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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUL 30 2013

State of North Dakota)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20130138
)	
vs.)	
)	
Lance Mossey,)	District Court No. 51-2012-CR-01016
)	
Defendant/Appellant.)	
)	

STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT
CRIMINAL JUDGMENT DATED APRIL 29, 2013
IN AND FOR THE COUNTY OF WARD, STATE OF NORTH DAKOTA,
NORTHWEST JUDICIAL DISTRICT
HONORABLE DOUGLAS L. MATTSON
JUDGE OF THE DISTRICT COURT, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

- I. Ward County was the proper venue to try the crime of Luring Minors by Computer against Lance Mossey.
- II. The State proved beyond a reasonable doubt the six (6) essential elements of the crime of Luring Minors by Computer.
- III. The remark made by the prosecutor in the closing argument was proper and if not proper, the Court provided an admonition to the jury to disregard the remark.

STATEMENT OF THE CASE

This is an appeal from a judgment and commitment upon a jury verdict finding the Defendant, Lance Mossey (Mossey), guilty of Luring Minors by Computer, a class B felony. Mossey was charged with Luring Minors by Computer by a criminal Complaint on May 14, 2012. (Appellant Appendix (App.) p. 4). A jury trial in this matter was held on January 9 and 10, 2013. (Transcript of Jury Trial (Tr.)). The jury returned a verdict of guilty on January 10, 2013. (App. p. 9).

At the close of the State's case, Mossey made a motion for judgment of acquittal under Rule 29 of the North Dakota Rules of Criminal Procedure. (Tr. p. 128-29, l. 24-25, 1-12). The trial court denied the motion for judgment of acquittal. (Tr. p. 130, l. 2-21). Mossey took the stand in his own defense. (Tr. p. 132-157). A sentencing hearing was held on April 29, 2013. (App. p. 10). Judgment was entered on May 1, 2013. (App. p. 10). Mossey was sentenced to seven (7) years with the North Dakota Department of Corrections and Rehabilitation, with four (4) years and six (6) months suspended. (App. p. 10). Notice of Appeal was filed on May 1, 2013. (App. p. 16).

STATEMENT OF FACTS

Mark Holter is a sergeant with the Ward County Sheriff's Department. (Tr. p. 43, l. 18-23). Sergeant Holter is also a member of Internet Crimes Against Children Task Force. (Tr. p. 45, l. 2-5). As part of the Task Force, Sergeant Holter does undercover operations where he goes online and looks for child predators. (Tr. p. 45, l. 9-12). Sergeant Holter goes online with the undercover identity of Bethany Hanson. (Tr. p. 45, l. 22). Sergeant Holter set up a Yahoo! account and Facebook account in the name of Bethany Hanson. (Tr. p. 46-47, l. 1-25, 1-6). Sergeant Holter uploaded pictures of a female deputy when she was 13 years old to his profile of Bethany Hanson. (Tr. p. 46, l. 14-17).

While online, Sergeant Holter uses Camtasia software which records, like a video, the entire computer screen. (Tr. p. 49, l. 7-10). Sergeant Holter also uses another software to do screen captures, which captures still images. (Tr. p. 49, l. 13-16). On May 11, 2012, Sergeant Holter, acting as Bethany Hanson, entered a Yahoo! chat room. (Tr. p. 47, l. 18). Sergeant Holter entered the chat room and just waited. (Tr. p. 47, l. 18-19). Sergeant Holter was using the recording software to capture any chats he would have that day. (Tr. p. 49, l. 23-25). While sitting in the chat room, Sergeant Holter received an instant message from Mossey. (Tr. p. 53, l. 9-13). The message stated hi, male, 50, Fargo. (Tr. p. 54, l. 19-21). Sergeant Holter responded by writing hey, 13, female, Minot. (Tr. p. 55, l. 6-9). The chat between Sergeant Holter, undercover as Bethany Hanson on May 11, 2012, was essentially small talk and getting to know each other. (Tr. p. 55-56, l. 15-22). During the chat on May 11, 2012, Sergeant Holter identified himself as a thirteen (13) year old girl four (4) times. (Tr. p. 56, l. 6-12). Mossey acknowledged

that he was speaking with a thirteen (13) year old during the chat. (Tr. p. 56, l. 22-24). At the end of the chat on May 11, 2012, Mossey and Sergeant Holter agreed to meet in the chat room the next day. (Tr. p. 57, l. 18-22).

