

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20130138

State of North Dakota,

Plaintiff-Appellee

- vs -

Lance Mossey,

Defendant-Appellant

APPEAL FROM THE CRIMINAL JUDGMENTS
EAST CENTRAL JUDICIAL DISTRICT
WARD COUNTY CR. NO. 51-2012-CR-01016
THE HONORABLE DOUGLAS L. MATTSON, PRESIDING

BRIEF

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ABBREVIATIONS

Transcript - Tr

Line - L

Page - P

STATEMENT OF THE ISSUES

[¶1] ISSUES:

I. Was Ward County without any venue to try this case because all acts and elements of the crime of luring minors by computer were committed in Cass County?

II. In this case were all of the 6 essential elements of the crime of luring minors by computer proven?

III. After the prosecutor in her closing argument said “Sergeant Holter is out there doing this, trying to protect children from this, so that it doesn’t happen to an actual 13 year old out there” could the jury in this case be reasonably expected to follow the trial judge’s instruction to disregard the above prosecutor’s statement?

NATURE OF THE CASE

[¶2] Defendant-Appellant, Lance Mossey (Mr. Mossey) was arrested on May 12, 2012 in Fargo, North Dakota for luring minors by computer.

[¶3] Mr. Mossey was transferred to Ward County where he was on May 15, 2012 charged with Luring Minors by Computer.

[¶4] On May 15, 2012, Mr. Mossey made his initial appearance in the district court before district judge Douglas L. Mattson on the charge of Luring Minors by Computer.

[¶5] On June 19, 2012 Mr. Mossey had a Preliminary Hearing/Arrestment before district judge, Douglas L. Mattson on the charge of Luring Minors by Computer.

[¶6] Mr. Mossey's jury trial on the charge of Luring Minors by Computer began on January 9, 2012.

[¶7] That jury trial ended on January 10, 2012 when the jury found Mr. Mossey guilty of the charge of Luring Minor's by Computer.

[¶8] Judgment was entered on May 1, 2013.

[¶9] Mr. Mossey timely appealed the judgment on May 1, 2013.

[¶10] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶11] In this case Defendant-Appellant, Lance Mossey (Mr. Mossey) was at all times relevant to this case in a room at Motel 6 in Fargo, North Dakota. While in that room he was using his laptop computer. His laptop computer was turned onto a chat room listed as an adult website. While in this chat room on May 11, 2013 and May 12, 2013 he made contact with a Bethany Hanson who said she was 13 years old and in

Minot, North Dakota. The person claiming to be Bethany Hanson was Sergeant Mark Holter who was in the Ward County Sheriff's Office which is located in Ward County courthouse in Minot, North Dakota. Tr. P. 133, L.1 to P.134, L.25.

[¶12] Sergeant Mark Holter (Sergeant Holter) was at all times relevant to this case in the Ward County courthouse, at the Sheriff's office using a computer. Sergeant Holter had the computer turned onto the same chat room as the one Mr. Mossey was on and he was chatting with Mr. Mossey. Sergeant Holter while chatting with Mr. Mossey claimed to be a 13 year old girl named Bethany Hanson. Tr.P.36,L.11 to P.37,L.2 and P.53, L.6&7.

[¶13] Whenever ages were discussed during the chats Mr. Mossey was M, 50, Fargo (which means male, age 50 and located in Fargo, North Dakota) and Sergeant Holter was 13F Minot (which means female, age 13 and located in Minot, North Dakota) Tr.,P.55, L.2-12.

[¶14] Sergeant Holter sent Mr. Mossey a picture of a female during the first chat that was supposed to be Bethany Hanson. The girl in that picture was not Bethany Hanson but was a female Ward County Deputy Sheriff when she was about 13. Tr. P.58, L.13-17.

