

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff and Appellee,)	Supreme Court No. 20120375
)	
vs.)	District Court No. 18-2011-CR-02656
)	
Adam Scott Hamilton,)	
)	
Defendant and Appellant.)	

ON APPEAL FROM THE CRIMINAL JUDGMENT ENTERED
OCTOBER 10, 2012 BY THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JUDGE JOEL MEDD PRESIDING

BRIEF OF APPELLEE

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Statement of the Issues

- I. Whether the district court committed obvious error when the Defendant was substantially advised his rights and the district court complied with Rule 11 of the North Dakota Rules of Criminal Procedure prior to accepting his plea of guilty?

Statement of the Case

[¶1] On December 13, 2011, the Defendant was charged with Continuous Sexual Abuse of a Child and appeared before the court for his bond hearing. Bond Hearing Tr. 2, Dec. 13, 2011. On February 21, 2012, the Defendant appeared before the court for his arraignment hearing. Arraignment Hearing Tr. 2, Feb. 21, 2012. On May 24, 2012, at the pre-trial conference, the Defendant entered an open guilty plea. Pre-Trial Conf. Tr. 3, May 24, 2012. On October 1, 2012, the Defendant was sentenced to thirty years in prison. Sentencing Hearing Tr. 96, Oct. 1, 2012.

[¶2] On November 9, 2012, the Defendant filed a notice of appeal. (Appellant's App. at 4). Transcripts were ordered by the Defendant. (Appellee's App. at 3-4). The Defendant raises two issues on appeal. The issues both relate to whether the district court was in compliance with Rule 11 of the North Dakota Rules of Criminal Procedure. However, the Defendant only ordered two transcripts out of the multiple hearings that were held in this case. The Defendant's brief before this Court relies solely on those two transcripts.

Statement of Facts

[¶3] On December 12, 2011, the Defendant's wife called law enforcement after her minor son, H. H., stated the Defendant engaged in anal sex with him. Aff. of Probable Cause 1, Dec. 12, 2011. (Appellee's App. 1-2). The Defendant was Mirandized and agreed to speak to law enforcement. (Appellee's App. 1-2). The Defendant admitted to perpetrating sexual acts upon minor male H. H. a minimum of six times over a course of several months. See (Appellee's App. 1-2).

[¶4] On December 13, 2011, the Defendant was charged with Continuous Sexual Abuse of a Child in violation of Sections 12.1-20-03.1(1) and 12.1-32-01(1) of the North Dakota Century Code, a Class AA Felony. That same day, he appeared before the court for a bond hearing. Bond Hearing Tr. 2, Dec. 13, 2011. At the hearing, the court verified that the Defendant had a copy of the Information. Id. The court engaged in the following discussion with the Defendant:

The Court: And Mr. Hamilton, it alleges that between 2005 and December 12th of 2011, you did engage in any combination of three or more sexual acts or sexual contacts with a juvenile minor, H.H., who was under the age of 15 years during a period of three or more months when Adam Scott Hamilton was at least 22 years of age at the time of the offense. This taking place in Grand Forks County.

This is a AA felony. It carries a maximum penalty of life imprisonment and also carries a minimum - - a fine of up to \$10,000.

Additionally, Mr. Hamilton, if you plead guilty or are convicted of this charge, you will be required to register as an offender against children and that can be a lifetime registration.

Do you understand that, Mr. Hamilton?

Defendant: Yes, your Honor.

The Court: And Mr. Hamilton, this is a criminal offense. I'm going to go over the rights that you have on a criminal charge.

...

You have the right to remain silent and any statement that you make may be used against you.

You have the right to the assistance of an attorney before you make any statement or answer any questions.

You have the right to be represented by an attorney at each and every step of the proceedings. If you cannot afford an attorney and a jail sentence may be imposed, then you are entitled to a court appointed attorney with the understanding you may have to reimburse the State of North Dakota for those attorney's fees.

