20090257

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STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

State of North Dakota, )
Plaintiff-Appellee, ) Sup. Crt. No.: 20090257
vs. )
Michael Moe, ) Dist. Crt. No.: 08-K-0404
Defendant-Appellant. )

# APPELLEE'S BRIEF

APPEAL FROM THE CRIMINAL CONVICTION AND SENTENCE OF THE WILLIAMS COUNTY DISTRICT COURT THE HONORABLE DAVID W. NELSON, PRESIDING

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## Statement of the Issues

¶1. 1. Moe's claim that *voir dire* was not recorded is without merit.

¶2. 2. There is no inconsistency in the jury verdicts.

## Statement of the Case

¶3. Pursuant to N.D.R.App.P. 28(c)(3), the State provides a Statement of the case. As discussed in more detail below, Moe was charged with Solicitation of a minor alleging solicitation with intent to engage in sexual acts with a minor under the age of fifteen (N.D.C.C. §12.1-20-05(2)), and with Gross Sexual Imposition alleging sexual contact with a minor under the age of fifteen years (N.D.C.C. §12.1-20-03(2)(a)). (R.O.A. #59)

¶4. After his conviction on August 18, 2009, Moe filed a *pro se* motion for release pending appeal and notice of appeal on or about August 21, 2009. (R.O.A. ##68, 69, 70) The motion for release pending appeal was denied as premature for lack of pending appeal. The premature notice of appeal effectively resulted in a limited remand back to District Court for sentencing purposes.

¶5. Moe had previously filed his Appellant's brief with this Court on February 1, 2010. That brief was subsequently retracted, and the State returned the brief and appendix which it received. Moe then filed his Appellant's brief with this Court on February 8, 2010. The State received a copy of the brief, dated February 1, 2010, with a certificate of service dated February 8, 2010.

## Statement of the Facts

¶6. The State provides the following Statement of Facts under N.D.R.App.P. 28(c)(4) to provide this Court with a more comprehensive, and accurate presentation

of the facts. The State notes that Moe's Statement of facts is completely devoid of the testimony of Kyle Hovey regarding Moe's alleged offers of money for sexual favors. The State also notes that Moe's State of Facts is similarly lacking his admissions to having offered younger girls money for sex.

¶7. Mr. Kyle Hovey, who was the boyfriend of Jane Doe at the time in question, testified during Moe's jury trial. Starting at line 11, on page 171 of the appeal transcript, Hovey testified that Moe had offered money for sexual favors somewhere between three and ten times. (Appeal transcript page 171, lines 11-25).

¶8. Further, Detective Verlan Kvande testified that during his interview with Moe, Moe admitted that he had offered money to younger girls for sex, and that it had happened four to five times. (Appeal transcript pages 68-70). Moe even described a situation where he had given money to a minor female for sex, but that she took the money and was never heard from again. (Appeal transcript page 69, lines 4-14). Moe was even able to provide Detective Kvande with the name of this minor female. (Appeal transcript page 69, lines 15-17).

¶9. During trial, there was testimony regarding Moe's touching of Jane Doe's breast(s) as set forth in Moe's Statement of Facts. Moe himself notes: "The facts indicate the only reason Jane Doe allowed Mr. Moe to touch her breast is because he agreed to pay her $20 so her boyfriend[,] Kyle Hovey[,] who was hungry could buy food." (Moe brief page 11).

¶10. Also, the appeal transcript shows that the peremptory challenges occurred after the quotations presented by Moe. "Now, we start the stage, which is called the

peremptory challenges. In any jury case, each side had the right to strike specific jurors for what's called the peremptory challenge…" (Appeal transcript pages 28-32).

¶11. After the trial, no request for preparation of a *voir dire* transcript was made by Moe until the order for *voir dire* transcript was filed on January 20, 2010. (R.O.A. #96). As discussed further below, the original request for transcript for use on appeal, filed November 19, 2009, did not contain a request for a *voir dire* transcript. (R.O.A. #88). This lack of request for a *voir dire* transcript was noted even by Moe himself.

