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IN THE SUPREME COURT

20090076

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20090076

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JUL -7 2009

STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff-Appellee,

- vs -

Rondale Grant,

Defendant-Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CR. NO. 07-K-02971
THE HONORABLE STEVEN L. MARQUART, PRESIDING

BRIEF

BENJAMIN C. PULKRABEK

Attorney for Appellant
402 First Street NW
Mandan, North Dakota 58554
(701)663-1929
N.D. Bar Board ID No. 02908

MARK R. BOENING and
TANYA JOHNSON MARTINEZ

Attorney's for Appellee
211 South Ninth Street
Fargo, North Dakota 58108
(701)241-5850
N.D. Bar Board ID No. 03797
N.D. Bar Board ID No. 05893

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ABBREVIATIONS

Page - P.

Line - L.

Transcript - T. Vol. I, T. Vol. II and T. Vol. III

STATEMENT OF THE ISSUE

ISSUES: I. Did the trial judge err when he found that Exhibit 3, the Report of Sheryll Clapp was admissible evidence because it met the requirement of 803(6)?

II. Was there evidence sufficient to sustain a conviction of Gross Sexual Imposition?

NATURE OF THE CASE

This is an appeal by Rondale Grant from a Criminal Judgment and Commitment entered by the Honorable Steven L. Marquart, East Central Judicial District Court on February 20, 2009. App 15.

Mr. Grant was charged in a two count information:

Count I charged him with a Class AA felony, with Gross Sexual Imposition.

Count II charged him with a Class A Misdemeanor, Contributing to the delinquency of a minor. App 1.

Count II was dismissed. T. Vol. I - P. 2, L. 10-12.

Mr. Grant's trial to a 12 person jury on Count I began on October 14, 2008 and ended with a guilty verdict on October 17, 2008. App T. Vol. I. P. 2, L.2 and Vol. III. P. 337, L.13.

Criminal Judgment and Commitment took place on February 20, 2008. Mr. Grant's Notice of Appeal, App 15 and Order for Transcription, App 16 are dated February 23, 2008.

The Notice of Filing of the Notice of Appeal is dated and filed on February 24, 2009. App 17.

This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

The State charged Defendant, Appellant Rondale Grant (Mr. Grant) with committing sexual acts with his daughter K.D.J. between November 1. 2006 and February 2007. There are only two witnesses who could testify as to whether or not these sexual acts ever occurred. Mr. Grant and his daughter, K.D.J. During the trial there was no medical evidence, no scientific evidence or DNA to support the charge that sexual acts occurred.

K.D.J.'s testimony about the sexual acts is found in Volume II of the transcript from pages 48 to 116.

Mr. Grant's testimony is found in Volume III from page 260 to page 295.

The following is a summary of Mr. Grant's testimony:

In 2005, Mr. Grant married K.D.J.'s mother, Randie Johnson (R. Johnson). Prior to the marriage K.D.J. had been born. K.D.J. is the oldest of the three children that Mr. Grant and R. Johnson have. T. Vol. III, P. 263, L.9-21.

Mr. Grant and R. Johnson have always had problems with their relationship because R. Johnson deals with drugs. T. Vol. III, P. 264, L.15-24.

When Mr. Grant and R. Johnson were living in Oklahoma, R. Johnson's mother, Beth Johnson came to Oklahoma, got the children and brought them back to North Dakota. T. Vol. III, P.265, L.14-18.

R. Johnson and Mr. Grant decided to return to North Dakota. When they returned to North Dakota they stayed at the Hi Ten Motel and later moved to a shelter. They left the shelter and purchased a mobile home. After they moved back to North Dakota the

children were living with them. T. Vol. III, P.266, L.10 to P.268, L.14.

When Mr. Grant, R. Johnson and the children were living in the mobile home, R. Johnson worked at Joseph`s as a beautician and Mr. Grant stayed home and took care of the children. About two months after R. Johnson started her job with Joseph's, she was terminated because she came to work intoxicated. About the same time drug sales for R. Johnson picked up and so did the fighting between Mr. Grant and R. Johnson. T. Vol. III, P.269, L.12-24.

Mr. Grant started leaving the mobile home and visiting a friend, Kelly Sarten. T. Vol. III, P.269 L.22 to P. 270, L.13. At this point Mr. Grant's relationship with R. Johnson was over. Mr. Grant stated to bring the children with him to Kelly Sarten's. T. Vol. III, P.270, L.14-24.

Mr. Grant's explanation of how K.D.J. got and watched pornographic videos is found in T. Vol. III, P.271, L.2 to P. 275, L.17. In this explanation, Mr. Grant tells how he never allowed K.D.J. to watch the pornographic videos and he denied ever watching pornographic videos with K.D.J.. T. Vol. III, P.272, L.2-8.

Mr. Grant believes the videos gave K.D.J. the information that enabled her to testify about the sexual acts. T. Vol. III, P.275, L.11-23

Mr. Grants denied ever touching K.D.J. inappropriately. T. Vol. III, P.275, L.8-14.

