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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20100100
Walsh County No. 50-09-K-0006

State of North Dakota,)
)
Plaintiff/Appellee,)
)
vs.)
)
Ciro Gomez,)
)
Defendant/Appellant.)

BRIEF OF APPELLANT

Appeal Taken from Criminal Judgment
Entered on March 17, 2010
Honorable Richard Geiger, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

North Dakota Century Code:

Other Authorities:

ISSUES FOR REVIEW

The trial court erred when it failed to issue a special verdict form pursuant to N.D.Cent.Code §12.1-20-03.1(2).

There was insufficient evidence to support the guilty verdict.

The trial court erred when it refused to consider Gomez's challenge to the ethnic and racial makeup of the jury panel and jury.

The sentence imposed by the Court violates the Eighth Amendment prohibition against cruel and unusual punishment by being disproportionate to the crime.

1. **Statement of Facts:**

2. S.D.J. was a 12 year old female that lived in Grafton, North Dakota, with her mother and two brothers. (Tr.Vol. VII, p. 105, ll. 1-7). In May, 2008, Ciro Gomez ("Gomez") started spending time with S.D.J.'s family. (Tr.Vol. VII, p. 112, ll. 9-12). He eventually moved in with the family. (Tr. Vol. VII, p. 113, ll. 2-5). He began a relationship with S.D.J.'s mother. (Tr.Vol. VII, p. 113, ll. 9-11).

3. S.D.J. claimed that Gomez would have her "touch him." (Tr.Vol. VII, p. 117, ll. 7-11). Around the end of May or middle of June, 2008, S.D.J. told her friend, B.B., that in December, 2008, Gomez had been "having me touch him" at night in her room. (Tr.Vol. VII, pp. 119, ll. 16-20). He would "take my hand and put it on his penis, over his clothes." (Tr.Vol. VII, p. 119, l. 25, p. 120, l. 1). He would "have his hand over mine and he would move it up and down." (Tr.Vol. VII, p. 120, ll. 2-5). There was never any touching of the skin of Gomez by S.D.J. It was always over his clothing. (Tr.Vol. VII, p. 120, ll. 6-11). These events happened more than ten times. (Tr.Vol. VII, p. 121, ll. 4-5).

4. **Statement of Proceedings.**

5. On January 6, 2009, Ciro Gomez ("Gomez") was charged with one count of Continuous Sexual Abuse of a Child in Walsh County, North Dakota. On April 21, 2009, he was bound over for trial following a preliminary hearing.

6. On October 27, 2009, a jury trial was held before the Honorable Richard Geiger, District Judge. On October 30, 2009, the jury entered a guilty verdict.

7. On March 16, 2010, Gomez was sentenced to life imprisonment. After serving 30 years, the balance was suspended for 20 years.

8. On March 29, 2010, Gomez filed a Notice of Appeal to the North Dakota Supreme Court.

9. **Law and Argument: Issue One: The trial court erred when it failed to issue a special verdict form pursuant to N.D.Cent.Code §12.1-20-03.1(2).**

10. Gomez was charged and convicted of Continuous Sexual Abuse of a Child, under Section 12.1-20-03.1, N.D.Cent.Code. Subsection 2 also requires that:

11. "(2) If more than three sexual acts or contacts are alleged, a jury must unanimously agree that any combination of three or more acts or contacts occurred. The jury does not need to unanimously agree which three acts or contacts occurred." (Emphasis added).

12. This Subsection requires the jury to make two separate unanimous findings. Initially, they must determine guilt under Subsection 1. Secondly, they must find that three or more acts or contacts occurred under Subsection 2. One cannot assume that the guilty verdict necessarily subsumes a unanimous finding under Subsection 2. The presence of a separate finding, set apart from the definition of the crime under Subsection 1, reveals the legislative intent to require two separate findings before an individual can be convicted of continuous sexual abuse of child. A special verdict form must contain room for these two separate findings. A review of the verdict form reveals that the jury never made the finding, unanimous or otherwise, required under Subsection 2. See, Tr. Vol. IX, p. 86, ll.

9-25, through page 89, ll. 1-3.

13. The remedy is clear. The jury verdict must be reversed. A new trial must be ordered.

14. **Law and Argument: Issue Two. There was insufficient evidence to support the guilty verdict.**

15. Even though continuous sexual abuse of a child can occur either through or by sexual acts or sexual contact, or a combination of acts or contacts, the State conceded that they were only charging sexual contact. (Tr.Vol. VIII, p. 159, ll. 4-17).