You have the right to be released from custody by posting bail.

You have the right to have a jury trial on the charge and any verdict of guilty must be unanimous. You may give up your right to a jury trial and have your case tried to the judge if the prosecuting attorney consents and the judge approves.

You have the right to a speedy and public trial, the right to confront and cross-examine the witnesses against you and the right to the subpoena power of the state for the purpose of summoning those witnesses in your own behalf.

You are presumed innocent of the charge and the burden is on the State to establish your guilt, if any, by proof beyond a reasonable doubt.

Mr. Hamilton, since this is a felony charge you do have the right to have a preliminary hearing on the charge. That is a probable cause hearing. At that hearing the State must establish probable cause the crime was committed and probable cause that you committed the crime.

If the State is able to establish probable cause, then there will be an arraignment where you'll be asked to enter a plea of either guilty or not guilty. If the State is unable to establish probable cause, then the charge will be dismissed.

And Mr. Hamilton, if there is probable cause established, after the arraignment there'll be a pretrial conference and if the case isn't resolved at the pretrial conference stage then it will be set for trial.

Do you have any questions at all about these rights, Mr. Hamilton?

Defendant: No, Your Honor.

Bond Hearing Tr. 2-4, Dec. 13, 2011.

[¶5] On February 21, 2012, Defendant was arraigned. Arraignment Hearing Tr. 2, Feb. 21, 2012. At the arraignment, Defendant appeared with counsel. Id. The court verified that Defendant was able to hear and understand the proceedings. Id. The court confirmed that Defendant had a copy of the Information. Id. The court advised Defendant of the charge and the classification for the charge. Id. The court verified that Defendant understood the charge and his rights. The court further verified that Defendant was previously informed of the maximum penalty imposable by law. Id. Defendant entered a plea of not guilty. Arraignment Hearing Tr. at 3, Feb. 21, 2012.

[¶6] At the pre-trial conference on May 24, 2012, the following exchange occurred:

The Court: And Mr. Hamilton, are you able to hear and understand the proceedings this morning?

Defendant: Yes, Your Honor.

The Court: This is a pretrial for this case. The Defendant is charged with continuous sexual abuse of a child as a class AA felony.

Mr. Hankey, how does the Defendant wish to proceed?

Hankey: Your Honor, I have thoroughly discussed Mr. Hamilton's options. We were given a plea agreement by Mr. McCarthy and the State. It's my client's position he'd like to enter

into an open plea of guilty knowing his options and so he'll be entering an open plea of guilty today.

The Court: Mr. McCarthy, the State forwarded a plea agreement offer to Mr. Hankey, is that correct?

McCarthy: That's correct, Your Honor.

The Court: Mr. Hamilton, your attorney's indicating that you reviewed, he reviewed the plea agreement offer with you, is that correct?

Defendant: Yes, sir. Yes, Your Honor.

The Court: And Mr. Hankey is indicating that you reviewed it and it's your desire to enter an open plea to the charge, is that correct?

Defendant: Yes, Your Honor.

The Court: And you understand what an open plea means is the Court would have an option of sentencing you to the maximum potential sentence or, anything less than that. You understand that?

Defendant: Yes, Your Honor.

The Court: With that understanding, how would you plead to this charge of continuous sexual abuse of a child?

Defendant: Guilty, Your Honor.

The Court: Is this plea of guilty freely and voluntarily made?

Defendant: Yes, Your Honor.

The Court: And we'll go over this more thoroughly at the time of the sentencing but at this point do you agree that you committed the offense as charged in the Information?

Defendant: Yes, Your Honor.

The Court: And the charge here is that you engaged in a combination of three or more sexual acts or sexual contacts with a juvenile minor, initials H.H., who was under the age of 15 during a period of three or more months when you were at

least 22 years of age at the time of the offense and that the minor was under the age of 15. And that this took place in Grand Forks County. That's what's specifically alleged in the Information. You understand that.

