme Court held:

[A]lthough the district court did not admonish the jury before a brief recess, the court had admonished the jury prior to an earlier lunch break. While even a short-form admonition would have been appropriate, Myers did not object to district court's failure to admonish the jury before the recess, and he has not claimed or demonstrated any prejudice. See His Chase, 531 N.W.2d at 273-74. Under Rule 52(a), N.D.R.Crim.P., any error, defect, irregularity or variance that does not affect substantial rights must be disregarded. We conclude the district

1 court's failure to admonish the jury before the recess was not  
2 reversible error.

3  
4 This case is virtually identical to the Myers case. As in Myers, the  
5 trial court admonished the jury prior to an earlier lunch break. Trans.  
6 of Trial, Pp. 334-335. Further, Everett did not object to the trial  
7 court's failure to admonish the jury before the recess and has failed to  
8 demonstrate any prejudice. State v. Myers, 2006 ND 242, 724 N.W.2d  
9 168. Thus, absent a showing of prejudice, the trial court's failure to  
10 admonish the jury before the recess is not reversible error.

11  
12 **III. Whether there was sufficient evidence presented at trial to  
13 sustain the jury verdict of guilty**

14 Rule 29(a), North Dakota Rules of Criminal Procedure, provides that the  
15 court, on its own motion, or the defendant's motion, following the close of  
16 evidence on either side, shall enter a judgment of acquittal if the evidence is  
17 insufficient to sustain a conviction. In the case before this Court, Everett  
18 made such a motion both at the close of the State's case and the defense's  
19 case. Trans. of Trial, p. 418, lines 18-20, and p. 471, lines 3-4. The trial court  
20 denied Everett's Rule 29 motion stating that there was more than sufficient  
21 evidence presented during the trial which for the jury to make its decision.  
22 Trans. of Trial, p.418, lines 21-23, and p. 471, lines 5-8.

23  
24 In an appeal challenging the sufficiency of the evidence, the defendant  
25 must show that the evidence, when viewed in the light most favorable to the  
26 verdict, reveals no reasonable inference of guilt. State v. Noorlun, 2005 ND  
27

1 189, ¶ 20, 705 N.W.2d 819; State v. Knowels, 2003 ND 180, 671 N.W.2d  
2 816; State v. Steen, 2000 ND 152, 615 N.W.2d 555, 561(citing City of  
3 Jamestown v. Neumiller, 2000 ND ¶ 5, 604 N.W.2d 441; State v. Pollack,  
4 462 N.W.2d 119, 121 (N.D.1990); State v. Fasching, 461 N.W.2d 102, 102-03  
5 (N.D.1990)). In reviewing the sufficiency of the evidence, this court has  
6 previously declined to resolve conflicts in the evidence or weigh the  
7 credibility of witnesses. State v. Pollack, 462 N.W.2d 119, 121 (N.D.1990);  
8 State v. Fasching, 461 N.W.2d 102, 103 (N.D.1990). Only if the record  
9 presents no substantial evidence to support the verdict will a jury's  
10 determination be reversed. State v. Lund, 424 N.W.2d 645 (N.D.1988).

13 Corroborating evidence need not be incriminating in and of itself.  
14 State v. Garcia, 1997 ND 60, ¶ 38, 561 N.W.2d 599; State v. Torres, 529  
15 N.W.2d 853, 855 (N.D.1995). Nor must the corroborating evidence directly  
16 link the accused to the crime. State v. Burgard, 458 N.W.2d 274, 277  
17 (N.D.1990); State v. Haugen, 448 N.W.2d 191, 195 (N.D.1989).