16. Sexual Contact is defined as:

17. 4. "Sexual contact" means any touching of the sexual of other intimate parts of the person for the purpose of arousing or satisfying sexual or aggressive desires.

18. Gomez's trial counsel argued, in his Rule 29 Motion following presentation of the State's case, that "a touching by the minor of the adult cannot constitute an offense under the statute." (Tr.Vol. VII, p. 159, l.25; p. 160, l. 1). Sexual contact is defined as any touching of the sexual parts of a person for the purpose of arousing or satisfying sexual or aggressive desires. In **State v. Brown,** 420 N.W.2d 5 (N.D. 1988), the North Dakota Supreme Court recognized that a touching by Brown of the private, sexual parts of his daughter, through her clothing was sufficient to sustain the guilty verdict of Gross Sexual Imposition. The case did not address the issue of whether the contact occurs when the defendant does not use his hand or other body part to touch private or sexual parts

of another.

19. The testimony of S.D.J. was that Gomez "would have me touch him." (Tr.Vol. VIII, p. 117,ll. 6-7). He "would take my hand and put it on his penis, over his clothes." (Tr.Vol. VIII, p. 112, l. 25, p. 120, l. 2). Gomez was described as having "his hand over (her hand) and he would move it up and down." (Tr.Vol. VIII, p. 120, ll. 2-4). Gomez would never try and touch her body. (Tr.Vol. VIII, p. 120, ll. 12-13).

20. A review of decisions by this court on the issue of sexual contact all reveal that the defendant was the individual who made the sexual contact. None of the defendants were accused of causing the victim to engage in sexual touching or contact.

21. Indiana does provide for a crime of vicarious sexual gratification. See I.C. § 35-42-4-5. This provides for a crime to "knowingly or intentionally direct, aid, induce or cause a child under . . . 16 years of age to touch or fondle himself . . . with the intent to arouse or satisfy the sexual desires of the child or other person. . .". Indiana also provides for a separate crime for other sexual contact.

22. The North Dakota legislation has not specifically provided for sexual contact directed by the defendant on his own person. S.D.J.'s body, including the sexual parts, were never touched or contacted by Gomez in any fashion. There was no contact between any part of Gomez with the sexual or intimate parts of S.D.J. A reasonable reading of the definition of sexual contact appears to require the contact between two persons. The phrase talks of 'the person" without

identifying that "person" as either the perpetrator or the victim. See Section 12.1-01-04-24, N.D.Cent.Code.

23. Without a strongly stated statutory desire to include conduct by which the defendant is both the actor and the person on whom the contact is made within the definition of "sexual contact", the State failed to prove beyond a reasonable doubt that Gomez committed sexual contact sufficient to constitute continuous abuse of a child.

24. **Law and Argument: Issue Three: The trial court erred when it refused to consider Gomez's challenge to the ethnic and racial makeup of the jury panel and jury.**

25. Gomez's trial counsel issued an objection to the composition of the jury panel. (Tr.Vol. VII, p. 3, ll. 24-25). Counsel also objected to the State's use of peremptory challenges to "purge" the jury of Hispanics. Gomez is Hispanic. (Tr.Vol. VII, p. 2, ll. 21-25).

26. Counsel presented evidence that Walsh County consists of ten percent of its population being Hispanic. (Tr.Vol. VII, p. 3, ll. 1-11).

27. Gomez complained that, due to the limited number of (potential) Hispanic jurors on the panel, the distinctive group in the community was systematically excluded in the jury process. See **Duren v. Missouri,** 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

28. The issue is whether the selection process used in this case violated the "fair cross section" requirement announced by the United States Supreme Court in **Taylor v.**

Louisiana, 419 U.S. 522 (1975).

29. The Supreme Court required that a "defendant in order to establish a prima facie violation of that requirement must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the group's representation in the source from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation results from systematic exclusion of the group in the jury-selection process." **Taylor,** id. at 363.

30. The trial court recognized the necessity of having an evidentiary hearing on the issue. (Tr.Vol. VII, p. 45, ll. 21-24). However, he concluded that the case of **State v. Robles,** 535 N.W.2d 729 (N.D. 1995), answered the concern of Gomez and eliminated the need for an evidentiary hearing.

