20090076

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO. 20090076

State of North Dakota,

Plaintiff-Appellee,

vs.

Rondale Grant,

Defendant-Appellant.

APPELLEE'S BRIEF

Appeal from the Criminal Judgment,
East Central Judicial District, Cass County No. 07-K-02971
the Honorable Steven L. Marquart, Presiding

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[¶3] <u>STATEMENT OF THE ISSUES</u>

[¶4] **I. The trial court acted within its discretion in admitting the medical report prepared by Nurse Practitioner Sheryll Clapp.**

[¶5] **II. The evidence was sufficient to sustain the conviction of gross sexual imposition.**

[¶6] **STATEMENT OF THE CASE**

[¶7] The State is not dissatisfied with the Statement of the Case contained on page 2 of the Brief of Defendant/Appellant ("Defendant Grant") dated July 6, 2009 (Defendant Grant refers to this section as the "Nature of the Case").

[¶8] STATEMENT OF THE FACTS

[¶9] By an Information dated July 26, 2007, the State charged Defendant Grant with gross sexual imposition, a class AA felony, alleging he had penetrated K.D.J.'s vagina with his fingers and coerced her to place his penis in her mouth, and also with contributing to the delinquency of a minor, a class A misdemeanor, alleging he had showed K.D.J. a pornographic film, exposed her to drugs and drug paraphernalia and gave her a controlled substance. (Defendant/Appellant's appendix ("DA") at A-1.) Defendant Grant made his initial appearance on December 3, 2007, and he was appointed counsel. (DA at A-18.)

[¶10] On October 14, 2008, the class A misdemeanor, contributing to the delinquency of a minor, was dismissed. (DA at A-19.) The jury trial on the gross sexual imposition charge began the same day. (DA at A-19.)

[¶11] At the trial, the State called six witness, K.D.J., Randie Johnson, Beth Johnson, Anna Thompson, Sheryll Clapp, and Laura Wilson. (Transcript of Jury Trial ("T.") 24-25.) Defendant Grant called two witnesses, himself and Kelly Sarten. (T. 255.)

[¶12] K.D.J. testified at trial that she was ten years old, having been born in 1998. (T. 49, ll. 23-25, T. 50, ll. 1-3.) K.D.J. stated that while she was living in a trailer house in Cass County, Defendant Grant made her watch pornographic movies with him. (T. 72, ll. 13-25, T. 73, l. 1, T. 82, ll. 19-20.) She further testified that he directed her to remove her clothing and he subsequently removed his own clothing. (T. 84, ll. 1-13.)

[¶13] K.D.J. then went on to describe how Defendant Grant's fingers, mouth and penis touched her vagina and mouth. (T. 84-85.) She described how Defendant Grant put lotion on her vagina with his fingers. (T. 85-86.) She explained that she believed he did this so that his penis would "go through." (T. 86, ll. 14-17.) When asked if Defendant Grant's penis did go through, she said "No. * * * Because it was too big." (T. 86, ll. 18-24.)

[¶14] K.D.J. testified that she didn't remember each sexual act specifically, but that it did happen more than once, and that it happened in more than one location. (T. 87, ll. 3-24.) She specifically remembered that his penis was hard when Defendant Grant put it in her mouth. (T. 88, ll. 8-15.) She never saw anything come out of it, even though he had told her that stuff comes out of it "when he gets excited." (T. 88, 11. 22-25, T. 89, l. 1.)

[¶15] K.D.J. testified that she remembered a sex act occurring in the bedroom that she shared with her two younger siblings. (T. 89, ll. 15-25, T. 90, ll. 1-17.) She stated that she was sleeping in her bed and woke up to find her legs off the side of the bed and Defendant Grant was licking her vagina. (T. 90, ll. 18-23.) She described another occasion where Defendant Grant kissed her with his tongue while over at his girlfriend's house. (T. 93, ll. 2-12.)

[¶16] K.D.J. said that she didn't tell anyone about the acts by Defendant Grant until June of 2007 because she was scared of him and she was scared she would get in trouble. (T. 97, ll. 4-10, T. 113, ll. 4-6.)

[¶17] Randie Johnson ("R. Johnson"), K.D.J.'s mother, testified that she

met Defendant Grant in 1996, and that her parents didn't like him from the beginning because of the eight year difference in age. (T. 118-120.) Defendant Grant and R. Johnson have three children together, K.D.J., born 1998, D.J., born 2003, and L.J., born 2005. (T. 120, ll. 12-25.) The family moved around the country frequently and returned to Fargo in 2005, initially living in a hotel. (T. 121, ll. 4-7, T. 139, ll. 3-6.) They spent a brief period in an apartment and then lived with friends. (T. at 139, ll. 5-10.) In the fall of 2006, the family moved to Countryside Trailer Court where they lived until K.D.J. went to live with R. Johnson's mother, Beth Johnson, in February of 2007. (T. 128, ll. 16-19.) Randie Johnson indicated that Defendant Grant was responsible for watching the children while she was out. (T. 125, ll. 4-10.)