Defendant: Yes, Your Honor.

The Court: And you admit that you committed the offense as indicated that I just outlined.

Defendant: Yes, Your Honor.

The Court: The Court finds that the plea of guilty is freely and voluntarily made and there's a factual basis for the plea of guilty. The Court will accept the plea of guilty.

Transcript of Pretrial Conference 2-4, May 24, 2012.

[¶7] At the sentencing hearing on October 1, 2012, Judge Joel Medd entered a Criminal Judgment sentencing Defendant to 30 years incarceration. Sentencing Hearing Tr. 96-97, October 1, 2012. On October 8, 2012, Notice of Appeal of the Final Judgment of Conviction was filed on the Defendant's behalf by his defense counsel, Mr. Hankey. Notice of Appeal, Oct. 8, 2012.

[¶8] Transcripts were ordered by the Defendant. (Appellee's App. at 3-4). The Defendant failed to order transcripts of all the Defendant's hearings. (Appellee's App. at 3-4). Defendant relies on only two transcripts when submitting his appellate brief to this Court. However, as set forth above Defendant had multiple hearings in this case. In order to provide a complete record, the State ordered and received transcripts from the bond hearing on December 13, 2011, and the arraignment from February 21, 2012.

Law and Argument

I. Issues not previously raised at the district court level cannot be raised for the first time on appeal.

[¶9] It is well-settled case law that this Court does not hear issues raised for the first time on appeal. State v. Vondal, 2011 N.D. 186, ¶5, 803 N.W.2d 578, (citing State v. Keller, 550 N.W.2d 411, 412 (N.D. 1996)). This Court has stated that a narrow exception to this rule is that an obvious error or defect that affects substantial rights may be considered even though it was not brought to the court’s attention. Id. Further, the power to notice obvious error is exercised cautiously and only in exceptional circumstances where the defendant has suffered a serious injustice. Id. Rule 52(b) of the N.D.R.Crim.P. states: “An obvious error or defect that affects substantial rights may be considered even though it was not brought to the court’s attention.” Obvious error is only established if the Defendant demonstrates “(1) error, (2) that is plain, and (3) that affects substantial rights.” State v. Myers, 2009 ND 141, ¶ 10, 770 N.W.2d 716 (citing State v. Gibbs, 2009 ND 44, ¶ 12, 763 N.W.2d 430 (quoting State v. Olander, 1998 ND 50, ¶ 14, 575 N.W.2d 658)). An alleged error only constitutes obvious error if there is “a clear deviation from an applicable legal rule under current law.” State v. Vandehoven, 2009 ND 165, ¶ 8, 772 N.W.2d 603 (citing State v. Blurton, 2009 ND 144, ¶ 8, 770 N.W.2d 231). If the Defendant does not establish obvious error, the failure to object “operates as a waiver on the issue on appeal.” State v. Fickert, 2010 ND 61, ¶ 7, 780 N.W.2d 670 (citing State v. Bethke, 2009 ND 47, ¶ 25, 763 N.W.2d 492).

[¶10] In the case at hand, Defendant alleges that the district court failed to substantially comply with Rule 11(b)(1) of the North Dakota Rules of Criminal Procedure and that the district court failed to comply with Rule 11(b)(3) in establishing a

factual basis for the guilty plea. However, Defendant has never raised either of these issues before the district court. Defendant failed to object during the change of plea hearing. Defendant failed to file a motion with the district court to withdraw his plea of guilty. As set forth in State v. Vondal, issues not previously raised at the district court level cannot be raised for the first time on appeal. The only narrow exception in which the Defendant's issues can be considered by this Court would be exceptional situation in which obvious error occurred. In this case, there is no obvious error.

A. Defendant's guilty plea was entered knowingly and voluntarily as the court complied with Rule 11(b)(1) in substantially advising him of his rights.