The opinion of Mr. Grant that K.D.J. isn't truthful and why is found at T. Vol. III, P.276, L.23 to P.277, L.9.

At the conclusion of Mr. Grant's direct examination he was asked: "Mr. Grant are

you guilty of the charge?" His answer was: "no". T. Vol. III, P281, L.18-19.

The witness called by the defense was Kelly Sarten. She testified about her observing Mr. Grant and K.D.J. together and how well they got along. She also testified she never saw K.D.J. exhibit any inappropriate behavior toward Mr. Grant. T. Vol. III, P. 295, L.24 to P. 300, L.25.

Other witnesses called by the state were: Randie Johnson, K.D.J.'s mother, (T. Vol. II, P.116, L.25 to P.145, L.4) Beth Johnson, K.D.J.'s grandmother and the person who had custody of K.D.J. at the time of the trial (T. Vol. II, P.145, L.20 to P.157, L. 14). Anna Thompson an employee of Village Family Services, who was referred to see K.D.J. By Cass County Social Service and visited with K.D.J. (T. Vol. II. P.158, L.17 to P.176, L.21) Sheryll Clapp a certified family nurse practitioner employed by Merit Care who examined K.D.J. (T. Vol. II, P.177, L.12 to P.221, L.18) and Laura Wilson a counsel at the Rape and Abuse Crisis Center. She never interviewed K.D.J. but gave expert testimony about the wide variety of emotions a child who has been the victim of sexual abuse may exhibit. T. Vol. II, P.222, L.15 to P.242, L.14.

ARGUMENT

ISSUE I. Did the trial judge err when he found that Exhibit 3, the Report of Sheryll Clapp was admissible evidence because it met the requirement of 803(6)?

Evidentiary rulings of trial judges are reviewed by the North Dakota Supreme Court under an abuse of discretion standard. State v. Sevigny 2006 ND 211, 722 NW2D 515.

The evidentiary ruling by the trial judge in this case in Exhibit 3, App. 3states: "and the Court finds that Exhibit 3 does meet the requirements of 803(6) in that the foundation has been laid". T. Vol. II, P.199. L.20-22.

Mr. Grant's objection to the admission of Exhibit 3, App. 3 begins in T. Vol. II, on P.196, L.18-25, P.197, L.5-7, 13, 19-25, P.198. L.1-3. This objection is not only to hearsay but to hearsay within hearsay.

These hearsay within hearsay statements are found in Exhibit 3. App. 3at:

1) On page 2 "Maternal Grandma, Beth Johnson. does report that since this disclosure K.D.J. has been much more talkative and inquisitive. She has been like a {different child}";

2) On page 4 under History of Trauma "Grandma reported to me that K.D.J. told her that her father would hit her in the head";

3) On page 5 under Family Medical History "Given by Beth Johnson indicates that K.D.J.'s mother, Randie, does have psychological problems which she is unable to specify. There is drug use in the home. K.D.J.'s youngest sister, L., did test positive at birth for methamphetamine and PCP. K.D.J. and her brother, D., were never tested. Beth

Johnson is not sure of what Dale Grant's (biologic father) health history is. She states that there is drug use but she is unsure of any other history".

The following language in Interest of B.B., 2007 ND 115, 735 NW2d 855 sets out the criteria necessary to qualify an exhibit as a business record under N.D.R.Ev.803(6) [¶8] The child protection service assessment report does not meet the criteria set out in N.D.R.Ev.803(6) to qualify as a business record. The information in the report includes out-of-court statements by B.B., B.B.'s half-siblings, B.B.'s maternal grandfather, and other reporters. Business records are made reliable "by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business by relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Fed. R. Evid. 803(6) Advisory Comm. Note. To satisfy the business records exception, each participant in the creation of the record must be acting in the course of regularly conducted business to ensure the trustworthiness and reliability of the information. N.D.R.Ev. 803(6); Cameron v. Otto Bock Orthopedic Indus., Inc., 43 F.3d 14, 16 (1st Cir. 1994). Although Koop may have been acting in the regular course of business when she prepared the report, the report also includes statements by others who were not acting in the regular course of business, and Koop did not have personal knowledge about the events detailed in their testimony, therefore, there are no guarantees of the reliability or trustworthiness of their statements. See, e.g., Fed. R. Evid. 803(6) Advisory comm. Note (bystanders' statements in a police report are inadmissible); In re Termination of Parent- Child Relationship of E.T., 808 N.E.2d 639, 643-44 (Ind. 2004) (simply because a caseworker may have a duty to record a third-party statement does not

guarantee the accuracy or reliability of those statements). The report contained hearsay within hearsay, and those additional levels of hearsay are not admissible unless they are admissible under another hearsay exception. N.D.R.Ev. 805. See also Zimmerman v. Zimmerman, 1997 ND 182, ¶ 12, 569 N.W.2d 277 (out-of-court statements from persons other than the author contained in a child abuse investigation report were inadmissible hearsay). We conclude the hearsay statements in the report were not admissible under the business records exception.