[¶18] R. Johnson understood that Defendant Grant did not want K.D.J. learning about sex from other persons, rather he wanted to teach her himself. (T. 133, ll. 14-17.) At one point, R. Johnson learned that K.D.J. had watched a movie with Defendant Grant and she believed Defendant Grant had made a statement to K.D.J. that one day sex will feel good. (T. at 133, ll. 19-22.)

[¶19] Beth Johnson testified regarding the children coming to live with her in February of 2007. (T. 149, ll. 17-19.) She indicated that Anna Thompson from The Village came out in June of 2007 to assist K.D.J. with homework issues. (T. 149, ll. 20-25, T. 150, ll. 1-6.) She was present when K.D.J. made the sexual disclosures to Anna Thompson ("Thompson"). (T. 151, ll. 20-23.) Beth Johnson testified she had not discussed the matter any further with K.D.J. (T. 152, ll. 2-8.)

[¶20] Thompson testified that she is employed as an in-home family therapist with The Village. (T. 159, ll. 1-2, T. 24-25.) She began seeing K.D.J. at the end of April, 2007, approximately once per week, for an hour and a half, to two hours per visit. (T. 164, ll. 5-13.) During these visits, Thompson testified about the nature of the counseling sessions. (T. 164, ll. 18-25.)

[¶21] K.D.J. and Thompson met on June 7, 2007, as they typically did in Beth Johnson's house, at the dining room table, for the in-home counseling session. (T. 166, ll. 10-19, T. 167, ll. 12-13.) Beth Johnson was also present for portions of the counseling session. (T. 166, ll. 20-25.) During this session, K.D.J. revealed to Thompson that Defendant Grant would have her watch sex movies and he explained to her that this is how babies were made. (T. 169, ll. 1-6.) K.D.J. then went on to reveal sexual contact with Defendant Grant. (T. 169, ll. 22-24.)

[¶22] Nurse Practictioner Sheryll M. Clapp ("N.P. Clapp") testified that she is a certified family nurse practitioner. (T. 179, ll. 12-13.) This encompasses a master's degree in nursing as well as prescription privileges. (T. 179, ll. 19-25, T. 180, ll. 1-4.) She also testified that she has had extensive training while employed with the Child Advocacy Center. (T. 182, ll. 2-18.)

[¶23] N.P. Clapp testified that the "first thing you learn in school is that you have to have a history." (T. 186, ll. 5-16.) She explained that this is a deviation from the typical pediatric exam because it requires that the practitioner delve into the child's psychological and mental state. (T. 186, ll. 17-25, T. 187, l. 1.) It necessarily requires obtaining information from the caregiver of the child

because it gives the practitioner insight on the past medical history that the child is unable to convey, as well as information about the child's behavior and any concerns of the custodial adult. (T. 187, ll. 2-9.)

[¶24] N.P. Clapp testified that in her position of administering primary care, she screens patients for mental and emotional health issues. (T. 220, ll. 13-18.) It is the primary caregiver that identifies mental and emotional health issues and refers the patient to a specialist. (T. 220, ll. 21-25, T. 221, ll. 1-5.) The information obtained from the caregiver of the child typically does not include information about the sexual disclosure and is limited to the child's past medical history. (T. 221, ll. 6-15.)

[¶25] The State introduced Exhibit # 3, N.P. Clapp's eight (8) page report of examination of K.D.J. on June 20, 2007, and the trial court admitted it over Defendant Grant's objection. (T. 196, ll. 12-25, T. 199, ll. 20-25, T. 200, l. 1.; DA at 3-10.) Pages two and three of the medical report indicate that N.P. Clapp asked K.D.J. "did it hurt in [your] private parts after he put the lotion in" and K.D.J. responded "Yes, it stinged when I went to the bathroom." (DA at p. 4-5.) When asked how long it stung, K.D.J. answered "just that day." (DA at p. 4-5.) N.P. Clapp testified at trial that this burning is known as dysuria. (T. 205, ll. 20-25.) She explained that "the genitals of a prepubertal child are very, very sensitive and so any touching can cause discomfort." (T. 206, ll. 1-9.) She further testified that it's common for a child to report dysuria after contact in the genital area. (T. 206, ll. 10-12.)

