20080290 + 20080291

ORIGINAL (e-filed) IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff & Appellee,	)	Supreme Court Nos. 20080290 & 20080291
v.	)	Stutsman County District Court Nos. 47-07-K-136 & 137
Gary Duane Ripley, Defendant & Appellant,	)	

APPELLEE'S BRIEF

Appeal from the
Criminal Judgment(s)
Entered October 20, 2008,
by the Honorable Mikal Simonson
Judge of the Southeast District Court

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ISSUES PRESENTED

1. Whether the District Court abused its discretion in denying the defendant's motion for continuance?

2. Whether the District Court's failure to admonish the jurors at the noon recess during jury selection was harmless error because the defendant did not object and has not claimed or demonstrated any prejudice as a result of the oversight?

3. Whether the evidence at trial was sufficient to allow a reasonable jury to find the defendant guilty beyond a reasonable doubt?

STATEMENT OF THE CASE
AND
STATEMENT OF FACTS

4. Statement of the Case: The State will join appellant/defendant Gary Ripley's Statement of the Case.

5. Statement of Facts: The State supplements the defendant's Statement of Facts as follows:

6. Gary Ripley was charged with two felonies occurring in or about October 2006: (1) Sexual assault on his daughter, Jane Doe (File No. 06-K-136; *see* App. I, pp. 6-7); (2) abuse or neglect of Jane Doe (No. 06-K-137; *see* App. II, p. 5). Jane Doe testified that she lived with her father from late July 2006 until November 5, 2006, when she was taken to the State Hospital after the police found her intoxicated at her father's apartment. TR I, p.172; TR I, p.194, lines 9-24. The next day, she was interviewed by a police detective and a social worker, and denied that her father had engaged in sexual misconduct with her. TR II, pp. 260-263. One month later, however, Jane Doe told her sister that Ripley had assaulted her; the two of them contacted Social Services, and Jane Doe gave a second interview where she described the events to which she testified at trial. TR I, pp.195-198; TR II, p. 265.

7. Ripley's attorney, David Ogren, cross-examined Jane Doe at length regarding her alcohol use and consequent memory loss (TR I pp.199-200; p. 205 line 12 through p. 207 line 19; p. 209 line 14 through p. 210 line 9); her inability to describe her father's private regions (TR I p. 203 line 9 through p. 204 line 16); and the fact she had first denied any

sexual contact by the defendant and one month later changed her story. TR I p. 200 line 18 through p. 202 line 2; p. 208 line 9 through p. 210 line 14.

8. The defendant's girlfriend, Barbara Davis, testified that she would get upset because of the way Ripley behaved around Jane Doe. Ms. Davis thought Ripley talked to his daughter "in a way that was inappropriate about sexual things"; that she caught him laying on top of her in bed and it "looked like he was kissing her"; and that "whenever she was with Gary she pretty much was drinking." TR II, p. 215 line 24, through p. 216 line 25. She also testified about the trip to Fargo where "Gary . . asked [Jane Doe] to come with. He wanted to get her a dildo, which I was very much against. . . They were drinking." TR II, p. 217, lines 13-20. The defendant purchased the vibrator for Jane Doe. "And when we got into the vehicle he said he wanted her to use it and so he could watch in the rearview mirror." TR II, p. 219, lines 6-13. Ripley drove back to Jamestown: both he and Jane Doe were "very" intoxicated. The defendant went over an embankment with the car and damaged it. TR II, p. 219, lines 14-25.

9. The defendant's sister, Terry Fritz, testified that Ripley called her shortly after the November 5, 2006, incident that led to Jane Doe's placement at the State Hospital. He asked Ms. Fritz "to go to his apartment and . . pack up some things that the police might not understand," and to take his ex-girlfriend Heather along because she would know what Ripley was talking about. TR II, p. 234, lines 11-15. Among the items that Ms. Fritz found in the defendant's bedroom closet was a pink nightie similar to the one Jane Doe described. TR II, p. 235 line 15, through p. 236 line 6.