On May 12, 2012, Sergeant Holter, undercover as Bethany Hanson, chatted with Mossey again. (Tr. p. 59, l. 1-2). During the chat on May 12, 2012, Sergeant Holter again identified himself as a thirteen (13) year old three (3) times. (Tr. p. 61, l. 3-9). Mossey again acknowledged that he was speaking with a thirteen (13) year old. (Tr. p. 61, l. 10-12). The chat on May 12, 2012, lasted approximately three (3) hours. (Tr. p. 61-62, l. 25, 1). During the chat, the conversation turned sexual. (Tr. p. 62, l. 11). Mossey then invited Sergeant Holter to view his web cam. (Tr. p. 67, l. 16-24). Sergeant Holter accepted the invitation and was able to then view Mossey. (Tr. p. 67, l. 7-11). Mossey then moved back from the web cam to expose his body. (Tr. p. 68, l. 14-20). Mossey then removed his underwear and exposed his penis to the web cam. (Tr. p. 68, l. 24-25). After this, the chat continued in a sexual nature. (Tr. p. 74-76, l.1-25, 1-25, 1-9).

During the chat, Mossey asked Sergeant Holter, undercover as Bethany Hanson, to take off her shorts and touch her vaginal area. (Tr. p. 76, l. 14-15). During this time, the web cam on Mossey's face pointed down to Mossey's penis. (Tr. p. 76, l. 19-20). At that time, Mossey proceeded to masturbate on the web cam. (Tr. p. 76, l. 21). During this time, Mossey was explaining to Bethany Hanson how to masturbate. (Tr. p. 78, l. 5-6). Mossey masturbates to ejaculation. (Tr. p. 82-83, l. 23-25, 1-5).

After the chat was over, Sergeant Holter contacted the Fargo Police Department and requested assistance in locating Mossey. (Tr. p. 84, l. 11-18). Mossey was located at the Motel 6 in Fargo, North Dakota. (Tr. p. 84, l. 17-22). Officers with the Fargo Police

Department arrested Mossey for Luring Minors by Computer. (Tr. p. 84-85, l. 25, 1). Mossey was then transported to Minot. (Tr. p. 85, l. 10). Sergeant Holter spoke with Mossey after his arrest. (Tr. p. 85, l. 16-19). Mossey stated that he was online, had chatted with Bethany Hanson, had been on his web cam, and that he had masturbated on the web cam. (Tr. p. 85, l. 22-24). Mossey initially stated he believed he was chatting with a thirteen (13) year old. (Tr. p. 85-86, l. 25, 1-3). Mossey also told Sergeant Holter that during the chat on May 12, 2012, he did not believe he was chatting with a thirteen (13) year old. (Tr. p. 86, l. 14-16).

Steven Harstad, a special agent for the Bureau of Criminal Investigation also testified. (Tr. p. 110-118). Agent Harstad specializes in computer/cyber crime and computer forensics. (Tr. p. 111, l. 3-4). Sergeant Holter contacted Agent Harstad and requested that Harstad conduct a forensic analysis on evidence collected in the Mossey case. (Tr. p. 111, l. 20-24). Agent Harstad received a cell phone and a computer which had been taken from Mossey at the time of his arrest. (Tr. p. 112, l. 23-25). Agent Harstad testified that he located fragments of the conversation between Sergeant Holter and Mossey on the computer. (Tr. p. 116, l. 8-9).