In the Interest of B.B. one person who wasn't acting in the course of regularly conducted business was the maternal grandfather. In the case now before the Court one person not acting in the course of regularly conducted business is the maternal grandmother Beth Johnson.

The Interest of B.B. explains case law regarding trial in juvenile court in [¶] 10 and 11.

[¶ 10] We have said in a non-jury case the court should "admit all evidence which is not clearly inadmissible because a judge, when deliberating the ultimate decision, is capable of distinguishing between admissible and inadmissible evidence." McKechnie v. Berg, 2003 ND 136, ¶ 7, 667 N.W.2d 628. In a bench trial, we presume the court only considered competent evidence, and it is not reversible error to admit incompetent evidence unless the evidence induced an improper finding. Id.

[¶ 11] Although the juvenile court erred in admitting the hearsay statements in the report, we conclude the error was harmless because, as we discuss later, we conclude there was enough other admissible evidence without the hearsay statements to support

the finding of deprivation and the hearsay statements did not induce an improper finding.

The difference between the Interest of B.B. and the case now before the court is that the case now before the court involved a jury trial and in the Interest of B.B. the trial was to the court.

Exhibit 3, App. 3 should not have been admitted into evidence because the third party statements of the maternal grandmother contained in that exhibit lacked a guarantee of accuracy or reliability.

At a trial to a judge it is presumed that the court only considers competent evidence. In a jury trial the jury has no such presumption and it is reversible error for the trial court to allow a jury to consider incompetent evidence.

ISSUE II. Was there evidence sufficient to sustain a conviction of Gross Sexual Imposition?

At the conclusion of the State's case, Mr. Grant made a motion for acquittal when his lawyer said:

"This case rests on the testimony of a child. There's ample evidence that – well, there's no corroborating evidence whatever, no medical evidence, no physical evidence, no other witnesses who saw anything. There's also evidence that I believe shows that there were persons with motive to encourage her to fabricate. So under Rule 29 of the rules, I move for a judgment of acquittal." T. Vol. II P.243, L.16-23. Such a motion tests the sufficiency of the evidence.

The standard of review for insufficiency of the evidence is set out in State vs. Steen 2000 ND 152, 615 N.W.2d 555.

"This Court will reverse a conviction on the ground of insufficient evidence only if, after viewing the evidence and all reasonable inferences in light most favorable to the verdict, no rational fact finder could have found the defendant guilty beyond a reasonable doubt." State v. Steen, 2000 ND 152, ¶ 17, 615 N.W. 2d 555.

Mr. Grant claims that the State has failed to prove he committed the crime of Gross Sexual Imposition. He bases this claim on the fact that there is absolutely no evidence or testimony that the crime occurred other than K.D.J.'s allegations. Evidence that is lacking is no medical evidence, no scientific evidence. and no DNA evidence. Mr. Grant testified at the trial that he was not guilty because he never committed the crime.

[¶ 73] The Double Jeopardy Clause precludes a second trial once an appellate court has found the evidence legally insufficient. Burks v. United States, 437 U.S. 1, 18 (1978). Therefore, this Court should direct the District Court to enter a judgment of acquittal pursuant to N.D.R.Crim.P. 29(a).

CONCLUSION

The District Court committed reversible error in its evidentiary ruling admitting Exhibit 3 under N.D.R. of Ev.803(6). Therefore the Judgment of the District Court must be reversed and remanded for a new trial ordered.

The District Court Judgment should be reversed because the evidence is legally insufficient to sustain a conviction for Gross Sexual Imposition.

DATED at Mandan. North Dakota, this 6 day of July, 2009.

Benjamin C. Pulkrabek
BENJAMIN C. PULKRABEK
402 - 1st Street NW

Mandan, North Dakota 58554
(701)663-1929
N.D. Bar Board ID #02908
Attorney for Defendant - Appellant

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

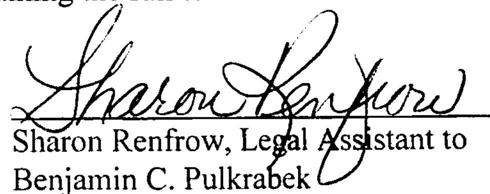
That on July 7th, 2009, she served, by mail, a copy of the following:

APPELLANT'S BRIEF

by placing a true and correct copy thereof in an envelope and depositing the same, with

Mr. Mark R. Boening and Ms. Tanya Johnson Martinez
Assistant State's Attorneys
Cass County Courthouse
211 South 9th St.
Fargo, North Dakota 58108-2806

The undersigned further certifies that on July 7th, 2009, she dispatched to the Clerk, North Dakota Supreme Court, an original and seven copies of the APPELLANT'S BRIEF and emailed the same containing the full text of the Brief.



Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek