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FOR THE STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,

Plaintiff and Appellee,

vs. Supreme Court No. 20130179

BARRY LEE BENSON,

Defendant and Appellant.

Appeal from Judgment of Conviction dated March 6, 2013 by the District Court for Bottineau County, Northeast Judicial District, State of North Dakota
The Honorable Michael G. Sturdevant

Bottineau County Criminal No. 05-2012-CR-128

BRIEF OF APPELLEE

1/2/2014
Date

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I. STATEMENT OF FACTS

[¶1] The Appellant's Statement of Facts does recite the facts, especially those favorable to the Appellant, and the Appellee does not disagree with Appellant's Statement of Facts. However, the Appellee will also provide some additional facts which need highlighting.

[¶2] The victim, T.M. was approximately eight years old when she first began suffering sexual abuse at the hands of the Defendant. Tr. 96. This sexual abuse continued over a number of years, until the victim was about thirteen years old, possibly even until she turned fifteen years old. Tr. 102. The sexual abuse that T.M. suffered at the hands of the Defendant was varied and widespread. The sexual contact and acts began with the Defendant touching T.M.'s breasts and vagina with his hands and fingers. Tr. 96, 99. The Defendant would also digitally penetrate T.M.'s vagina. Tr. 101. The Defendant made T.M. rub his penis with her hand, and the Defendant also made T.M. perform oral sex on the Defendant numerous times, to the point of ejaculation. Tr. 101, 103 - 104. The Defendant also had sexual intercourse with T.M., wherein his penis penetrated T.M.'s vagina, again on numerous occasions over the course of many years. Tr. 104 – 105.

[¶3] On one occasion that T.M. remembered, the Defendant made her shower with the Defendant and he attempted to have intercourse with her in the shower. Tr. 103. The Defendant also made T.M. dress up in different costumes and role play for the Defendant. Tr. 108 – 109. T.M. also recalled an incident that the Defendant duct taped T.M. to his bed before he had intercourse with T.M. Tr. 112. The

Defendant also made T.M. watch pornographic movies with him at his house. Tr. 110 – 111. These sexual act and contacts took place over a time period of approximately five to seven years, during which time T.M. was eight years old to thirteen or fifteen years old. Tr. 102. This abuse stopped because T.M. and her mother moved from the Newburg area to a town further away from the Defendant's residence, which was in Maxbass. Tr. 112.

[¶4] The Defendant also threatened to hurt T.M.'s mom if T.M. said anything. Tr. 99, 102, 105 – 106. T.M. and her mother moved to North Dakota when T.M. was 8 years old, and T.M. was raised in a single parent home. Tr. 86 – 87, 226. T.M. was very scared by the threats the Defendant made about hurting her mother, as she testified her mother was all T.M. had in North Dakota. Tr. 102, 105 - 106.

[¶5] The only person T.M. told about some of the sexual abuse as it was occurring was a child hood friend, K.S. Tr. 118. K.S. testified that when T.M. moved to Newburg, they became best friends. Tr. 266. Though K.S. did not know the Defendant, she became aware of the Defendant over at T.M.'s house. Tr. 266 - 268. K.S. noticed that after a while, the Defendant began to get more physically close to T.M. when only the two girls and the Defendant happened to be in a room together, with no other adults in the room. Tr. 269

[¶6] K.S. began observing the Defendant snuggling his face into T.M.'s face, then K.S. observed the Defendant put his hand on T.M.'s stomach, up her shirt, and down her pants. Tr. 270. K.S. observed the Defendant on multiple occasions put his hand down T.M.'s pants, and after putting his hand down her pants, his hand would

be moving back and forth. Tr. 271. K.S. testified that while there was usually a blanket over T.M.'s lap, K.S. could see the top of T.M.'s pants sticking out over the blanket, and could see the Defendant with his hand between the fabric of her pants and her skin, and observed his hand moving in and out of her pants on multiple occasions. Tr. 271. These observations scared K.S., who was also only a child when this happened. Tr. 271. K.S. was approximately 11 or 12 years old when she remembers this happening, which would put T.M.'s age around 9 or 10. Tr. 273.

[¶7] After some time, T.M. showed K.S. an outfit that the Defendant made T.M. wear, and T.M. told K.S. that the Defendant had sex with T.M., many times. Tr. 274 – 275. T.M. told K.S. that T.M. had sex with the Defendant many times, that T.M. tried once to tell her mom, but didn't know how to and that she was scared of him and didn't want to. Tr. 276. K.S. also indicated that T.M. told K.S. "not to tell anybody, including K.S.'s father or other adults, and not to bring it up or anything." Tr. 293.

[¶8] Upon being informed of the sexual abuse of T.M. in the fall of 2011, Bottineau County law enforcement obtained a search warrant for the Defendant's house in Maxbass. Tr. 299, 310. In executing the search warrant, Deputy Tim Klabo and BCI Agent Steve Neibuhr found, documented and photographed certain items in the Defendant's house, as well as the interior of the house. Tr. 317 – 318. During the search, photographs were taken of video cassette covers of pornographic movies found in the dresser of the living room area of the home. Tr. 318 -319. Also discovered was a pink skirt located in the basement of the hose, and a partial roll of

duct tape in the entryway of the house. Tr. 320 - 321.

[¶9] After considering all of the evidence, the Jury convicted the Defendant of the crime of Continuous Sexual Abuse of a Child.

II. LAW AND ARGUMENT

[¶10] The Appellant has correctly stated the standard of review for a sufficiency of the evidence challenge to a verdict of guilt, which standard will not be replicated herein.

A. The trial court did not abuse its discretion in denying the Defendant's motions for acquittal due to insufficient evidence.

[¶11] In the present case, the Defendant was charged with the criminal offense of Continuous Sexual Abuse of a Child, in violation of N.D.C.C. § 12.1-20-03.1, and was convicted after a Jury trial. In the case of State v. Martin,, 2001 ND 189, 636 N.W.2d 447 (N.D. 2001), a case involving a conviction for continuous sexual abuse of a child following a jury trial, the Court held that "the Court will review a challenge to the sufficiency of the evidence by drawing all inferences in favor of the verdict, and that reversal of the conviction is warranted only if, after viewing the evidence and all reasonable evidentiary inferences in the light most favorable to the verdict, no rational fact-finder could have found the defendant guilty beyond a reasonable doubt." See also State v. Gomez, 2011 ND 29, 793 N.W.2d 451 (N.D. 2011).

[¶12] At the present trial there was substantial evidence presented and upon which the Jury based its decision to convict the Defendant. The evidence

consisted of both direct evidence and circumstantial evidence, and when this Court considers the same and draws all inferences in favor of the verdict, this conviction should be affirmed.

[¶13] The direct evidence considered by the Jury included the testimony of the victim, T.M. The Jury heard from T.M. about the years of systematic and horrific sexual abuse she suffered at the hands of the Defendant. The Jury listened to the first interview law enforcement conducted with T.M. in September of 2011. Tr. 302. The Jury also observed the video recording of a forensic interview conducted by the Children's Advocacy Center in Minot, ND with T.M., also in September of 2011. Tr. 167. T.M. was vigorously cross examined at length by the Appellant's attorney, about inconsistencies between the different interviews, T.M.'s testimony at the Preliminary Hearing, and T.M.'s testimony to the Jury.

[¶14] The jury also considered direct evidence in the form of testimony of T.M.'s childhood friend, K.S., who testified not only about disclosures T.M. made, but also about K.S.'s direct observance of many times where the Defendant had sexual acts or contacts with T.M. in the presence of K.S. Tr. 269 – 277. Again, the Appellant's attorney had opportunity to cross examine K.S. about her testimony, and how her testimony differed from the testimony of T.M.

[¶15] The jury considered circumstantial evidence in the form of pictures of the Defendant's home in Maxbass, pictures of pornographic video cassette covers found in the Maxbass house, and physical items found in the Maxbass house. Tr. 317 – 321. The Appellant had opportunity to attack the weight of the physical

evidence offered in this matter. After full and careful deliberation of all of the evidence presented by the Jury, as well as all of the Arguments made by Appellant and Appellee, the facts and evidence were sufficient to establish beyond a reasonable doubt that the Defendant committed the crime of Continuous Sexual Abuse of a Child.