Finally, Lance Mossey testified. (Tr. p. 132-157). Mossey admitted chatting with Sergeant Holter posing as Bethany Hanson. (Tr. p. 150, l. 3-5). Mossey admitted exposing his penis his Sergeant Holter. (Tr. p. 150, l. 6-8). Mossey also admitted explaining to Sergeant Holter how to masturbate. (Tr. p. 150, l. 9-12). Finally, Mossey admitted that he is the individual who masturbated on the web cam. (Tr. p. 151, l. 2-3). Mossey also testified that the individual he was chatting with identified herself as a

thirteen (13) year old female at least seven (7) times during the two (2) chat sessions.
(Tr. p. 151, l. 4-7).

LAW AND ARGUMENT

- I. Ward County was the proper venue to try the crime of Luring Minors by Computer against Lance Mossey.

Lance Mossey argues that Ward County was not the proper venue for the trial of the charge of Luring Minors by Computer. Lance Mossey did not object to the venue of the case being in Ward County. The North Dakota Supreme Court had held that “[b]y failing to properly object at trial, [the defendant] failed to preserve this issue for review.” State v. Thompson, 2010 ND 10, ¶ 19, 777 N.W.2d 617. The Rules of Criminal Procedure allow the Supreme Court “to notice obvious errors not raised in the district court.” Id. at ¶ 20. “When a defendant fails to properly preserve an issue for appellate review, our standard of review requires a showing of obvious error that affects substantial rights of the defendant.” Id. “To establish obvious error, a defendant must show: (1) error, (2) that is plain, and (3) affects substantial rights.” Id.

In this case, Mossey did not object to the venue of the matter being in Ward County. Mossey failed to properly preserve this issue for appeal. Additionally, Mossey has not shown that there was error, including obvious error, when the matter was venued in Ward County.

Further, pursuant to North Dakota law, this case was properly venued in Ward County. “A criminal trial must be in the county where the offense was committed, unless a statute or these rules permit otherwise.” N.D.R.Crim.P. 18.

The venue of a criminal action for any of the following offenses is in any county in which the offense is committed, or into or out of which the individual upon whom the offense was committed may have been brought, in the course of the commission of the offense, or in which an act was done by the accused in instigating, procuring, promoting, soliciting, or

facilitating the commission of the offense: . . . (3) Luring a minor by computer or other electronic means in violation of section 12.1-20-05.1.

N.D. Cent. Code § 29-03-09.

North Dakota law specifically allows for the venue of this matter to be in Ward County. Sergeant Holter was in the Sheriff's Department in Ward County when he was chatting online with Mossey, who was in Cass County. Section 29-03-09 of the North Dakota Century Code allows for jurisdiction to be in Ward County. An act was committed in Ward County because that is where Sergeant Holter was when Mossey was communicating with Sergeant Holter. Mossey sent the web cam images of his penis and him masturbating to Sergeant Holter, who was in Ward County. Ward County was the proper venue for the case of Luring Minors by Computer against Lance Mossey.

Mossey relies upon Section 29-03-04 of the North Dakota Century Code, which states

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.

N.D. Cent. Code § 29-03-04. The Court held “[a]s a general rule it may be said that a crime is committed in a county when the criminal act, its object and purpose, is completed within that county.” State v. Robinson, 2 N.W.2d 183, 191 (N.D. 1942).

Without Sergeant Holter posing as Bethany Hanson in Ward County, a crime would not have been committed. If Sergeant Holter had been in Cass County, then the proper jurisdiction would have been Cass County. However, Mossey communicated over the internet from Cass County to Ward County. Jurisdiction would have been proper in either county. The choice to venue the matter in Ward County was not improper.

II. The State proved beyond a reasonable doubt the six (6) essential elements of the crime of Luring Minors by Computer.

Mossey argues that the State failed to prove beyond a reasonable doubt the six (6) essential elements of the offense of Luring Minors by Computer. “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.” State v. Knowels, 2003 ND 180, ¶ 6, 671 N.W.2d 816.

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.

Id.