[¶11] The purpose of Rule 11 is to ensure defendants are entering informed pleas of guilty. N.D.R.Crim.P. 11, Explanatory Note. The list of informative requirements in Rule 11(b)(1) facilitate informed guilty pleas. Rule 11(b)(1) prohibits the court from accepting a guilty plea if the defendant does not understand that he or she has:

(A) the right to plead not guilty, or having already so pleaded, to persist in that plea; (B) the right to a jury trial; (C) the right to be represented by counsel at trial and at every other stage of the proceedings and, if necessary, the right to have the counsel provided under Rule 44; (D) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses.

N.D.R.Crim.P. 11(b)(1)(A)-(D). Rule 11(b)(1) also prohibits the court from accepting a guilty plea if the defendant does not understand that (E) these trial rights are waived by the court accepting the defendant's guilty plea; "(F) the nature of each charge to which the defendant is pleading; (G) any maximum possible penalty, including imprisonment, fine, and mandatory fee; (H) any mandatory minimum penalty; and (I) the court's authority to order restitution." N.D.R.Crim.P. 11(b)(1)(E)-(I).

[¶12] In order to ensure defendants enter informed guilty pleas, the proceedings must be recorded. State v. Berger, 1999 ND 46, ¶ 6, 590 N.W.2d 884, (citing State v. Pitman, 427 N.W.2d 337, 343 n.5 (N.D. 1988)). Rule 11(f) states: “A verbatim record of the proceedings at which the defendant enters a plea must be made. If there is a plea of guilty, the record must include the court’s inquiries and advice to the defendant required under Rule 11(b) and (c).” N.D.R.Crim.P. 11(f). According to the Explanatory Note, Rule 11(f) does not require courts to go over the requirements of subdivision (b) and (c) at the proceeding where the defendant enters a guilty plea. N.D.R.Crim.P. 11, Explanatory Note.

[¶13] To ensure a voluntary plea of guilty is entered by the defendant, courts “must substantially comply with the procedural requirements” of Rule 11. Abdi v. State, 2000 ND 64, ¶ 12, 608 N.W.2d 292 (citing State v. Abdullahi, 2000 ND 39, ¶ 9, 607 N.W.2d 561). Substantial compliance regarding Rule 11 does not require the “court’s advice to follow a ritualistic predetermined formality.” Abdi, 2000 ND 64, ¶ 12, 608 N.W.2d 292 (citing Abdullahi, 2000 ND 39, ¶ 9, 607 N.W.2d 561). Rule 11 does not require courts to go over every right at each proceeding. State v. Gunwall, 522 N.W.2d 183, 185 (N.D. 1994) (holding a “court is not required to readvise a defendant of each of his rights at a change of plea hearing, provided . . . that the defendant was properly advised at arraignment, and that the defendant . . . recalls that advice.”); Abdi, 2000 ND 64, ¶ 15, 608 N.W.2d 292 (holding that “a trial court is not required to readvise a defendant of each of his rights under N.D.R.Crim.P. 11(b), if the court determines the defendant previously was properly advised of those rights and recalls the advice.”). Even a group explanation of the rights listed under Rule 11, rather than a personal explanation

to each defendant, constitutes compliance. Abdi, 2000 ND 64, ¶ 15, 608 N.W.2d 292 (citing State v. Parisien, 469 N.W.2d 563, 566 (N.D. 1991)). This Court has made it clear “that it is sufficient to satisfy due process and the procedural mandates of Rule 11, N.D.R.Crim.P., if knowledge on the part of the defendant of the rights waived by pleading guilty ‘is clearly reflected from the whole record, not just the interrogation of the defendant by the trial court.’” State v. Hagemann, 326 N.W.2d 861, 866 (N.D. 1982) (quoting State v. Storbakken, 246 N.W.2d 78, 84 (N.D. 1976)). The confirmation of whether a defendant knowingly and voluntarily enters a guilty plea is made upon the “totality of the circumstances, not specific recitals.” State v. Hendrick, 543 N.W.2d 217, 219 (N.D. 1996).

