

IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA

<b>State of North Dakota,</b>	)	
	)	<b>Supreme Court No. 20160364</b>
<b>Plaintiff/Appellee,</b>	)	
	)	<b>Criminal No. 51-2016-CR-00527</b>
	)	
<b>vs.</b>	)	
	)	
	)	
<b>Jessica Belgarde,</b>	)	
	)	
<b>Defendant/Appellant.</b>	)	

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**BRIEF OF PLAINTIFF-APPELLEE**

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**Appeal from the October 17, 2016 Jury Verdict October 18, 2016 Criminal  
Judgment, The Honorable Gary Lee, Presiding**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS.....p. 1

TABLE OF AUTHORITIES .....p. 2

STATEMENT OF THE ISSUE.....p. 3

STATEMENT OF THE CASE.....¶1-4

STATEMENT OF THE FACTS .....¶5-9

LAW AND ARGUMENT .....¶10-18

CONCLUSION.....¶19

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Paragraph</u></b>
David M. Epstein, <i>Advance Notice of Alibi</i> , 55 J. Crim. L. Criminology and Policy 29 (1964).....	¶13
<u>State v. Flohr</u> , 301 N.W.2d 367 (N.D. 1980).....	¶10, 13
<u>State v. Ramsey</u> , 2005 ND 42, 692 N.W.2d 498 .....	¶10
<u>State v. Sevigny</u> , 2006 ND 211, 722 N.W.2d 515 .....	¶10
<u>Williams v. Florida</u> , 399 U.S. 78, 83, 90 S. Ct. 1893 (1970) .....	¶13, 16
<b><u>Statutory Materials and Rules</u></b>	<b><u>Paragraph</u></b>
N.D.R. Crim. P. Rule 12.1 .....	¶7, 10, 12, 13, 15, 18, 19

## **STATEMENT OF THE ISSUE**

- I. The District Court did not abuse its discretion in preventing the admission of alibi evidence

## **STATEMENT OF THE CASE**

[[1] On March 11, 2016, Jessica Lynn Belgarde was charged with Theft of Property, a class A misdemeanor. (Citation, docket sheet No. 1; Appellants Appendix “A”1). The defendant made her Initial Appearance on May 2, 2016. (Initial Appearance, docket sheet; A1). Belgarde was issued a Misdemeanor Scheduling Order, setting a Motions’ Deadline of June 13, 2016. (Scheduling Order, docket sheet No. 11; A8).

[[2] On July 13, 2016, a Pretrial Conference was held. (Pretrial Conference, docket sheet; A2). Subsequently, the case was scheduled for trial on October 17, 2016. (Order; docket sheet No. 21; A2). On October 3, 2016, Belgarde filed a Joint Witness & Exhibit List and a Notice of Alibi. (Information and Notice of Alibi, docket sheet Nos. 23 and 24, A9-10). On October 7, 2016, the State filed a response. (Response, docket sheet No. 28; A2; State’s Objection to Rule 12.1 Notice of Alibi Defense; A11-12). Belgarde replied to the State’s response on October 7, 2016. (Response, docket sheet No. 33; A13-14). The State filed a Notice of Endorsement of Additional Witnesses on the State’s Information on October 11, 2016. (Notice, docket sheet No. 38; A2). On the same day, Belgarde served six (6) Motions in Limine on the State. (Notice and Motions, docket sheet Nos. 39-43, 46-47; A2-3).

[[3] On October 14, 2016, the Honorable Judge Gary H. Lee issued an Order addressing Belgarde’s Notice of Alibi, the State’s Notice of Endorsement of Additional Witnesses, and the six (6) Motions in Limine filed by Belgarde without a hearing. (Order,

docket sheet No. 54; A15-35). In that Order, Belgarde's Notice of Alibi was denied. (Order, docket sheet No. 54; A15-35).

[¶4] On October 17, 2016, the Jury Trial was held. (Criminal Judgment, docket sheet No. 69; A3). Belgarde was convicted of Theft of Property and a Criminal Judgment was entered. (Verdict and Criminal Judgment, docket sheet No. 68-69; A54-56). On November 2, 2016, Belgarde filed her Notice of Appeal. (Notice, docket sheet No. 71; A57).

### **STATEMENT OF THE FACTS**

[¶5] Belgarde filed her Notice of Alibi more than one hundred (100) days after the Motions' Deadline in this case. (Scheduling Order, docket sheet No. 11; A8; Notice, docket sheet No. 24; A2). In the State's response to this Notice, the State argued that it was prejudiced by the late notice and that the State was not aware of the minor child's name. (Response, docket sheet No. 28; A2; State's Objection to Rule 12.1 Notice of Alibi Defense; A11-12).