## Law and Argument

### 1. Moe's claim that *voir dire* was not recorded is without merit.

¶12. Moe stated in his Motion to Defer Filing of Appendix, dated January 20, 2010, that: "… the jury *voir dire* transcript according to [N.D.R.App.P. 10(b)(1)(D)] doesn't have to be prepared unless specifically requested and the initial order for transcript didn't specifically request a copy of the jury *voir dire*." (italics added).

¶13. In his "Order for Jury *Voir Dire* Transcript," Moe requested: "[Ms. Lindvig] provide him with a transcript of the jury *voir dire* in the above entitled proceeding." (R.O.A. #96)(italics added).

¶14. However, Moe then goes on to state: "If no transcription of the jury *voir dire* was ever made, [Moe wants Ms. Lindvig to] file a written report with the District Court that no transcription was ever made of the jury *voir dire* in this case." (Id.)(italics added).

¶15. The State notes that in his Motion to Defer Filing, Moe expressly states: 1) That a *voir dire* transcript need not be made if not requested; and 2) That no

request had been previously made for a *voir dire* transcript. Clearly, that which was not previously requested would not exist. Even Moe's Motion itself demonstrates that the hardcopy transcript would not exist because it was never requested. "That the jury *voir* dire transcript according to [N.D.R.App.P. 10(b)(1)(D) doesn't have to be prepared unless specifically requested and the initial order for transcript didn't specifically request a transcript of the jury *voir dire*." The State asserts there is no clearer explanation for why no paper transcript then existed than what Moe himself set forth in his Motion to this Court.

¶16. However, Moe then makes the leap from a lack of the hardcopy transcript, never previously requested, to a claim that the *voir dire* proceedings were never recorded. It appears that Moe has confused recording(s) with a transcript. The confusion is further demonstrated by his inclusion of 28 U.S.C. §753(b) which provides for recording procedures in federal court, and of "Personal[sic] Policy 103R" which provides a general job description for court reporters.

¶17. Next Moe argues: "Court reporters in North Dakota claim they aren't required to transcribe jury *voire dire*. This claim is based on [N.D.R.App.P. 10(b)(1)(D)]." (Moe brief page 8). Moe then notes his order for *voir dire* transcript.

¶18. As noted above, Moe's Motion to Defer Filing of Appendix filed with this Court states that no N.D.R.App.P. 10(b)(1)(D) request for *voir dire* transcript had previously been made. In his order for *voir dire* transcript, Moe states: "If no transcription of jury *voir dire* was ever made …" (R.O.A. #96)(italics added). Now, Moe is claiming that no recording of the *voir dire* was ever made.

¶19. Nowhere in the record has Moe actually attempted to verify that no recording of *voir dire* was ever made. The entirety of his argument rests upon the failure of Ms. Lindvig to have in existence at the time of his order, something that even he himself admits would not have existed because no prior request for a *voir dire* transcript had been made.

¶20. Moe's argument claiming failure to record *voir dire* is contrary to the record in this case. The appeal transcript shows in numerous locations where preparations were made for recording the entirety of the proceedings, including *voir dire*. During the pre-trial meeting in chambers, options for recording the *voir dire* sessions were discussed. (Appeal transcript page 15, lines 3-22).

¶21. Early on in the proceedings, Judge Nelson states: "First off, as far as the record itself. This is Jean Lindvig, she is keeping a record – an audio record of everything that's happening today. She will be – there'll be microphones that you are using…" (Appeal transcript page 20, lines 18-24). Pages 27-28 of the appeal transcript also document the procedures used to record the group *voir dire*.