[¶26] Laura Wilson, a counselor at Rape and Abuse Crisis Center, provided expert testimony regarding the spectrum of emotions exhibited by sexual assault victims after disclosing the assault. (T. 222-242.)

[¶27] Defendant Grant testified on his own behalf. (T. 260-295.) He denied that he was guilty of the charge of gross sexual imposition. (T. 281, ll. 18-19.) Kelly Sartin testified on Defendant Grant's behalf. (T. 295-300.)

[¶28] On October 16, 2008, the jury sitting in Cass County, North Dakota, found Defendant Grant guilty of gross sexual imposition. (DA at A-11.) This appeal followed.

[¶29] **<u>LAW AND ARGUMENT</u>**

[¶30] **<u>I. The trial court acted within its discretion in admitting the medical report prepared by Nurse Practitioner Sheryll Clapp.</u>**

[¶31] Defendant Grant argues the admission of the medical report prepared by N.P. Clapp into evidence was reversible error because it contains hearsay within hearsay and it does not qualify under the business record exception. (Defendant's brief, p. 7.)

[¶32] This Court will not reverse a district court's decision to admit or exclude evidence absent an abuse of discretion. <u>Interest of B.B.</u>, 2007 ND 115, ¶ 6, 735 N.W.2d 855. "A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or if it misinterprets or misapplies the law." <u>Id.</u> This Court has in the past looked to the federal courts' interpretations of the federal rule as a guide in construing the analogous North Dakota rule. <u>Id.</u> at ¶ 7.

[¶33] It is the State's position that although the trial court admitted N.P. Clapp's medical report under N.D.R.Ev. 803(6), the business record exception, it is more appropriately admissible under N.D.R.Ev. 803(4), the medical diagnosis or treatment exception. This is the position that was argued at trial. (T. 198-200.) In <u>State v. Bernstein</u>, 2005 ND App.P 6, ¶ 10, 697 N.W.2d 371, the court noted that "[w]hen the judgment below is entirely favorable to the appellee, he is entitled to attempt to save the judgment upon any ground asserted in the trial court."

[¶34] Rule 803(4), N.D.R.Ev. provides for admission of hearsay statements when they are:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

[¶35] "Rule 803(4), N.D.R.Ev., was drawn, verbatim, from Rule 803(4), F.R.Ev., which 'considerably liberalized prior practice pertaining to the admissibility of statements made for purposes of medical diagnosis or treatment.' 4 J. Weinstein and M. Berger, Weinstein's Evidence, ¶ 803(4)[01], p. 803-143 (1985)." State v. Janda, 397 N.W.2d 59, 63 (N.D. 1986).

[¶36] Janda made it clear that sexual assault medical examinations are for diagnosis and treatment, as well as for evidence preservation. Id. at 63. In this type of examination, a health care provider must ascertain "whether or not the alleged victim has suffered psychological trauma and, if so, its nature and extent, and treat that as well." Id. The Court also noted the identity of the perpetrator is admissible in sexual abuse cases involving psychological trauma to the extent necessary for diagnosis and treatment. Id. at 63 n.3; State v. Weatherspoon, 1998 ND 148, ¶16, 583 N.W.2d 391 (holding that health care provider's opinion that counseling is necessary or advisable treatment in sexual assault case is admissible); State v. Muhle, 2007 ND 132, ¶ 11, 737 N.W.2d 647 (holding hearsay statements in medical report involving child victim of sexual assault admissible for purposes of diagnosis and treatment).

[¶37] The State offered the medical report as State's Exhibit # 3. (T. 196, ll. 12-14.) Appellant Grant objected and argued that the statements within the report don't "fall within the exception for the statements made for the purposes of medical diagnosis" and that "[i]t also doesn't qualify under the business records in that it contains far more than simply a diagnosis." (T. 196, ll. 18-25.) The State responded by stating it is a business record, but argued that the report is admissible under the exception that includes diagnosis and treatment. (T. 198, ll. 5-17.) The State specifically cited N.D.R.Ev. 803(4) and argued the medical report should be admitted under this hearsay exception. (T. 198, ll. 18-25, T. 199 1-19.) The trial court ruled in favor of admission and stated:

> And the Court finds that Exhibit #3 does meet the requirements of 803(6) in that the foundation is laid. And by the doctor's testimony that the information, including that of the third parties, was reasonably pertinent to the diagnosis or treatment. The Court is going to allow that exhibit, and again relying upon the Muhle case. So Exhibit #3 is received.