[¶15] When a person chats, he or she can see the person he or she is chatting with if that person wants to appear on the web camera. Sergeant Holter because he was claiming to be 13 years old, Bethany Hanson never appeared on the web camera. Tr. P. 65., L.11-22. Mr. Mossey did appear on the web camera and was seen doing different things by Sergeant Holter. Tr. P.66, L.1-4.

[¶16] The first chat on May 11, 2012 between Mr. Mossey and Sergeant Holter was described a benign. During that chat on May 11, 2012 Mr. Mossey believed he was chatting with a teenager. On the chat that took place on May 12, 2012, Mr Mossey began to think he wasn't chatting with a teenager. The first thing that caused him to believe he wasn't chatting with a teenager was a picture he received from Sergeant Holter that had an extension on it. This caused Mr. Mossey to think about other things that were said, occurred, and didn't occur during the chats and he decided he wasn't chatting with a teenager. Tr. P.150, L.7 to P. 139, L.6.

[¶17] The chat on May 12, 2012 started to involve sex and so did the images of Mr. Mossey that appeared on the web camera. Tr. P.72, L.10-22. During this time the web camera showed pictures of Mr. Mossey taking off his shorts and exposing his penis. Once his penis was exposed Mr. Mossey wanted to know how it made Sergeant Holter feel. Mr. Mossey also wanted to know if Sergeant Holter was aroused. Tr. P.75, L.11-23 – Obviously there was no arousal because the person answering Mr. Mossey's arousal question was Sergeant Holter.

[¶18] During the above chat Mr. Mossey said he was aroused and his penis was getting hard. He asked the person on the other end of the computer to take off her shorts and to touch her vaginal area. Then Mr. Mossey started to masturbate. Tr. P.83, L.9-12.

[¶19] When the chat on May 12, 2012 ended Sergeant Holter called the Fargo Police and asked them to go to the Motel 6 in Fargo, see if there was a Lance Mossey there, and if there was arrest him for luring a minor by computer. The Fargo Police then went to the Motel 6, found Mr. Mossey and arrested him. Tr., P.84, L.7 to P.85, L1.

ARGUMENT

[¶20] ISSUE I. Was Ward County without any venue to try this case because all acts and elements of the crime of luring minors by computer were committed in Cass County?

[¶21] In the case now before the court the prosecutor when she charged Mr. Mossey with violating NDCC 12.1-20-05.1 decided the language to be used in the Complaint and Information. That language is found in the Tr. P.23, L.23 to P.25, L.12.

[¶22] From that Information the trial court drafted the jury instruction that contained the six essential elements that the State had to prove beyond a reasonable doubt before a jury could convict Mr. Mossey of violating NDCC 12.1-20-05.1.

[¶23] Those six essential elements were:

1. On or about May 11, 2012, in Ward County, North Dakota, the Defendant, Lance Mossey knowingly;
2. Made a communication that, in whole or in part, implicitly or explicitly discussed or depicted actual or simulated nudity;
3. Used a computer communication system or other electronic means that allowed the input, output, examination, or transfer of computer data or computer programs from one computer or electronic device to another to initiate or engage in this type of communication;
4. To communicate with “Bethany Hanson” whom the Defendant, Lance Mossey, believed was a minor.
5. Through this communication, the Defendant, Lance Mossey, importuned, invited, or induced “Bethany Hanson” to engage in a sexual

performance, obscene sexual performance, or sexual conduct for the Defendant's benefit, satisfaction, lust, passions, or sexual desires; and

6. The Defendant was an adult twenty-two years old or older and reasonably believed the minor was under fifteen years of age.

[¶24] The proof required of the State as to each of the above six elements of the offense charged are found at Tr. P.27, L.21-25. "Presumption of innocence and burden of proof. The Defendant has pled not guilty. Before the Defendant can be convicted the State must prove all the essential elements of the offense beyond a reasonable doubt."