Mossey essentially reiterates the venue argument in I above by arguing the State could not meet the essential elements of the offense because the State could not prove that Mossey committed each of the essential arguments in Ward County. In the Rule 29 motion made by Mossey during trial, Mossey argued the State did not prove the essential elements of the offense because of the following: 1) Mossey was communicating with an adult, not a minor; 2) Mossey did not reasonably believe the individual he was communicating with was a minor under the age of 15; and 3) the State did not prove Mossey was over the age of 22. The Court denied Mossey’s Rule 29 motion. (Tr. p. 130, 1. 2-21). Again, Mossey did not preserve the venue argument for appeal. The State would rely upon the argument in I. above regarding venue in rebutting Mossey’s argument that the State did not meet the essential elements of the offense.

Further, there was evidence presented to meet each of the six (6) essential elements of the offense of Luring Minors by Computer. The first essential element was

that “on or about May 11, 2012, in Ward County, North Dakota, the Defendant, Lance Mossey, knowingly[.]” (Tr. p. 195, l. 21-22). The State provided the dates through the testimony of Sergeant Holter. (Tr. p. 47, l. 11-12). Sergeant Holter also testified that he was in the Ward County Sheriff’s Department, located in Ward County, North Dakota, when the chats occurred. (Tr. p. 84, l. 2-6).

The second element was “made a communication that, in whole or in part, implicitly or explicitly discussed or depicted actual or simulated nudity[.]” (Tr. p. 195, l. 23-25). The State proved beyond a reasonable doubt that Mossey exposed his penis and masturbated to ejaculation through the testimony. (Tr. p. 67-68, 76 l. 5-25, 1-25, 18-21). The third element was “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[.]” (Tr. p. 196, l. 1-6). Sergeant Holter testified that he was online in a Yahoo! chat room as his undercover identity Bethany Hanson on the days in question. (Tr. p. 47, 58, l. 13-15, 23-25). Sergeant Holter testified that he received an instant message from the screen name lmossey. (Tr. p. 53, l. 19-20). Mossey admitted chatting online with Sergeant Holter undercover as Bethany Hanson. (Tr. p. 150, l. 3-5). Further, a web cam was used to transmit images of Mossey’s penis to Sergeant Holter. (Tr. p. 68, l. 24-25). Mossey also used the web cam to transmit video of him masturbating to Sergeant Holter. (Tr. p. 76, l.21).

The fourth element was “to communicate with ‘Bethany Hanson’ whom the Defendant, Lance Mossey, believed was a minor.” (Tr. p. 196, l. 7-8). Sergeant Holter testified he went online as thirteen year old Bethany Hanson. (Tr. p. 45, l. 22). On May

11, 2012, during the course of the online with Mossey, Sergeant Holter identified himself as a thirteen (13) year old girl at least four (4) times. (Tr. p. 56, l. 6-12). Additionally, during the online chat on May 12, 2012, Sergeant Holter identified himself as a thirteen (13) year old girl to Mossey at least three (3) times. (Tr. p. 61, l. 1. 3-9). Mossey acknowledged that he was chatting with a thirteen (13) year old on both occasions. (Tr. p. 56, 61, l. 22-24, 10-12).

The fifth element was “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[.]” (Tr. p. 196, l. 9-13). During the chat, Mossey described to “Bethany Hanson” how to masturbate. (Tr. p. 79-81, l. 18-25, 1-25, 1-14). As Mossey was describing how a female should masturbate, Mossey was physically masturbating on the web cam. (Tr. p. 81, l. 15-21).

The sixth and final element was “the Defendant was an adult twenty-two years old or older and reasonably believed the minor was under fifteen years of age.” (Tr. p. 196, l. 15-17). Sergeant Holter testified that Mossey’s date of birth was April 1, 1962, making Mossey fifty (50) years old at the time of the offense. (Tr. p. 88, l. 14-16). As stated above, Sergeant Holter identified himself at least seven (7) times as a thirteen (13) year old girl. (Tr. p. 56, 61, l. 6-12, 3-9).

Based upon the testimony provided at the trial, there was sufficient evidence to warrant a conviction in this matter.

III. The remark made by the prosecutor in the closing argument was proper and if not proper, the Court provided an admonition to the jury to disregard the remark.