¶22. North Dakota law, both case law and rules, squarely places the responsibility of having transcripts prepared for purposes of appeal on the Appellant. N.D.R.App.P. 10; Rosendahl v. Rosendahl, 470 N.W.2d 230, 231 (N.D. 1991); Dakota Bank and Trust Co. v. Federal Land Bank, 437 N.W.2d 841,843 (N.D. 1989); State v. Raywalt, 436 N.W.2d 234, 238-239 (N.D. 1989). When an Appellant fails to have the transcripts prepared or presented, the Appellant bears the consequences of that failure. E.g. Rosendahl, 470 N.W.2d 230, 231.

¶23. Here, there was confusion as to what exactly Moe was seeking in his order for *voir dire* transcript. This confusion was mentioned in Ms. Lindvig's letter to the court on February 8, 2010. In that letter, Ms. Lindvig states there is no transcription of the *voire dire* at this time (date of letter), and she notes that under N.D.R.App.P. 10(b)(1)(D), a transcript of any record of *voir dire* is not required until specifically requested. (R.O.A. #98). As Ms. Lindvig noted in her letter, a *voir dire* transcript would not previously existed, because as Moe himself even admits, no prior N.D.R.App.P. 10(b)(1)(D) request for *voir dire* transcript had been made.

¶24. Moe then notes, regarding the appeal transcript that: "The lawyers have now issued some legal challenges to specific members of the jury, some were granted, some of those were not." (Moe brief pages 8-9). Moe then claims: "This quote alone shows that the pre-emptory[sic] challenges could have involved some appealable issues. The problem is[,] without a transcript[,] any error during jury *voir dire* can't be appealed." (Moe brief page 9)(italics added).

¶25. Again, it is Moe's responsibility to obtain the transcript(s) that he wants. N.D.R.App.P. 10. There was confusion here, at least part of it generated by the poorly worded order for preparing a *voir dire* transcript. However, nothing in the record demonstrates an attempt by Moe to resolve the confusion.

¶26. Moe's order did not state: if no recording of the jury *voir dire* was ever made. Moe's order stated "If no transcription of the jury *voir dire* was ever made..." (R.O.A. #96)(italics and underlining added). As noted repeatedly above, no transcription of the *voir dire* existed because no previous request for preparing one

had been made. This was even admitted by Moe to this Court in his Motion to Defer Filing.

¶27. The option of requesting an extension of time to file his brief was open under N.D.R.App.P. 26(b). Moe did not exercise that option. Instead, Moe filed his Appellant's brief claiming a failure to record *voir dire* apparently without verifying whether or not the proceedings were actually recorded. The State notes that there is a *voir dire* transcript being prepared based on the recorded *voir dire* proceedings, but as of this time, the State is unsure of its expected completion date.

¶28. Further, assuming only for the sake of argument that by some happenstance, *voir dire* was not recorded in this case, this Court has previously held that failure to conduct *voir dire* on the record does not, by itself entitle a defendant to a new trial. State v. Entzi, 2000 ND 148, 615 N.W.2d 145; State v. Ellis, 2000 ND 177, ¶5, 617 N.W.2d 472. There is one major difference between Entzi and the case at hand. In Entzi, there was no discussion about having *voir dire* on the record. Id. at ¶5. Here, the appeal transcript shows, as noted above, that preparations were made for recording the *voir dire* proceedings, and that Judge Nelson told the jurors that Ms. Lindvig was the court reporter who would be recording everything that happened that day.

¶29. Additionally, while Moe makes claims about "pre-emptory[sic]" challenges, his quotation from the appeal transcript addresses the challenges for cause, and ends just before Judge Nelson's discussion of peremptory challenges. The State notes that this is the first of the highly selective quotations that Moe uses in an attempt to support his arguments. The "legal challenges" language is found in the last

sentence before Judge Nelson began his statements to the jury about how peremptory challenges work, and what their purpose is. An complete reading of pages 28-32 of the appeal transcript shows that the "legal challenges" language relates to challenges for cause not to the peremptory challenges.