10. The defense called four witnesses: Ericka Ripley, Barb Davis, Don Boehmer of Social Services, and Gary Ripley. In his testimony, Ripley claimed that Jane Doe's older sister, Ericka, knew that Jane Doe was drinking and demanded that he do something about it. TR II, p. 298. Ericka Ripley denied that ever occurred; she said the only such conversation she had with her father related to his alcohol use. TR II, p. 251 through p. 252, line 20. Ripley said Ericka was lying. TR II, p. 318, lines 11-25. Ripley also said his girlfriend, Barb Davis, lied when she said that Ripley gave alcohol to Jane Doe (TR II, p. 319, lines 12-23), and that Don Boehmer testified falsely when he said Ripley had been told that Jane Doe's alcohol abuse, and consequent blackouts and poor judgment, were the primary cause of her sexual vulnerabilities. TR II, p. 273-274; TR II, pp. 320-321.

11. On rebuttal, Jane Doe's case manager, Linda Ebel, testified that a team meeting was held on September 6, 2006, to review Jane Doe's issues and single plan of care with the defendant. TR II, pp. 352-354. At that meeting, he was told that his daughter's emotional/behavioral issues "includ[ed] use of alcohol, failing in school, engaging in self-injurious behaviors, and engaging in high-risk sexual activities requiring a higher level of supervision." Ripley was also told his daughter's sexual acting out was directly related to her use of alcohol. Tr II p. 353, lines 6-25.

JURISDICTIONAL STATEMENT

12. The Supreme Court has jurisdiction over defendant Gary Ripley's appeal of the judgments of conviction pursuant to Subsections (1) and (2) of Section 29-28-06 of the North Dakota Century Code. The defendant alleges that he was deprived of due process

of law in violation of Article 1, §12, of the North Dakota Constitution and Amendment 14 to the United States Constitution by reason of the district court's denial of his motion for continuance and failure to give the admonishment prescribed by Rule 6.11(b) of the North Dakota Rules of Court. Notice of appeal was timely filed on November 10, 2008, as it was less than 30 days after judgments were entered on October 20, 2008. N.D.R.App.Proc. 4(b)(1).

LAW AND ARGUMENT

13. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR CONTINUANCE

14. Standard of Review: A trial court's grant or denial of a motion for continuance may be reversed only if the trial court's decision was an abuse of discretion. State v. Frohlich, 2007 ND 45 ¶11, 729 N.W.2d 148, 152. "A trial court abuses its discretion only when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law." Id.; State v. Stoppleworth, 2003 ND 137, ¶ 6, 667 N.W.2d 586, 588. "When reviewing a trial court's decision on a motion for continuance, an appellate court must look to the particular facts and circumstances of each case as there is no mechanical test for determining whether or not a trial court abused its discretion." State v. Kunkel, 452 N.W.2d 337, 339 (N.D. 1990).

15. North Dakota Rule of Court 6.1(b) provides that motions for continuance "will be granted only for good cause shown, either by affidavit or otherwise." In this case, the defendant's counsel based his motion on the fact that he had only three weeks to prepare for trial. *See* Motion to Reconsider, Appendix I at p. 31. However, the defendant knowingly chose to place his newly-appointed counsel in that position by refusing to cooperate with his previous counsel and requesting a new lawyer on August 6, 2008, despite being advised that no continuances of the September 4th trial date would be granted. *See* Order Denying Motion to Continue Trial, Appendix I, p. 34. Now Ripley contends that his attorney's ethical duty of competent representation required the court to allow the defendant another continuance. This Court has previously noted the "troubling

implication [of] the apparent attempt to use legal ethics and the Sixth Amendment as a sword to delay and frustrate the judicial process." State v. Wicks, 1998 ND 76, ¶23, 576 N.W.2d 518 (*citing* Neal v. Grammer, 975 F.2d 463, 467 (8th Cir. 1992)).

16. In Wicks, the Court held that when evaluating a request for continuance relating to a defendant's request to replace counsel, "the right to select counsel must be carefully balanced against the public's interest in the orderly administration of justice.'" Id. at ¶ 26. In exercising its discretion, the district court should consider the time required for trial preparation and the diligence of the moving party. Frohlich, 2007 ND 45 ¶13; Wicks, at ¶ 27.