19 “The corroborating evidence need not 'establish criminal  
20 conduct,' but need only corroborate the accomplice as to some  
21 material fact and tend to connect the defendant with the crime.  
22 Furthermore, the corroborating evidence need not, in isolation,  
23 be incriminating, if the combined and cumulative evidence  
24 other than the accomplice's testimony tends to connect the  
25 defendant with the commission of the offense.”  
26  
27

1 State v. Torres, 529 N.W.2d 853, 855 (N.D.1995) (quoting State v. Burgard,  
2 458 N.W.2d 274, 277 (N.D. 1990)).

3  
4 While, Everett has provided no evidence in support of his position, it is  
5 clear that in applying these standards, there is sufficient corroborating  
6 evidence which tends to establish that Everett committed the offense of gross  
7 sexual imposition. The victim, Freda Linder, testified: (1) Everett held her  
8 down on the couch. Trans. of Trial, Pp. 248-49. (2) Everett keep holding her  
9 down even after she said, "No.". Trans. of Trial, Pp. 249-50. (3) Everett took  
10 her clothes off. Trans. of Trial, Pp. 249-50. (4) Everett forcibly engaged in  
11 sexual intercourse with her. Trans. of Trial, Pp. 251-52. Detective Roger  
12 Marks learned of the sexual assault of Freda Linder while talking to witnesses  
13 as part of a different criminal investigation. Trans. of Trial, Pp. 182-83.  
14 Debra Two Bears and Linder confirm the report concerning the sexual assault  
15 of Linder. Trans. of Trial. Pp. 182-83. Rebecca LaFavor, a Sexual Assault  
16 Nurse Examiner (SANE nurse) testified: (1) She examined Linder and  
17 observed 2<sup>nd</sup> degree lacerations which completely obliterated Linder's  
18 posterior forchette. Trans. of Trial. Pp. 360-362. (2) Linder's exam was  
19 approximately 9 hours after the sexual assault and she was still actively  
20 bleeding in the area of the sexual injury. Trans. of Trial, Pp. 362-363. (3)  
21 The injuries she observed were consistent with the blunt force trauma  
22 associated with a forced sexual act. Trans. of Trial, Pp. 360-373.  
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26 Reviewing the evidence in a light most favorable to the prosecution  
27 and giving the prosecution the benefit of all inferences reasonably to be drawn



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in its favor, a rational fact finder could find Everett guilty beyond a reasonable doubt. See, State v. Tibor, 2007 ND 146, 738 N.W.2d 492. Thus, there is sufficient evidence to sustain Everett's conviction.

Everett's supplemental brief does not specify the legal basis upon which he makes his claims. The State is therefore unable to respond.

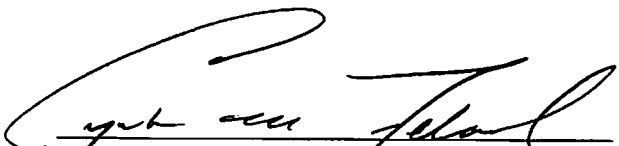
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**CONCLUSION**

The comment made by the State in its closing argument, even if construed as alluding to or regarding Everett's failure to testify, constitutes harmless error and is not grounds for reversal. The remedy for improper remarks by the State was a mistrial, which was not requested by the defense. Further, Everett has failed to establish that he was prejudiced when the trial court failed to admonish the jury prior to two breaks. Finally, the evidence presented to the jury was sufficient to sustain the verdict. The jury obviously believed the testimony of State's witnesses.

Everett has failed to present any evidence of error. Therefore, based on the reasoning above, the State respectfully requests that the convictions, in all matters, be affirmed.

Dated this 16<sup>th</sup> day of May, 2008.



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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota, )  
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Plaintiff-Appellant, )  
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-vs- )  
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Tilmer Everett, ) Supreme Ct. No. 20070074  
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Defendant-Appellee, ) District Ct. No. 08-06-K-1026  
) SA File No. F 363-06-05  
..... )  
STATE OF NORTH DAKOTA )  
) ss  
COUNTY OF BURLEIGH )

Kim Bless, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 16<sup>th</sup> day of May, 2008, I deposited in a sealed envelope a true copy of the attached:

- 1. Brief of Plaintiff-Appellant
- 2. Affidavit of Mailing

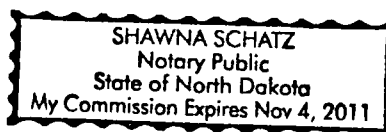
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

BENJAMIN C. PULKRABEK  
ATTORNEY AT LAW  
402 FIRST STREET NW  
MANDAN, ND 58554

which address is the last known address of the addressee.

Kim Bless  
Kim Bless

Subscribed and sworn to before me this 16<sup>th</sup> day of May, 2008.



Shawna Schatz  
Shawna Schatz, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: 11-4-2011.