¶30. Also, pages 29-30 of the appeal transcript demonstrate how peremptory challenges were conducted at Moe's trial. "[At bench] **Mr. Rustad:** Just the question of if she does one and then I do, then it comes to you, or do you want to see it between each individual…**The Court:** I don't need to see it between each one. **Mr. Rustad:** Okay. That's all I wanted to make sure of. **The Court:** Okay." (Appeal transcript page 29-30).

¶31. Pages 30-31 of the appeal transcript provide the colloquy given by Judge Nelson about the purpose and use of peremptory challenges to the jury. During this time, the State and Moe were exercising their peremptory challenges in writing. (Appeal transcript page 31, line 11)("Peremptories continuing). Later, Ms. Lindvig notes: "Whereupon the peremptory challenges were completed."(Appeal transcript page 32, line 2). The State notes that the *voir dire* paperwork, including peremptory challenge form should be found in the record. (R.O.A. ##60, 61, 62)

¶32. For the above reasons, the State asserts that Moe is the primary reason why no hard copy transcript of jury *voir dire* was produced prior to his order of January 19, 2010. Moe then filed his brief apparently without verifying whether or not recordings of the *voir dire* proceedings existed, and without asking for an extension of time to file pending completion of the transcript. Ms. Lindvig has started on preparing the hard copy written transcript. Moe's argument regarding

"pre-emptory[sic]" challenges is based on a quotation from the appeal transcript which relates to challenges for cause and not peremptories. Therefore, the State requests this Court affirm the conviction and sentence in this matter.

**2. There is no inconsistency in the jury verdicts.**

¶33. Moe confuses the nature of the two charges that were at issue during the trial. While both charges relate to minor individuals, the nature of the offense is different. To aid this Court, the State briefly discusses each below.

¶34. Moe was acquitted of Solicitation of a Minor, which related to offers of money for sexual favors/acts. N.D.C.C. §12.1-20-05(2). The term "sexual act" is defined under N.D.C.C. §12.1-20-02(4), and in general describes penetration of the anus or vagina, and oral sex. Moe's touching of Jane Doe's breast falls outside the classification of "sexual act" as defined under N.D.C.C. §12.1-20-02(4). The State sets forth the pertinent portion of N.D.C.C. §12.1-20-05(2) below.

> An adult who solicits with the intent to engage in a sexual act with a minor under age fifteen or engaged in or causes another to engage in a sexual act when the adult is at least twenty-two years of age and the victim is a minor fifteen years of age or older, is guilty of a class C felony.

¶35. Moe was convicted of Gross Sexual Imposition, Class-A Felony relating to his touching of Jane Doe's breast(s). This offense was charged as "sexual contact" with a minor under the age of fifteen years. N.D.C.C. §12.1-20-03(2)(a). The term "sexual contact" is defined under N.D.C.C. §12.1-20-02(5), and for purposes of this appeal, covers contact with the sexual or other intimate parts of a person for purposes of sexual gratification.

¶36. The State asserts that there are several differences in the elements between these offenses, including mindset, sexual act versus sexual contact, and the offering of money. For example, the State need not show an offer of money to prove Gross Sexual Imposition. Conversely, the State need not show actual sexual contact to prove Solicitation as charged in this case.

¶ 37. "The facts indicate the only reason Jane Doe allowed Mr. Moe to touch her breast is because he agreed to pay her $20 so her boyfriend Kyle Hovey[,] who was hungry[,] could buy food." (Moe brief page 11). The State asserts that Moe appears to concede that the facts demonstrate he did engage in sexual contact with Jane Doe, namely touching her breast(s).

¶38. Moe's contention is that: "In order for the Gross Sexual Imposition to occur[,] the Solicitation has to occur first." (Moe brief page 11). However, for the reasons set forth below, Moe's argument completely misapprehends the nature of the charges.