17. The only authority cited in the appellant's brief is an Ohio appellate decision which held that giving defense counsel approximately 20 minutes to prepare for trial was an abuse of discretion. The State will concede that the ruling in Ohio v. Jones is eminently reasonable – the difficulty is in seeing any analogy between that situation and Ripley's. First, the issue in Jones is not whether the defendant's right to counsel was effectively denied, the issue is whether the judge erred in finding Jones, the defendant's attorney, in contempt for refusing to go to trial totally (and understandably) unprepared. Second, it appears the trial court appointed Jones as counsel and then set trial for the very next day. Jones, pp. E-1 to E-2.[1] Ripley had over six weeks notice of the trial date and already had an attorney in place, but waited until four weeks before trial to choose not to cooperate with his lawyer and ask for a new one. Finally, there is a huge quantitative and qualitative difference between an attorney being given 20 minutes to review a file and

[1] Citations are to the page numbers of the copy attached to the appellant's brief.

meet one's client for the first time, as in Jones, and having three weeks to review a file and a whole afternoon to discuss a "she said, he said" case with one's client, as Ripley's attorney did. *See* David Ogren's affidavit, Appendix I at p. 37.

18. Indeed, the two situations are so fundamentally different that the factors cited by the Ohio court in finding an abuse of discretion in Jones (p. E-8, ¶26) lead to the opposite conclusion here. (1) "Whether other continuances have been requested and received": Ripley received a one-month continuance of the original trial date of November 8, 2007 (App. I at p. 11 and 17), then delayed trial for another nine months by pleading guilty on the rescheduled trial date of December 13, 2007, then waiting until the sentencing date of May 20, 2008, to announce his intention to withdraw his plea – which the district court granted. Order, Appendix I at p. 25. The trial judge gave Ripley ample opportunity to prepare and defend himself, and acted reasonably in deciding not to allow him to further delay the trial. (2) "Inconvenience to witnesses, opposing counsel and the court": Since September 2007, Jane Doe had been living at foster homes and going to high school in Fargo. TR I, p. 198, 209. Prepping her for trial in November-December 2007, and then again in September 2008, required extensive planning with her custodian and, of course, missing school. The court already had lost two trial dates due to Ripley's requests and tactics, plus the wasted time and travel for the original sentencing date. (3) "Whether the defendant contributed to the circumstance which gives rise to the request for continuance": The fact is that Ripley was the *sole* cause of the "circumstance" on which the motion for continuance was based. He chose to wait until August to stop cooperating with his counsel. He is the one who demanded a new attorney four weeks before trial,

after being advised that no further continuances would be granted. The dilatory nature of his demand for new counsel was even more patent in light of the fact that he had already caused a nine-month delay of the trial by waiting six months to withdraw his guilty plea.

19. The Ohio court also noted that there may be "other relevant factors [raised by] the unique facts of each case." Jones, E-8 at ¶26. In this case, that factor is Jane Doe's right to fair treatment as a child victim. North Dakota law recognizes the right of all victims to "prompt disposition" of their cases. N.D.C.C. §12.1-34-02(12). In the case of child victims, moreover, the legislature *mandates* that "the court and the state's attorney shall take appropriate actions to ensure a speedy trial in order to minimize the length of time the child must endure the stress of the proceedings." N.D.C.C. §12.1-35-05. The defendant argues that the trial judge simply ignored the defendant's rights and needs (appellant's brief, p. 11). In fact, the trial judge did "carefully balance" the Ripley's right to counsel "against the public's interest in the orderly administration of justice" (Wicks, 1998 ND 76, ¶ 26) and concluded, accurately, that "the Court has bent over backwards to accommodate the Defendant's wishes. The day has come to stand up for the victim." Order, Appendix I at p. 40. His decision was not arbitrary, or capricious, and it correctly interpreted and applied North Dakota law. Frohlich, supra, 2007 ND 45 ¶11.

20. As for cases from other jurisdictions, Ripley's circumstances are much more akin to the situation and analysis in U.S. v. Heine, 920 F.2d 552 (8th Cir. 1990). Heine was charged with three drug- and firearm-related felonies. On November 2, 1989, he requested a continuance and new counsel; on November 13, the day before trial was set to

begin, the court appointed new counsel and granted a one-day continuance of the trial to allow the defense some preparation time. Id. at 553.