[¶25] In the case now before the court Defendant, Lance Mossey, at the end of the State's case made a Rule 29 Motion. Tr. P.128, L.24 to P.29, L.12. Such a motion challenged the sufficiency of the evidence. That Motion was denied by the court. Tr., P. 130, L.2-11.

[¶26] According to State vs Kunkel 548 N.W.2d 773 (ND 1996). Our standard of review is well established for cases in which a defendant challenges the sufficiency of the evidence to support a criminal conviction:

"In reviewing the sufficiency of the evidence to convict, we look only to the evidence most favorable to the verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction. A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn

in its favor.”State v. Schill, 406 N.W.2d 660, (N.D. 1987) (citation omitted).

[¶27] The above standard of review applies to issues I and II.

[¶28] Mr. Mossey’s Rule 29 Motion questioned the sufficiency of the evidence to establish all of the six essential elements that are set out above. To establish the proof of essential elements 1, 2, 3, 4, 5 and 6 the State has to prove that Mr. Mossey was in Ward County when he knowingly made a communication, used a computer, communicated with “Bethany Hanson”; through this communication importuned, invited or induced Bethany Hanson and that he believed the minor was under fifteen years of age.

[¶29] Because of the above the proper venue for his case was Cass County because at all times relevant to the charge in this case Mr. Mossey was at a room at a Motel 6 that is located in Fargo and Fargo is located in Cass County.

[¶30] The issue of venue was raised in State vs Rasmussen, 365 NW2d 481 (ND 1985). In Rasmussen “the jury was instructed that before it could find Rasmussen” guilty it had to find beyond a reasonable doubt that the crime was committed in Mercer County.

[¶31] In the case now before the court the language in element 1 is “that on or about May 11, 2012 in Ward County North Dakota the Defendant, Lance Mossey knowingly;” This language requires the jury to find not just that a crime was committed but that Mr. Mossey was in Ward County when the crime was committed. This the jury can’t do because at all times relevant to the charge in this case Mr. Mossey was in Cass County. Therefore the only and proper venue for his case is Cass County.

[¶32] Venue is set out in Rule 18 NDR of CivP. **Rule 18. Location of trial or hearing.** A criminal trial must be in the county where the offense was committed, unless

a statute or these rules permit otherwise. The initial appearance, arraignment, or other hearing or proceeding may take place outside the county of venue.

[¶33] NDCC 29-03-04 is an exemption to Rule 18 NDR of Crim P.

According to Section 29-03-04 of the North Dakota Century Code:

“When a crime or public offense is committed in part in one county and in part in another, or when the acts or effects thereof constituting, or requisite to the consummation of, the offense occur in two or more counties, the Jurisdiction is in either or any of said counties.”

[¶34] The fact that a defendant has a right to be tried in the district where the crime is alleged to have been committed is set out in Article 6 of United States Constitution:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.”

[¶35] The venue problems with element 1 have already been discussed above. Because the language in element 1 requires Mr. Mossey be in Ward County, that requirement prevents the State from proving Ward County has venue in elements 2, 3, 4, 5 and 6 from being able to be proven.

[¶36] The following sets out additional reasons why essential elements 2, 3, 4, 5, and 6 must be venued in Cass County.

[¶37] Element two requires Mr. Mossey make a communication that in whole or part implicitly or explicitly discusses or depicts actual or simulated nudity. All of the communications made by Mr. Mossey in this case were made while he was in a room at Motel 6 in Fargo, North Dakota.

[¶38] Element 3 requires the use of a computer system or other electronic means that allow the input, examination or transfer of computer data or computer programs from one computer or electronic device to initiate or engage in a type of communication. The computer that Mr. Mossey had with him on May 11, 2013 was his own laptop. When Mr. Mossey used his laptop on May 11, 2013 both he and his laptop were in a room in a Motel 6 in Fargo, North Dakota.