[¶14] In State v. Hagemann, the district court advised the defendant of the “contents of the criminal information and . . . informed [him] of his constitutional rights.” 326 N.W.2d at 863. At the arraignment the defendant, “[r]epresented by court-appointed counsel,” entered a not guilty plea. Id. On the date of the trial, the defendant changed his not guilty plea to guilty. Id. During the change of plea hearing, the court asked the defendant: (1) “if he had any questions concerning the consequences of his actions,” (2) various questions “concerning his understanding of the plea agreement and sentencing guidelines,” and (3) “if he could remember the contents of the criminal information which was read to him at the September 2, 1981, arraignment.” Id. The defendant communicated to the court that he had no questions regarding the consequences of his actions, the plea agreement, the possible sentences that could be imposed, or the contents of the criminal information read at the arraignment. Id. The court did not “re-advise [the defendant] of his constitutional rights.” Id.

[¶15] On appeal, this Court concluded that the whole record, including the arraignment and change of plea hearing, showed “substantial compliance with Rule 11(b).” Id. at 868. This Court reasoned the record reflected that “[the defendant] was informed of all his necessary rights” at the arraignment and that “the district court did determine that the defendant understood these rights and the charge brought against him.” Id. at 865-66. This Court also focused on the fact that the defendant’s defense counsel “indicated to the court that he believed that [the defendant] understood the consequences of his guilty plea because defense counsel had discussed the situation with [the defendant] immediately prior to the . . . [change of plea] hearing and on previous occasions.” Id. at 868.

[¶16] Here, as in State v. Hagemann, the entire record, including the December 13, 2011, bond appearance, February 21, 2012, arraignment, and May 24, 2012, pre-trial conference, establishes the court substantially complied with North Dakota Rule of Criminal Procedure 11(b).

[¶17] At the December 13, 2011, in-custody appearance the requirements of Rule 11(b)(1) were met. The court explained the crime the Defendant was charged with and the maximum penalties, as well as the minimum penalties, associated with the crime. Bond Hearing Tr. 2, Dec. 13, 2011. This satisfied Rule 11(b)(1)(F)-(H). The court stated:

Mr. Hamilton, this is a criminal offense. I’m going to go over the rights that you have on a criminal charge. . . . You have the right to remain silent and any statement that you make may be used against you. You have the right to the assistance of an attorney before you make any statement or answer any questions. You have the right to be represented by an attorney at each and every step of the proceedings. If you cannot afford an attorney and a jail sentence may be imposed, then you are entitled to a court appointed attorney with the understanding you may have to reimburse the

State of North Dakota for those attorney's fees. You have the right to be released from custody by posting bail. You have the right to a jury trial on the charge and any verdict of guilty must be unanimous. You may give up your right to a jury trial and have your case tried to the judge if the prosecuting attorney consents and the judge approved. You have the right to a speedy and public trial, the right to confront and cross-examine the witnesses against you and the right to the subpoena power of the state for the purpose of summoning those witnesses in your own behalf. You are presumed innocent of the charge and the burden is on the State to establish your guilty, if any, by proof beyond a reasonable doubt. Mr. Hamilton, since this a felony charge you do have the right to have a preliminary hearing on this charge. That is a probable cause hearing. At that hearing the State must establish probable cause the crime was committed and probable cause that you committed the crime. If the State is able to establish probable cause, then there will be an arraignment where you'll be asked to enter a plea of either guilty or not guilty. If the State is unable to establish probable cause, then the charge will be dismissed.

Id. at 3-4. The court also explained the various proceedings that would occur if probable cause was established, such as an arraignment, followed by a pre-trial conference, then followed by a trial. Id. at 4. The court verified Defendant's understanding of his rights. Id. This satisfied Rule 11(b).