31. In **Robles,** the North Dakota Supreme Court recognized that Hispanics are a distinctive group for the purposes of Sixth Amendment fair cross-section challenges to jury venire. It also concluded that to prove systematic exclusion in fair cross-section challenges to jury venires, it must be shown that exclusion of distinctive group is inherent in a particular jury selection process utilized.

32. The trial court in **Robles,** needed an evidentiary hearing where the clerk of district court testified as to the selection process. Here the trial court was concerned that defense counsel had failed to file the motion earlier in the proceedings. (Tr.Vol. VII, p. 8, ll 1-23). The court concluded that the motion was not timely, even though counsel had earlier indicated a concern, via a proposed motion, as to the

makeup of the jury panel. (Tr.Vol. VII,p. 8, ll. 24-25). At no time was an evidentiary hearing held.

33. In **Robles,** counsel for Mr. Robles moved to dismiss the criminal information due to the alleged systematic exclusion of Hispanics from the jury panel. However, counsel also moved for a mistrial on the same grounds. **Robles** was given an evidentiary hearing to develop his concerns. Gomez was never offered the same opportunity.

34. The verdict should be reversed. Gomez did not receive a fair and impartial trial due to the failure of the trial court to provide a hearing on the issue of a fair cross-section of the panel.

35. **Law and Argument: Issue Four: The sentence imposed by the Court violates the Eighth Amendment prohibition against cruel and unusual punishment by being disproportionate to the crime.**

36. Upon conviction, the trial court imposed a sentence of life imprisonment, with the balance suspended after 20 years.

37. Gomez was charged with Continuous Sexual Abuse of a Child under Section 12.1-20-03.1 N.D.Cent.Code. It provides as follows:

38. "1. An individual in adult court is guilty of an offense if the individual engaged in any combination of three or more sexual acts or sexual contacts with a minor under the age of fifteen years during a period of three or more months. The offense is a class AA felony if the actor was at least twenty-two years of age at the time of the offense. Otherwise, the offense is a class A felony. The court may

not defer imposition of sentence."

39. A class AA felony provides for a possible punishment of:

40. "1. Class AA felony, for which a maximum penalty of penalty of life imprisonment without parole may be imposed. The court must designate whether the life imprisonment sentence imposed is with or without an opportunity for parole. Notwithstanding the provisions of section 12-59-05, a person found guilty of a class AA felony and who receives a sentence of life imprisonment with parole, shall not be eligible to have that person's sentence considered by the parole board for thirty years, less sentence reduction earned for good conduct, after that person's admission to the penitentiary."

41. Section 12.1-32-01(1), N.D.Cent.Code.

42. The conviction was for a series of events over a short period of time. The allegations were that Gomez engaged in sexual contact by having the minor child touch his penis over his clothes. There were no allegations of sexual acts or sexual intercourse. There was no touching by Gomez of the child's intimate or private parts.

43. The court imposed the sentence as follows:

44. "It will be the judgment and sentence of this court that you be placed with the North Dakota DOC for placement in a penal facility of its selection for the duration of your life. After first serving 30 years, the balance will be suspended for a period of 20 years of supervised probation. You will - - and it will be under the terms of probation I have already recited. You will be required to register as

a sexual offender in accordance with the North Dakota Century Code 12.1-32-15(8)(c)(2). And again that will be for the duration of your life. You will be given credit for time served in custody relating to this matter. And that is the judgment and sentence, and that will include the probation terms I have already outlined."

45. Tr.Vol. X, p. 47, ll. 9-21).

46. He then went on to explain his reasons for the sentence:

47. "Now I'm going to, as I indicated, by the attached written document the factors that I have considered in imposing this sentence, Mr. Gomez, but let me offer these comments also. There is one thing that every adult in this room is obligated to do, and that is to provide nurturing and protection to children. Okay. In our society that's how it's supposed to work. And when you committed this offense as determined by a jury, you horribly breached that obligation, and you violated the law. As far as the impact on your victim, I know there was testimony that indicated that she would be at a risk - - an increased risk for anxiety and depression. That typically occurs for individuals who are victim - - victimized in this manner. There is no doubt in my mind that by what you have done, you have stolen a significant part of her childhood, and there is no doubt in my mind that you have disrupted a family unit significantly. Looking at all of that, and I appreciate the argument that you've made, Mr. Howe. That it may very well be that the wrongs that have been testified to that Mr. Gomez did may not be as severe and - - as severe and as offensive as some other wrongs that may fall