[¶39] Element 4 requires a communication with a person Mr. Mossey believed to be a minor Bethany Hanson. All communications Mr. Mossey had with Bethany Hanson came from the room Mr. Mossey was staying which was located in a Motel 6 in Fargo, North Dakota. The person receiving the communications wasn't Bethany Hanson but an adult Sergeant Mark Holter who was an adult and located at the Sheriff's Office in Ward County. No crime was committed when Sergeant Holter received the communications from Mr. Mossey because Sergeant Holter was an adult.

[¶40] As far as the belief by Mr. Mossey that Bethany Hanson was a minor, that belief had to be in Mr. Mossey's mind and that belief had to be when Mr. Mossey was in the room at Motel 6 in Fargo, North Dakota.

[¶41] Element 5 requires Mr. Mossey to impune, invite, or induce "Bethany Hanson to engage in a sexual performance, obscene sexual performance, or sexual conduct for Mr. Mossey's benefit, satisfaction, lust, passions or sexual desires". Any

impuning, inviting or inducing by Mr. Mossey to get Bethany Hanson to engage in a sexual performance, obscene sexual performance or sexual desires all come from and was from Mr. Mossey communications when he was in a room in a Motel 6 in Fargo, North Dakota. There is no way Bethany Hanson could be importuned, invited or induced to any type of a sexual act because Bethany Hanson was really an adult male Ward County Deputy Sheriff, Sergeant Holter. Any benefit Mr. Mossey got from any satisfaction, lust, passion or sexual desire had to occur in the room he was in at the Motel 6 in Fargo, North Dakota.

[¶42] As to element 6 any belief Mr. Mossey had about Bethany Hanson being a minor had to be in his mind while he was in a room in a Motel 6 in Fargo, North Dakota.

[¶43] ISSUE II. In this case were all of the 6 essential elements of the crime of luring minors by computer proven?

[¶44] In the case now before the court the language in element 1 is “that on or about May 11, 2013 in Ward County, North Dakota the Defendant, Lance Mossey knowingly;” This language requires the jury to find not just that a crime was committed but that Mr. Mossey was in Ward County when the crime was committed. This the jury couldn’t do because at all times relevant to the charge in this case Mr. Mossey was in Cass County.

[¶45] In the case now before the court, the Ward County State’s Attorney when she drafted the Complaint and Information could have drafted the charge so that it would state that the crime was committed by Mr. Mossey while in Cass County when communicated with a girl he believed to be under fifteen years of age in Ward County. Then when the trial court, drafted a jury instruction on the 6 essential elements based on

the Information it could have drafted an essential element instruction that would have placed Mr. Mossey in Cass County communicating with a minor he believed to be younger than 15 in Ward County.

[¶46] The language used in essential element instruction 1 is “that on or about May 11, 2012 in Ward County North Dakota, the Defendant, Lance Mossey knowingly” was drafted by the trial court. The language was then approved by the State’s Attorney during the trial.

[¶47] Mr. Mossey raised the question as to sufficiency of the evidence when he made his Rule 29 Motion at the end of the State’s case. That Motion should have been granted because there is no way the State could prove Mr. Mossey was in Ward County when the crime charged in this case was being committed.

[¶48] Rasmussen Supra make it clear that a Defendant can only be found guilty when a jury instruction states that a crime was committed in a county and the Defendant was in that county. Rasmussen doesn’t allow a jury to convict when a jury instruction requires that the Defendant was present in a county and the facts of the case establish he was not present in that county. In Rasmussen the Defendant had been physically present in and Mercer County when the crime was committed.

[¶49] **ISSUE III. After the prosecutor in her closing argument said “Sergeant Holter is out there doing this, trying to protect children from this, so that it doesn’t happen to an actual 13 year old out there” could the jury in this case be reasonably expected to follow the trial judge’s instruction to disregard the above prosecutor’s statement?**

[¶50] In this case the prosecutor said in her closing argument. Tr. P.185, L.9-13.