¶39. The appeal transcript demonstrates that the Solicitation charge related to sexual acts. Attorney Wilder noted that the "sexual act" was part of the "other one," which was the Solicitation charge. (Appeal transcript page 188, lines 4-5). Attorney Rustad noted: "Well, sexual act on the solicitation charge is a defined element, with intent to engage in a sexual act." (Id. Appeal transcript page 187, lines 23-25).

During closing argument, Attorney Rustad noted that contact with Jane Doe's breast(s) is not included in the definition of a sexual act. (Id. page 217).

¶40. Attorney Rustad also addressed the sexual act nature of the Solicitation charge as shown on page 217 of the appeal transcript. Specifically: "Now you've

been given the definitions and obviously we would direct you to the sexual act specifically for the solicitation charge." (Id. page 217, lines 7-11). More specifically: "Again, we've got the one allegation dealing with the hundred dollars for sex…". (Id. page 218, lines 2-8).

¶41. The Solicitation charge stemmed from, as Attorney Rustad noted, claims of offering money for sex. Particularly, it appears to stem from an allegation that Moe offered money in exchange for sexual favors (Appeal transcript page 171, lines 11-25). Sex of any type, anal, oral, or vaginal, would fall under the definition of sexual act as set forth in N.D.C.C. §12.1-20-02(4).

¶42. The Gross Sexual Imposition charge, as noted above, related to Moe's touching of Jane Doe's breast(s), and not the commission of any sexual act.

¶43. Two types of verdict inconsistencies exist, logical and legal. Verdicts are logically inconsistent when a jury finds both the presence and absence of an element. State v. Coppage, 2008 ND 134, ¶17, 751 N.W.2d 254. Verdicts are legally inconsistent when proving the elements of one offense negates one or more elements of the other offense. Id. (internal citations omitted). Generally, logical inconsistency in verdicts is not grounds for reversal. Id.

¶44. For the reasons set forth below, the State asserts that the two verdicts from Moe's trial are not inconsistent. As noted above, there are several differences between the Solicitation charge and the Gross Sexual Imposition charge. These differences include the actual act(s) referenced and the elements, including state-of-mind.

¶45. First, the Solicitation charge relates to a different incident than the Gross Sexual Imposition charge. As noted in the trial transcript, there was testimony regarding offers of money for sex. (Appeal transcript page 171, lines 11-25). Moe himself concedes in his brief that: "The facts indicate the only reason Jane Doe allowed Mr. Moe to touch her breast is because he agreed to pay her $20 so her boyfriend Kyle Hovey who was hungry could buy food." (Moe brief page 11). The State notes that this is the second highly selective quotation used by Moe in an attempt to shore up his position. For the sake of brevity, the State will not repeat all of the information in paragraph eight if its brief here, but directs this Court's attention to the paragraph and related portions of the appeal transcript.

¶46. The State asserts that this information presented at trial shows that the incident charged out in the Solicitation charge was different from that which resulted in the Gross Sexual Imposition charge. Kyle Hovey's testimony indicates that the offers of money for sexual favors occurred three to ten times, and the testimony appears to show those as not including the breast contact incident. As such, the State asserts that the Solicitation need not have occurred before the G.S.I.

¶47. Second, the elements of the offenses are completely different. Judge Nelson read the following jury instructions regarding essential elements at Moe's trial.

> [Solicitation] – One, during the year 2006, in Williams Court, North Dakota, the defendant, Michael C. Moe, willfully solicited with the intent to engage in a sexual act with Jane Doe. Two[,] Jane Doe was then a minor, under the age of fifteen (15) years, and three[,] the defendant was at least 22 years of age or older.

> [G.S.I.], victim less than fifteen years old. A person who willfully engages in a sexual contact with another person is guilty of Gross Sexual Imposition if the other person was less than fifteen years old. (Appeal transcript page 195, lines 3-12).