[¶16] The case of State v. Schill, 406 N.W.2d 660 (N.D. 1987) is particularly instructive as applied to this case. In Schill, the Court noted that while the child may have given inconsistent testimony about the specifics of each incident, she did not deviate from her basic position that Schill touched her in her "private parts" while she was staying with his family. Id. The Court further noted that "the jury heard her testimony at trial and viewed the videotaped deposition and interview. The inconsistencies were argued to the jury by Schill's attorney in closing argument. Nonetheless, the jury deemed the child's testimony credible and rendered a guilty verdict." Id.

[¶17] Presently, though there were inconsistencies in T.M.'s testimony, and in T.M.'s testimony as compared to K.S.'s testimony, T.M.'s testimony did not deviate from the basic position that the Defendant committed sexual acts and had sexual contact with T.M. on numerous occasions over many years. Schill at 661.

[¶18] It is conceded by the Appellee that there were conflicts in the evidence, both in T.M.'s testimony, as well as with T.M.'s testimony as compared to K.S.'s testimony. The attorney for the Appellant spent much time and effort in highlighting the inconsistencies for the Jury. During and after the Appellant's

cross examination of the witnesses, the inconsistencies were noted for the Jury. They were also highlighted during the Appellant's closing argument, just as the inconsistencies were argued by Schill's attorney in the Schill case. Id. However, it is the Jury's job to listen to all of the evidence, weigh the credibility of all of the witnesses and their testimony, and to arrive at the facts. This is precisely what the Jury did in the present case, and the Jury arrived at a unanimous decision of the guilt of the Defendant. This Jury's verdict, like the Jury's verdict in the Schill case, should be upheld by this Court. Id.

[¶19] The Appellant cites an Iowa case, State v. Smith, 508 N.W. 2d 101 (Iowa App. 1993), which case is both factually and legally distinguishable from the present case. Initially, the Smith case is from Iowa, and in that case the Iowa court recognized a judicially created evidentiary limitation in Iowa to the basic rule that it is up to the jury to determine credibility of the witnesses. Id. The result of this judicially created limitation, called the *Graham* limitation, is such that in the State of Iowa the Judge can decide that certain testimony shall be deemed a nullity. Id. This limitation has not been recognized by North Dakota courts, and as such the *Graham* limitation holds no precedential value for this Court. Notwithstanding the lack of binding effect or precedential value on this Court, the Smith case is also factually distinguishable.

[¶20] In Smith, the Court details many of the alleged episodes, including one in which there were joint birthday parties, with testimony placing 15 to 18 people in the room. Though the alleged victim in Smith testified something happened at that

birthday party, it was noted by the Smith Court that none of the 15 to 18 people in the room at the time saw or heard anything. Id. The Smith Court goes on to state that the testimony of one of the victims described scenes, such as the birthday party, that bordered on the surreal, and reversed the conviction, using the *Graham* limitation. Id. Again, however, most importantly the conviction was reversed by the Smith Court on the basis of a legal evidentiary limitation created by the Iowa Courts that has no binding or precedential value for this Court. Id.

[¶21] The testimony and evidence presented to the Jury in the present case was carefully considered by the Jury. The testimony of the victim was specific as to acts perpetrated on her by the Defendant, and locations. Never forget that the criminal actions of the Defendant in this case were perpetrated on a young child over the course of many years. So, while T.M. could not testify that on a certain specific date the Defendant committed a certain specific sexual act or sexual contact against her, she was able to testify about years of systematic sexual acts and contacts the Defendant perpetrated against her, and she continued to be consistent with her basic position regarding the types and nature of the sexual abuse she suffered at the hands of the Defendant. Schill at 661.