[¶18] At the February 21, 2012, arraignment hearing the court asked the Defendant whether he understood the charges against him and whether he remembered his rights from the previous hearing. Defendant indicated he understood the charges and remembered his rights. Arraignment Hearing Tr. 2-3, Feb. 21, 2012. Here, the court again satisfied Rule 11(b).

[¶19] It should be noted that the Defendant's entire argument on appeal relates to the advisement of his rights and the alleged deficient compliance with Rule 11 of the North Dakota Rules of Criminal Procedure. Interestingly, the Defendant fails to order transcripts of the two hearings in which Rule 11 of the North Dakota Rules of Criminal Procedure was read almost verbatim.

[¶20] At the May 24, 2012, pre-trial conference, the court satisfied Rule 11(b)(1)(F) by asking the Defendant:

And the charge here is that you engaged in a combination of three or more sexual acts or sexual contacts with a juvenile minor, initials H. H., who was under the age of 15 during a period of three or more months when you were at least 22 years of age at the time of the offense and that minor was under the age of 15. And that this took place in Grand Forks County. That's what's specifically alleged in the Information. You understand that.

Pre-Trial Conf. Tr. 4, May 24, 2012. The court satisfied Rule 11(b)(1)(G) when the court asked the Defendant: "And you understand what an open plea means is the Court would have an option of sentencing you to the maximum potential sentence or, or anything less than that." Pre-Trial Conf. Tr. 3, May 24, 2012.

[¶21] Additionally, the court asked the Defendant's defense counsel, Mr. Hankey, "how does the Defendant wish to proceed?" Pre-Trial Conf. Tr. 2, May 24, 2012. Mr. Hankey answered with: "Your Honor, I have thoroughly discussed Mr. Hamilton's options. We were given a plea agreement by Mr. McCarthy and the State. It's my client's position he'd like to enter into an open plea of guilty knowing his options and so he'll be entering an open plea of guilty today." Pre-Trial Conf. Tr. 2-3, May 24, 2012. In light of Hagemann, Mr. Hankey's indication of a thorough discussion is additional corroboration of Defendant's guilty plea being knowingly and voluntarily given.

B. The court accepted the Defendant's guilty plea with a factual basis that was consistent with the requirements of Rule 11(b)(3).

[¶22] North Dakota Criminal Procedure Rule 11(b)(3) states "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." N.D.R.Crim.P. 11(b)(3).

[¶23] A court may determine “a factual basis exists from anything that appears on the record.” Mackey v. State, 2012 ND 159, ¶ 13, 819 N.W.2d 539 (quoting United States v. Mastrapa, 509 F.3d 652, 660 (4th Cir. 2007)). A court relying on the whole record to find that a factual basis exists “is consistent with the language of [Rule] 11(b)(3).” Mackey, 2012 ND 159, ¶ 13, 819 N.W.2d 539. This Court reasoned that examination of the entire record may be relied upon including “the facts gleaned from the plea agreement and plea colloquy, the factual findings relied upon in the presentence report (‘PSR’), as well as ‘fairly drawn’ inferences from the evidence presented both post-plea and at the sentencing hearing.” Id. (quoting United States v. Trejo, 610 F.3d 308, 317 (5th Cir. 2010)). Presentence reports can be used to establish a factual basis “[b]ecause judgment is not entered until after sentencing, a court may defer the finding of a factual basis for the plea until that time.” Mackey, 2012 ND 159, ¶ 13, 819 N.W.2d 539 (quoting United States v. Martinez, 277 F.3d 517, 522 n.4 (4th Cir. 2002)). Information and evidence that becomes available between the court’s acceptance of a plea of guilty and the sentencing, may be used to find that a factual basis exists for a plea of guilty. Mackey, 2012 ND 159, ¶ 13, 819 N.W.2d 539 (quoting United States v. Hildenbrand, 527 F.3d 466, 475 (5th Cir. 2008)).