“You might think, oh, it was Sergeant Holter it wasn’t a 13-year girl. What does it matter? It matters. Sergeant Holter is out there doing this, trying to protect children from this, so that this doesn’t happen to an actual 13 year old out there.”

[¶51] Defendant’s counsel’s response. Tr. P.184, L.14-17.

“MR. GUNDERSON: I am going to object to that, Your Honor. I am objecting to that trying to protect children argument. It’s the golden rule argument she is trying to push.”

[¶52] The trial court had counsel for both sides approach the bench and had an off record discussion. The trial court then instructed to the jury: Tr. P.184, L.20-24.

“THE COURT: Members of the jury, there has been an objection made in terms of it was categorized as a golden rule argument. I direct that you disregard that portion of the closing argument. Counsel continue.

[¶53] In this case now before the Court the Defendant’s counsel objected to the above statement of the prosecution but did not request the trial court issue a cautionary instruction to the jury. Therefore the standard of review is set out in *State vs Potter* 452 N.W.2d 71 (ND 1990):

“Generally, issues not raised before the trial court, even constitutional issues, will not be addressed on appeal. *State v. Prigge*, 437 N.W.2d 520, 521 (N.D. 1989). When, as in this case, an issue has not been properly preserved for review, our inquiry is limited to determining whether the alleged error constitutes obvious error affecting substantial rights of the defendant under Rule 52(b), N.D.R.Crim.P. *State v. Smuda*, 419 N.W.2d 166, 168 (N.D. 1988). The power to notice obvious error is exercised cautiously and only

in exceptional circumstances where a serious injustice has been suffered by the defendant. State v. Haverluk, 432 N.W.2d 871, 874 (N.D. 1988).”

[¶54] Statement such as the one made above by the prosecutor should never be made during a jury trial. Such a statement is improper and was only made by prosecutor, to get the jury to believe that a guilty verdict is the only way to protect all other 13 year olds from similar crimes.

[¶55] The above prosecutors statement is so prejudicial the trial court didn't even state what language the jury was to disregard and just said “Golden Rule”. Had the trial court used the same language the prosecutor used, the jury would have been told a second time that Sergeant Holter is protecting children so this doesn't happen to an actual 13 year old. Informing a jury a second time of the exact language of a prejudicial statement would only make it even more impossible for the jury to erase such a statement from their minds.

[¶56] The only way to stop prosecutors from making such prejudicial statements is for trial courts to sustain defense attorney's objections and grant mistrials. At the present time this isn't being done. Therefore prosecutors have no reason not to make prejudicial statements during a trial.

[¶57] The worst that can happen when a prosecutor makes a prejudicial statement is that a defense attorney will object. The trial court will then sustain the defense attorney's objection and will cure the prejudicial question with an instruction. Later if the case is appealed and the issue of improper statement is raised the appeals court will decide the action taken by the trial court cured any harm done by the prejudicial statement.

CONCLUSION

[¶58] The only county that has venue in this case is Cass County.

[¶59] The State couldn't prove an essential element of the crime, that Mr. Mossey was in Ward County when the crime was committed and therefore his Rule 29 Motion at the end of the States case should have been granted.

[¶60] The statement of the prosecutor in her closing argument about the police protecting children so that this doesn't happen to an actual 13 year old is so prejudicial Mr. Mossey should be granted a new trial.

DATED this 1st day of July, 2013.

/s/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek, ID #02908

CERTIFICATE OF SERVICE BY MAIL

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

That on July 1st, 2013, she served, by e-mail and mail a copy of the following:

APPELLANT'S APPENDIX and BRIEF

to:

Christine A. Reiersen
Ward County State's Attorney's Office
Christine.Reiersen@wardnd.com

Mailed to:

Lance Mossey
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on July, 1st, 2013, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S BRIEF .

_ /s/ Sharon Renfrow _____
Sharon Renfrow, Admin. Legal Assistant to
Benjamin C. Pulkrabek