¶48. Solicitation, as charged, required the State to show that Moe had the intent to engage in a sexual act with Jane Doe. As noted above, a sexual act essentially relates to penetration. N.D.C.C. §12.1-20-02(4). Moe is claiming that the solicitation had to occur because Moe offered money for touching Jane Doe's breasts. The State notes that Solicitation by statutory language, relates only to sexual acts. N.D.C.C. §12.1-20-05; State v. Igou, 2005 ND 16, ¶¶11-14, 691 N.W.2d 213(repeated requests to have sex). No matter how repugnant offering a minor money for sexual contact is, it is simply not Solicitation of a minor as defined by N.D.C.C. §12.1-20-05. Therefore, the State asserts that Moe's argument claiming the Solicitation had to occur first is simply incorrect.

¶49. Further, the State notes that the offer of something, i.e. solicitation, is not an element of G.S.I.. N.D.C.C §12.1-20-03(2)(a). As such, the offer of money for touching Jane Doe's breast is not necessary to prove that Moe committed the offense of G.S.I.. While it may have been helpful in demonstrating Moe's state of mind, i.e. that the contact was not accidental, the State notes that it is not an essential element of the offense. Conversely, for the solicitation charge, the State needed to show that an offer of something, i.e. solicitation, had occurred.

¶50. On the G.S.I. charge, the State needed to show that contact actually occurred, which is not an element of the solicitation charge. As force was not alleged in the final information, how the victim came to allow the contact is irrelevant. Even

Moe notes that the facts presented to the jury demonstrate that he touched Jane Doe's breast.

¶51. For the above reasons, the State asserts that Moe's argument is incorrect. Particularly, Moe's claim that the solicitation had to occur first is simply erroneous under North Dakota law. Offering money to a minor for sexual contact is simply not solicitation under N.D.C.C. §12.1-20-05. Therefore, the State asserts that Moe's argument fails.

**Summary**

¶52. As noted above, Moe filed his Appellant's brief knowing that no prior request for creating a *voir dire* transcript had been made under N.D.R.App.P. 10. This lack of a prior request was the entire reason Moe ordered a *voir dire* transcript. In this order, Moe asks Ms. Lindvig to file a letter with the court if "no transcript of the jury *voir dire* was ever made." However, in his Motion to Defer Filing, Moe tells this Court he submitted the motion because no previous N.D.R.App.P. 10(b)(1)(D) request had been made.

¶53. Now, Moe is claiming that this lack of a *voir dire* transcript means that *voir dire* was never recorded. The record shows that Moe is the primary reason why the *voir dire* transcript is being prepared after he filed his Appellant's brief. Extensions of time to file his brief were available, he did not take advantage of them. His order for *voir dire* transcript was confusing and contradictory both internally and with his motion to defer filing. However, it was his responsibility to have the transcript prepared, and it is he who bears the consequence of failure.

¶54. Moe's argument regarding inconsistent verdicts is fatally flawed. The entirety of the argument is based on the claim that offering money for touching breasts is solicitation. This is argument simply erroneous. Solicitation of a minor relates to sexual acts, not sexual contact. Therefore, the State asserts it is incorrect to say that the solicitation had to occur before the G.S.I., because offering money for sexual contact is not solicitation of a minor. N.D.C.C. §12.1-20-05(2).

## Conclusion

¶55. For the above noted reasons, Moe's argument regarding recording the *voir dire* proceedings is without merit. Moe's argument concerning inconsistencies in the jury's verdicts is erroneously founded on a claim that the solicitation charge encompassed offering money for sexual contact. The State asserts this argument fails under the statutory definition of solicitation of a minor, and under the activities as charged. Therefore, the State requests this Court affirm the District Court's conviction and sentencing in this matter.

Dated this 26th day of February, 2010.

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## Certificate of Service

I, Nathan Kirke Madden, hereby certify that on February 26, 2010, a true an accurate copy of the State's Appellee's brief was served on Attorney Benjamin Pulkrabek via e-mail at pulkrabek@lawyer.com.

Dated this 26th of February, 2010.

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