21. The Eighth Circuit held that the trial court did not abuse its discretion in refusing to grant a longer continuance, based on its analysis of three factors. First, "whether counsel had sufficient time to prepare for trial" (a factor also cited by this Court in Frohlich and Wicks, supra). The Heine court found that the "case was not complex and involved very few exhibits." 920 F.2d at 555. The same is true here – the sexual assault on Jane Doe was a "she said, he said" situation, with some minimal corroboration based on Terry Fritz's testimony about finding a pink nightie in the defendant's closet. As for the abuse and neglect charge, Ripley admitted to giving his daughter alcohol regularly, and to taking her on the drunken road trip to Fargo to buy the vibrator – the only exhibit introduced in the State's case-in-chief.[2]

22. The second factor cited in Heine was "whether counsel's conduct at trial showed he was well-prepared." The court pointed out that defense counsel was able to cross-examine witnesses, and made timely and appropriate objections. Id. Again, the same is true here. Mr. Ogren cross-examined Jane Doe at length about her alcohol use and consequent memory issues, her inconsistent stories to the police, and inability to provide details about the defendant's anatomy. TR I, pp. 199-210. He obtained testimony from the Social Service investigator, Don Boehmer, that children's allegations of sexual abuse

[2] The only other exhibit, the Single Plan of Care document developed by Social Services, was introduced on rebuttal to disprove the defendant's testimony that he had never been told that Jane Doe's alcohol use contributed directly to her susceptibility to high-risk sexual behavior. *See* TR II, p. 352 line 5, through p. 354 line 21.

are often false. TR II, p. 264, lines 15-25. Mr. Ogren made a timely motion in limine to exclude the vibrator from evidence (App. I, pp. 44-47; TR I pp. 118-128); he made objections and was sustained (e.g., TR I p. 175, lines 4-6; TR II p. 275, lines 7-10); and he successfully kept all but one of the defendant's extensive history of prior convictions from being used by the State on cross-examination. TR II, pp. 313-316.

23. The third factor addressed in Heine was "whether the court's refusal to grant a continuance actually prejudiced the defendant." The court held the defendant had not shown any prejudice because all of the witnesses he wanted to testify did so. 920 F.2d at 555. The same is true here. The defense presented four witnesses, including the defendant, who got to tell his version of the "she said, he said," relating to the sexual assaults that occurred in his apartment. Ripley has never made any offer of proof that he could have presented additional witnesses or evidence if he had been able to put off the trial one more time. It now has been over six months since the verdict was rendered, and the defendant could have made a motion for new trial at any time if he had discovered new evidence. N.D.R.Crim.P. 33(b)(1). He has not, and there is no basis to believe that any additional evidence exists.

24. The defendant wants this Court to apply a "mechanical test" and rule that three weeks is not enough time for an experienced defense attorney to prepare for trial in an uncomplicated case. When one actually analyzes the "particular facts and circumstances" of this case – as required by North Dakota law – it is clear that the district court did not abuse its discretion. Kunkel, supra, 452 N.W.2d at 339. It acted reasonably and fairly with regard to the defendant – he was given continuances, an opportunity to withdraw his

guilty pleas, a new attorney – and it carefully balanced the defendant's unproven need for more time against the public's, and the victim's, interest in orderly and prompt administration of justice. Wicks, 1998 ND 76, ¶ 26; N.D.C.C. §12.1-35-05.

25. THE DISTRICT COURT'S FAILURE TO ADMONISH THE JURY WAS HARMLESS ERROR

26. Standard of Review: The defendant claims that the District Court erred in failing to give the admonishment prescribed by Rule of Court 6.11(b) to the twelve jurors already selected when the noon recess was taken on the first day of trial. Such oversights are reviewed under the "harmless error" standard set forth in Rule 52(a) of the North Dakota Rules of Criminal Procedure: "Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded." *See* State v. Myers, 2006 ND 242 ¶17, 724 N.W.2d 168, 173; State v. His Chase, 531 N.W.2d 271, 274 (N.D. 1995).