(T. 199, ll. 20-25, T. 200, ll. 1-2.) Clearly the trial court intended to admit the medical report under N.D.R.Ev. 803(4).

[¶38] The statements provided to N.P. Clapp, and included in her report, were the concerns held by K.D.J.'s caregiver, Beth Johnson, and were relevant to the treatment and diagnosis of a potential sexual assault involving a child. The trial court properly admitted the report containing the statements.

[¶39] II. The evidence was sufficient to sustain the conviction of gross sexual imposition.

[¶40] Defendant Grant argues there was insufficient evidence to sustain a conviction of gross sexual imposition because the case rests on the testimony of a child. This Court has previously held that "the uncorroborated testimony of a child is sufficient to sustain a conviction of a sexual offense." State v. Paul, 2009 ND 120, ¶ 31, --- N.W.2d ----.

[¶41] In reviewing a claim to determine whether a conviction is supported by sufficient evidence the "Court does not weigh conflicting evidence, or judge the credibility of the witnesses; instead [the Court] look[s] only to the evidence most favorable to the verdict and the reasonable inferences to determine if substantial evidence exists to support a conviction." State v. Barth, 2005 ND 134, ¶ 7, 702 N.W.2d 1.

[¶42] Even if there is conflicting testimony or other explanations of the evidence, a jury may reach a verdict of guilt beyond a reasonable doubt. State v. Krull, 2005 ND 63, ¶ 14, 693 N.W.2d 631 (citing State v. Charette, 2004 ND 187, ¶ 7, 687 N.W.2d 484). "A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty." State v. Wilson, 2004 ND 51, ¶ 9, 676 N.W.2d 98 (quoting State v. Hatch, 346 N.W.2d 268, 277 (N.D.1984)). The defendant bears the burden of convincing the Court that there is no reasonable inference of guilt, based on the evidence. See State v. Ebach, 1999 ND 5, ¶ 24, 589 N.W.2d 566.

[¶43] The jury found Defendant Grant was guilty of gross sexual imposition under N.D.C.C. § 12.1-20-03(1) (d) & 3(a) which states "a person who engages in a sexual act with someone less than fifteen years old is guilty of an offense." Sexual act in this case means "sexual contact between human beings consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any other portion of the human body and the penis, anus, or vulva." N.D.C.C. § 12.1-20-02(3). The acts were alleged to have occurred between November 1, 2006, and April 1, 2007.

[¶44] The elements of gross sexual imposition were proven at trial through witness testimony. K.D.J.'s testimony established both the location and the timeframe in which the acts occurred. She testified that she was living in a trailer house in Fargo, ND, at the time sexual acts were performed on her by Defendant Grant between November 1, 2006, and April 1, 2007. (T. 64-70, T. 84-90.) K.D.J.'s mother, R. Johnson, also testified that she lived in a trailer house in Fargo, in Countryside Trailer Court, with K.D.J., Defendant Grant, and two younger children, from October of 2006 through the spring of 2007. (T. 121, ll. 1-25, T. 122, ll. 1.)

[¶45] K.D.J. established that she was under 15 years of age when the sexual acts occurred when she testified at trial that she was only 10 years old. (T. 49, ll. 23-25, T. 50, ll. 1-3.) K.D.J. testified in detail regarding the nature and extent of the acts Defendant Grant engaged in with her. K.D.J. testified that while she was living in the trailer house in Cass County, Defendant Grant made her

watch pornographic movies with him. (T. 72, ll. 13-25, T. 73, l. 1, T. 82, ll. 19-20.) She testified that she and Defendant Grant had removed articles of clothing. (T. 84, ll. 1-13.) K.D.J. then described occasions where Defendant Grant would touch her vagina, make her perform oral sex, and perform oral sex on her. (T. at 84-84, 88, 89-90.) She testified her fear of Defendant Grant prevented her from telling anyone about the sexual contact until months later. (T. 97, ll. 4-10, T. 113, ll. 4-6.)

[¶46] Drawing all inferences in favor of the guilty verdict and viewing the foregoing evidence in a light most favorable to the guilty verdict, a rational fact finder could have found beyond a reasonable doubt that Count One occurred between November 1, 2006, and April 1, 2007. There is no reason to disturb the jury's verdict on Count One.

[¶47] **CONCLUSION**

[¶48] WHEREFORE, the State respectfully requests the Court affirm the Defendant's conviction.

[¶49] Respectfully submitted this 10th day of August, 2009.

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[¶50] **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on August 10, 2009, to pulkrabek@lawyer.com .

____
Tanya Johnson Martinez