within this same offense under the statute. Nonetheless, there is harm that occurs from even that, both from the acts that occurred and duration and frequency that they occurred. And in reciting the different cases and the convictions and the sentences that have occurred in the past, first of all, you know I'm always hesitant to compare one case and what happens in it to another, because every case I think is driven more by the facts of a case than anything else. But it almost - - but it also caused me to think of this, and this is, have we both as citizens, and law enforcement officials, and legislators, and judges protected children as best as we could have over the past time? I know that that is our task, and that's certainly my task here today, and that is among other reasons that I will set out in the factors that I will attach, the reasons for this disposition; and it certainly takes into account what is a significant criminal history. And I appreciate also that some of that criminal history included minor misdemeanor offenses. But a lot of them do not. And a lot of them show and reflect not only acts of violence towards others, but also problems relating to chemical abuse and a general disregard for the rights of other member in our society. And I agree, we are entitled to have peace and tranquility as citizens. And Mr. Gomez, I hope you change. But I have to look at your history to evaluate what you are likely to do in the future, and that history tells me that you're likely to re-offend, and I agree that your offenses are getting worse as time passes."

48. The United States Supreme Court in **Ewing v. California,** 538 U.S. 11 _____, (2003) dealt with the issue of proportionality of criminal sentences:

49. "The Eighth Amendment has a "narrow proportionality principle" that "applies to noncapital sentences." **Harmelin v. Michigan,** 501 U.S. 957, 996-997 (Kennedy, J., concurring in part and concurring in judgment). The Amendment's application in this context is guided by the principles distilled in Justice Kennedy's concurrence in **Harmelin**: "[T]he primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors" inform the final principle that the "Eighth Amendment does not require strict proportionality between crime and sentence [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime." ***Id.***, at 1001, pp. 8-11.

50. In examining Gomez's claim that his sentence is grossly disproportionate, the gravity of the offense must be compared to the harshness of the sentence.

51. Earlier, the same Supreme Court, in **Solem v. Helm,** 463 U.S. 277 (1983) determined that a sentence of life imprisonment without possibility of parole under South Dakota law, even for a seventh felony conviction, was violative of the Eighth Amendment.

52. The Court issued certain objective factors to be used by a sentencing court:

53. "When sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized. First, we look to the gravity of the [463 U.S. 277, 291] offense and the harshness of the penalty, In Enmund, for example, the Court examined the circumstances of the defendant's crime in great detail, 458 U.S., at 597-598 (plurality opinion); id, at 603

(POWELL, J., concurring in judgment in part and dissenting in part). In Robinson, the emphasis was placed on the nature of the "crime." 370 U.S. at 666-667. And in Weems, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U.S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, e.g., Coker, 433 U.S., at 598 (plurality opinion); Weems, 217 U.S., at 366-367. Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in Enmund the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U.S., at 795-796. The Weems court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U.S., at 380-381. Third, the courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. [463 U.S. 277, 292] In Enmund the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant [such as Enmund] to be sentenced to die." 458 U.S., at 792. Even in those jurisdictions, however, the death penalty supported its conclusion. Id., at 796-797, n.22. The analysis in Coker was essentially the same. 433 U.S., at 593-597. And in Weems the Court relied on the fact that , under Federal law, a similar crime was punishable by only two years' imprisonment and a fine. 217

U.S., at 380. Cf. Trop v. Dulles, 356 U.S. 86, 102-103 (1958)(plurality opinion). In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (I) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." **Solem v. Helm,** id., at 295.

54. Because the trial court failed to engage in any proportionality analysis or consider the objective factors declaimed in **Solem,** the matter should be remanded to the trial court.

55. **Conclusion.**

56. The trial court erred when it failed to issue a special verdict form pursuant to N.D.Cent.Code § 12.1-20-03.1(2).

57. There was insufficient evidence to support the guilty verdict.

58. The trial court erred when it refused to consider Gomez's challenge to the ethnic and racial makeup of the jury panel and jury.

59. The sentence imposed by the Court violates the Eighth Amendment prohibition against cruel and unusual punishment by being disproportionate to the crime.

Dated this 4th day of August, 2010.

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CERTIFICATE OF SERVICE

I certify that on the 4th day of August, 2010, a copy of the Brief of Appellant and Appendix to Brief of Appellant was served by electronic mail upon:

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/s/ Kent M. Morrow

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