27. The trial court's failure to admonish the jury is not reversible error because the defendant "did not object to the district court's failure to admonish the jury before the recess, and he has not claimed or demonstrated any prejudice." Myers, at ¶17. The alleged error was not prejudicial because jury selection had not yet been completed, and hence the jurors had not yet heard a shred of evidence on which they could converse or form an opinion. Moreover, the defendant's failure to object precludes him from raising the issue here. "When irregularities occur in a trial court, the party affected must bring the problem to the court's attention when the irregularities occur so that the court may take appropriate remedial action. An issue or contention not raised or considered in the

trial court cannot be raised for the first time on appeal." State v. Brown, 420 N.W.2d 5, 7 (N.D. 1988); State v. Ronngren, 361 N.W.2d 224, 231 (N.D.1985).

28. THE EVIDENCE WAS SUFFICIENT TO ALLOW A RATIONAL FACT-FINDER TO FIND THE DEFENDANT GUILTY OF BOTH CHARGES

29. Standard of Review: The defendant raises but does not argue the issue of sufficiency of the State's evidence. The standard of review on such claims is as follows:

> "When reviewing challenges to the sufficiency of evidence at trial, this Court draws all inferences in favor of the verdict. This Court will reverse a criminal conviction 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.' [citation omitted]. In its review, this Court will not weigh conflicting evidence or judge the credibility of witnesses." State v. Bitz, 2008 ND 202 ¶7, 757 N.W.2d 565.

30. The jury heard more than sufficient evidence to convict the defendant of both sexual assault on his daughter and abuse and neglect of a child. Regarding the sexual assault, Jane Doe testified in detail about three incidents where the defendant engaged in sexual contact with her. There was also testimony that the defendant asked his sister to remove, among other things, a pink nightie from his bedroom because the "police wouldn't understand." TR II, pp. 234-235. With regard to the abuse and neglect charge, Jane Doe and Barb Davis both testified about the defendant's regular provision of alcohol to Jane Doe, and the drunken road trip to Fargo so Ripley could buy his daughter a sex

toy. The defendant's sister testified that Ripley told her he bought the vibrator for Jane Doe because Social Services had turned her into a whore anyway. There was evidence that the defendant knew about Jane Doe's history of alcohol abuse and treatment but gave her alcohol anyway. TR II, p. 247 line 13 through p. 248 line 12.

31. In his testimony, the defendant admitted to all of these facts except for engaging in sexual contact with Jane Doe. There were no other witnesses to the sexual assaults that Ripley committed on his daughter at their apartment. So the jury's decision on that charge boiled down to whether they believed Jane Doe or Gary Ripley. They decided Jane Doe was telling the truth and Gary Ripley was not. On appeal, "this Court will not weigh conflicting evidence or judge the credibility of witnesses." Bitz, supra, at ¶7. The evidence was sufficient for the jury to conclude beyond a reasonable doubt that Gary Ripley was guilty of both charges.

CONCLUSION

32. For the foregoing reasons, plaintiff and appellee State of North Dakota respectfully requests that the Court affirm the guilty verdicts and the district court's judgments of conviction in both of these matters.

RESPECTFULLY SUBMITTED this 31st day of March, 2009.

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AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

STATE OF NORTH DAKOTA)
) :ss
COUNTY OF STUTSMAN)

Jay A. Schmitz, being first duly sworn on oath, does depose and say:

That he is a citizen of the United States. of legal age, and not a party to the above entitled action.

That on the 30th day of March. 2009, the affiant caused the Appellee's Brief in the matter of State of North Dakota v. Gary Duane Ripley to be filed electronically with the Clerk of the North Dakota Supreme Court by attaching the computer file containing said Brief to an e-mail transmission sent to the following address:

supclerkofcourt@ndcourts.gov

That the Appellee's Brief was served by first-class mail on counsel for defendant and appellant Gary Duane Ripley by mailing a copy thereof to counsel's business address, as follows:

Benjamin C. Pulkrabek
Attorney at Law
402 1st Street NW
Mandan. ND 58554

That to the best of the affiant's knowledge, information and belief, the address given above is the actual mailing address of the party intended to be served.

Signed: Jay A. Schmitz
Jay A. Schmitz

SUBSCRIBED and SWORN to before me this 30th day of March, 2009.

Signed: Cynthia A. Holzkamm
NOTARY PUBLIC
My Commission Expires: 2-17-2010