[¶22] The Appellant also argues that the testimony of K.S. creates conflicts in the evidence, such as to location of abuse, acts, etc.; the cumulative effect of which, opines the Appellant, confused or misled the Jury. The Appellant also contends that that the probative value of this evidence was substantially outweighed, under Rule 403 of the North Dakota Rules of Evidence. However, the

Appellate Court shall not substitute its judgment for that of the jury where the evidence is conflicting, if one of the conflicting inferences reasonably tends to prove guilt and fairly warrants a conviction. Schill at 661 (citing State v. Olmstead, 246 N.W.2d 888, 890 (N.D.1976)).

[¶23] While there are conflicts between the testimony of T.M. and K.S., the inferences created by the testimony of either T.M. or K.S. tends to prove the Defendant's guilt and fairly warrants a conviction. Id. The testimony offered by K.S., standing alone, created facts sufficient to warrant a conviction in this matter. Id. K.S. observed the Defendant put his hand on T.M.'s stomach, up her shirt, and down her pants. Tr. 270. She observed the Defendant on multiple occasions put his hand down T.M.'s pants, and after putting his hand down her pants, his hand would be moving back and forth. Tr. 271. She testified that while there was usually a blanket over T.M.'s lap, K.S. could see the top of T.M.'s pants sticking out over the blanket, and could see the Defendant with his hand between the fabric of her pants and her skin, and observed his hand moving in and out of her pants, on multiple occasions. Tr. 271. Those facts, taken on their own, would fairly warrant a conviction for the crime of Continuous Sexual Abuse of a Child, in violation of 12.1-20-03.1 of the North Dakota Century Code.

[¶24] However, K.S.'s testimony was not the sole evidence considered by the Jury. T.M. also testified, earlier interviews of T.M. were presented to the Jury, and documentary evidence was also presented. While T.M.'s testimony did conflict with K.S.'s testimony in certain respects, those conflicts were emphasized by

Appellant's attorney, and were considered by the Jury. A very plausible explanation or inference that may have been drawn by the Jury in considering T.M.'s testimony was that the abuse T.M. suffered in Maxbass completely overshadowed that which she suffered in Newburg. T.M. experienced years of systematic and invasive sexual acts suffered by T.M. at the Appellant's house in Maxbass, including oral sexual acts and sexual intercourse. T.M.'s memory of the incidents of the Appellant groping T.M. with his hands and fingers in Newburg, as witnessed by K.S., quite possibly paled in comparison to the severity and extent of abuse she suffered at the Defendant's house in Maxbass, and were simply not as memorable as the abuse suffered in Maxbass.

[¶25] K.S., on the other hand, witnessed the groping acts in Newburg, which were very upsetting and traumatic on K.S., who had very likely never seen such things before. Such acts, however, were unfortunately common place and likely less traumatic to T.M., compared to what she suffered at the Appellant's house in Maxbass. Such is an inference that may have been drawn by the Jury in considering the conflicting evidence. In any event, the Jury was able to consider all of the evidence, including the conflicting evidence, and the inferences to be drawn therefrom. Such inferences drawn by the Jury from the evidence presented do reasonably tend to prove the guilt of the Defendant, and accordingly such inferences fairly warrant a conviction. Schill at 661.

[¶26] It is therefore the request of the Appellee that the conviction be affirmed by the Court.

B. **<u>The trial court did not abuse its discretion in allowing the testimony of the victim's childhood friend K.S.</u>**

[¶27] In his second argument, the Appellant completely misconstrues or mischaracterizes the testimony offered by those witnesses other than T.M. The Appellant opines that the other testimony, especially that of K.S., was offered to simply corroborate T.M.'s testimony.

[¶28] Appellant argues that K.S.'s testimony was so prejudicial or confusing to the jury that it should have been excluded by Rule 403 of the North Dakota Rules of Evidence, and that the only purpose for which K.S.'s testimony could have been offered would be as proof of prior consistent statements, under Rule 801 of the North Dakota Rules of Evidence. Initially, it is noted that the Appellant did not cite any authority to the trial court to exclude K.S.'s testimony. Only upon the filing of the Appellant's brief was Rule 403 and 801 cited as authority in an attempt to attack K.S.'s testimony.