[¶24] The North Dakota Supreme Court has identified three methods for establishing a factual basis:

First the court could inquire directly of the defendant concerning the performance of the acts which constituted the crime. Secondly, the court could allow the defendant to describe to the court in his own words what had occurred and then the court could question the defendant. Thirdly, the court could have the prosecutor make an offer of proof concerning the factual basis for the charge.

State v. Bates, 2007 ND 15, ¶ 8, 726 N.W.2d 595 (quoting Kaiser v. State, 417 N.W.2d 175, 178 (N.D. 1987)). There are additional ways to establish a sufficient factual basis in compliance with Rule 11(b)(3). In an effort to find a factual basis, a court is free to make “[a]n inquire . . . of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case.” Mackey, 2012 ND 159, ¶ 12, 819 N.W.2d 539 (quoting Fed. R. Crim. P. 11, Advisory Committee Notes (1974 Amends.)). A factual basis may even be established for a guilty plea even when a defendant claims he is innocent or he has no memory of the crime. Hagemann, 326 N.W.2d at 869.

[¶25] In this case, a factual basis, as required under Rule 11(b)(3) was established through the entire record. At the bond hearing on December 13, 2012, the court advised Defendant of the allegations:

[E]ngage[d] in any combination of three or more sexual acts or sexual contacts with a juvenile minor, H. H., who was under the age of 15 years during a period of three or more months when [the Defendant] was at least 22 years of age at the time of the offense.

Bond Hearing Tr. 2, Dec. 13, 2011.

[¶26] At the pre-trial conference, the court ensured the Defendant was clear that he was pleading guilty to the charge by stating:

[Y]ou engaged in a combination of three or more sexual acts or sexual contacts with a juvenile minor, initials H. H., who was under the age of 15 during a period of three or more months when you were at least 22 years of age at the time of the offense and that minor was under the age of 15.

Pre-Trial Conf. Tr. 4, May 24, 2012. The Defendant admitted to these facts. Id.

[¶27] In light of Mackey, the information included in the pre-sentence investigation can be used by the court to determine a factual basis exists because it was

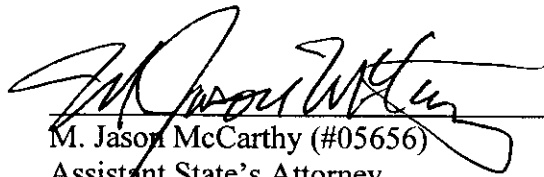
available prior to the final judgment being entered. At the sentencing hearing, the court also made it clear that it had thoroughly reviewed the pre-sentence investigation report as it was used to justify the thirty year prison sentence. Sentencing Hearing Tr. 6, 95-97, Oct. 1, 2012.


[¶28] A factual basis was established as the court specified the facts and crime and verified Defendant's understanding.

Conclusion

[¶29] For the foregoing reason, the State respectfully requests that this Court AFFIRM the judgment below.

Respectfully submitted this 15th day of March, 2013.


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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)
)
Plaintiff and Appellee,) Supreme Court No. 20120375
)
vs.) District Court No. 18-2011-CR-02656
)
Adam Scott Hamilton,)
)
Defendant and Appellant.)

ON APPEAL FROM THE CRIMINAL JUDGMENT ENTERED
OCTOBER 10, 2012 BY THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JUDGE JOEL MEDD PRESIDING

AFFIDAVIT OF SERVICE BY E-MAIL

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 1st day of March, 2013, she served via e-mail true copies of the following documents:

BRIEF OF APPELLEE
APPENDIX OF APPELLEE
NOTICE OF CERTIFIED STUDENT REPRESENTATION

and that said email was served on the address of:
Blake D. Hankey and said e-mail address is: bhankeylaw@gmail.com
jhankeylaw@gmail.com

Sheri Heister
States Attorney's Office

Subscribed and sworn to before me this 1st day of March 2013.

Mary Ann Lindgren
Notary Public

sh
SA#120328