Mossey argues that the State made an improper comment during closing argument which should have caused a mistrial in this matter. In closing, the State argued “You might think, oh, it was Sergeant Holter. It wasn’t a 13-year-old 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.” (Tr. p. 184, l. 9-13). Mossey objected to the statement at trial based upon the “golden rule” argument. (Tr. p. 184, l. 14-17). A discussion was held at the bench regarding the objection. (Tr. p. 184, l. 19). After the conversation at the bench, the Court directed the jury to disregard the State’s remark which was categorized as the “golden rule” argument. (Tr. p. 184, l. 20-23).

The North Dakota Supreme Court has held “The scope and control of closing arguments are left to the discretion of the trial court.” State v. Carlson, 1997 ND 7, ¶ 43, 559 N.W.2d 802. On appeal, the Court “will not reverse a conviction upon the ground that the State exceeded the scope of permissible closing argument unless the defendant establishes the State’s comments were improper and prejudicial.” Id. “[A]n improper argument is prejudicial if it causes substantial injury to the defendant so that, absent the error, a different decision would have resulted.” Id. “A defendant must object to improper closing argument and request a curative instruction to preserve the issue for appeal.” Id. “A ‘golden rule’ argument asks jurors to place themselves in the shoes of

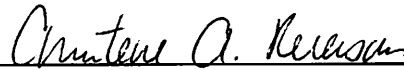
the plaintiff or the victim and is improper in both civil and criminal actions.” Id. at ¶ 46.
“‘Golden rule’ arguments should be avoided.” Id.

In this case, Mossey did object and the district court provided an admonition to the jury to disregard the statement that the State made. (Tr. p. 184, l. 14-17). Mossey did not request a curative jury instruction for the jury. Further, the statement made by the State was not a “golden rule” argument. The statement did not ask jurors to place themselves in the position of the victim/plaintiff. Rather, the State was explaining why Sergeant Holter does undercover chats of this nature. Finally, Mossey has not shown that the statement, which the judge advised the jury to disregard, caused reversible error. There was substantial evidence provided to the jury to prove beyond a reasonable doubt that Mossey committed the offense of Luring Minors by Computer based upon the discussion above in II.

CONCLUSION

The Northwest Judicial District Court in Ward County was the proper venue for the case against Mossey. The State proved each of the essential elements of the crime of Luring Minors by Computer beyond a reasonable doubt, including the venue of the case. Finally, the State's comment during closing argument was not prejudicial and the trial court provided an admonition to the jury to disregard the remark, therefore, there was no error requiring a new trial or reversal on appeal. Therefore, the State argues the jury finding of guilt should be affirmed and Mossey should not be granted a new trial in a different venue.

Respectfully submitted this 29th day of July, 2013.



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IN THE SUPREME COURT
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 Plaintiff/Appellee,) Supreme Court No. 20130138
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 vs.)
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 Lance Mossey,) District Court No. 51-2012-CR-01016
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AFFIDAVIT OF SERVICE BY MAIL

Lynnae Rudland, being first duly sworn, deposes and says:

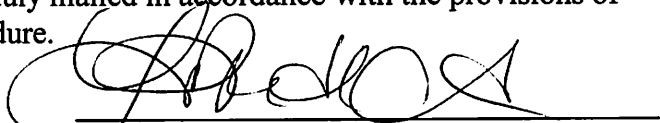
That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 30 day of July, 2013, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

BRIEF OF APPELLEE

That said envelope was addressed to the following person at his address as follows:

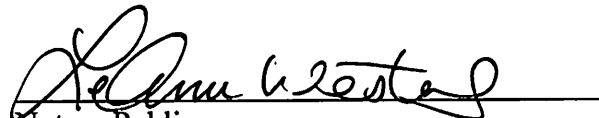
**BENJAMIN C PULKRABEK
ATTORNEY AT LAW
402 1ST ST NW
MANDAN ND 58554**

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



Lynnae Rudland

Subscribed and sworn to before me this 30 day of July, 2013, by Lynnae Rudland



Notary Public