[¶29] Rule 403 of the North Dakota Rules of Evidence should certainly not bar the testimony of K.S. Was K.S.'s testimony prejudicial to the Defendant? Absolutely. She personally observed him sexually assaulting her friend T.M. those many years ago, and testified to the Jury about her observations. Was the probative value of her testimony substantially outweighed by its prejudicial effect on the Jury? Absolutely not. There are not many cases where there is eyewitness testimony from one witness about an individual continuously and repeatedly sexually assaulting a different child. K.S.'s testimony was extremely probative as

the Jury considered the facts surrounding the crime for which the Defendant was charged, and the testimony was likely very useful and relevant to the Jury as it carefully deliberated and arrived at its verdict.

[¶30] K.S.'s testimony was also not confusing to or misleading to the Jury as the Jury weighed the evidence. What must not be forgotten is that both T.M. and K.S. were testifying about facts that happened many years ago, when they were both children. That fact does not mean that their testimony is to be discounted or not believed. It is well settled in North Dakota that once the competency of a witness has been established, it is up to the Jury to determine the credibility and reliability of the witness, and the weight to be given the witnesses testimony, including the testimony of children. Schill at 661 (citing State v. Werner, 16 N.D. 83, 112 N.W.2d 60, 62 (N.D. 1907) (testimony of 8 year old rape victim), State v. Oliver, 78 N.D. 398, 49 N.W.2d 564, 572 (N.D. 1951) (testimony of 6 ½ year old female rape victim). Having testimony from two witnesses who were children when the criminal actions occurred simply means that there are bound to differences in their testimony. In fact, their testimony would be less credible if their testimony were identical in all respects.

[¶31] T.M. suffered years of horrific sexual assault at the hands of the Defendant. The years of sexual assaults she suffered were perpetrated against her in many different fashions. Of course her testimony is going to differ somewhat between the different statements she gave to law enforcement officers and forensic examiners at the Children's Advocacy Center. And her testimony will differ from

the testimony of K.S., in that their experiences and perspectives of what happened are different. But the content of T.M.'s recitation was consistent, as was the content of K.S.'s testimony. T.M. may not have been able to testify that, for example, the 3rd time the Defendant assaulted her when she was in 3rd grade he digitally penetrated her, as compared to the 4th time he assaulted her, but she was able to testify that he digitally penetrated her many times over the years. The weight and credibility of the witnesses was a matter for the Jury, and the Jury did their job and returned a verdict after listening to all of the witnesses and considering all of the evidence admitted. Id.

[¶32] The Appellant also argues that K.S. should only have been allowed to testify under Rule 801 of the N.D.R.Ev. as to prior consistent statements made by T.M., but the Appellant clearly misses the point. K.S. was not testifying to corroborate T.M.'s testimony; rather K.S. was a fact witness, testifying about actual events she witnessed and experienced those many years ago. K.S. testified about her personal observations regarding the interaction between the Defendant and T.M. on many different occasions. She testified about actual criminal conduct in which she personally observed the Defendant engage, during the many times the Defendant had sexual acts and contact with T.M. while in K.S.'s presence. Thus, K.S.'s testimony was not offered for the purpose of confirming prior consistent statements from T.M; rather K.S. was offering her testimony as a fact witness to criminal acts committed in K.S.'s presence.

[¶33] The differences in K.S.'s testimony compared to T.M.'s testimony were

not so unduly prejudicial or confusing to the Jury to be excluded by Rule 403. Nor was K.S.'s testimony evidence of prior consistent statements, as contemplated by Rule 801. It was probative and factual testimony of an eyewitness to a crime repeatedly perpetrated over a number of years, was relevant and entirely admissible.

[¶34] The conviction should be affirmed by this Court.

III. CONCLUSION

[¶35] Based upon the foregoing law and arguments, the State respectfully requests that the Trial Court's Judgment and sentence be in all things affirmed.

Respectfully submitted this 2 day of January 2014

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CERTIFICATE OF FILING AND SERVICE

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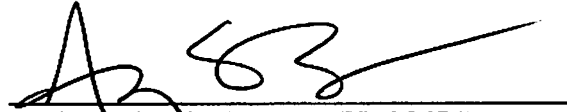
Dated this 2 day of January 2014.



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