[¶6] Belgarde's reply to the State's response indicated that the State could have called the minor child or Belgarde's counsel to obtain the name of the child. (Response, docket sheet No. 33; A13-14). In this reply, defense counsel, through Mr. Marquis Bradshaw, also specifically noted that the State had "ample knowledge" of the third witness, Sharee Lafromboise, and that defense counsel had contact with the State regarding Lafromboise regarding her alleged involvement in the matter. (Response, docket sheet No. 33; A13-14).

[¶7] Judge Lee's Order cited N.D.R. Crim. P. Rule 12.1 and analyzed the timeline of the case. (Order, docket sheet No. 54; A15-35). Judge Lee reasoned that no cause had been given for the late disclosure of the alibi witness and no justification given Doe's

close proximity to Belgarde. (Order, docket sheet No. 54; A15-35). Lee then held that the alibi testimony would be excluded under N.D.R. Crim. P. Rule 12.1(e). (Order, docket sheet No. 54; A15-35).

[¶8] During trial, after the State rested its case and Belgarde testified, Judge Lee addressed the alibi witness issue on the record. (Transcript of Jury Trial “Tr.” 215:16-25). At that time, a second attorney for Belgarde, Mr. Patrick Waters, represented that the State was well aware that Belgarde was pursuing an alibi defense prior to the filing of the Notice of Alibi on October 3, 2016. (Tr. 216:1-12). Judge Lee indicated that the Notice had been filed “outside the time” and did not reverse his Order. (Tr. 216:19-20).

[¶9] Belgarde, through Mr. Waters, requested that the minor child be allowed to testify under the different theory of third-party defense, arguing that Doe was not an alibi witness after all. (Tr. 217:8-22, 218:1-4). Judge Lee reasoned that defense counsel had previously identified the witness as an alibi witness and Doe’s testimony could not be brought in through a new “back door theory” after the alibi testimony was denied. (Tr. 218:11-17). John Doe did not testify during Belgarde’s trial.

## **LAW AND ARGUMENT**

### **I. The District Court did not abuse its discretion in denying the Notice of Alibi**

[¶10] “[A] ruling which, pursuant to Rule 12.1, prevents admission of alibi evidence is reviewable only to the extent of determining whether the lower court has abused its discretion.” State v. Flohr, 301 N.W.2d 367, at 372 (N.D. 1980). “A court abuses its discretion if it acts unreasonably, arbitrarily, or capriciously, or if it misinterprets or misapplies the law.” State v. Sevigny, 2006 ND 211, ¶ 12, 722 N.W.2d 515, *see State v. Ramsey*, 2005 ND 42, ¶ 8, 692 N.W.2d 498.

**[¶11] The District Court did not err in preventing admission of alibi evidence under N.D.R. Crim. P. Rule 12.1**

**[¶12] N.D.R. Crim. P. Rule 12.1(a)** provides:

A defendant who intends to offer an alibi defense must serve written notice on the prosecuting attorney of any intended alibi defense and file the notice within the time provided for the making of pretrial motions or afterward as the court directs. The notice must state: (1) each specific place where the defendant claims to have been at the time of the alleged offense; and (2) the name, address, and telephone number, if any, of each witness on whom the defendant intends to rely.

“For good cause, the court may grant an exception to any requirement of Rule 12.1(a)--(c).” N.D.R. Crim. P. Rule 12.1(d). “If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi.” N.D.R. Crim. P. Rule 12.1(e).

**[¶13]** The North Dakota Supreme Court reviewed the justification of excluding alibi evidence in State v. Flohr, 301 N.W.2d 367, at 371 (N.D. 1980). At the time, Rule 12.1 had recently been amended to require notice of alibi from a defendant without a specific request by the prosecution. Id., 369. The Court considered the rationale cited in Williams v. Florida, 399 U.S. 78, 83, 90 S. Ct. 1893 (1970):

Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh hour defense is both obvious and legitimate. Reflecting this interest, notice of alibi provisions, dating at least from 1927, are now in existence in a substantial number of states. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample

opportunity to investigate certain facts crucial to the determination of guilt or innocence.

The Court also referenced “a number of reasons for a notice rule” as articulated in a law journal and reiterated by the Chief Justice Burger’s concurring opinion in Williams:

1 -- Foremost is the idea that the statute prevents surprise. Alibi has been termed a 'hip-pocket' defense because of the ease with which it can be manufactured for introduction in the final hours of trial.

2 -- The statute acts to deter false alibis because defendants know that the information furnished will be investigated before trial.

3 -- Pretrial investigation results in a saving of money and trial time. This occurs in two ways. (1) If, after the investigation, the district attorney is satisfied that the alibi is true, the case should be dismissed; (2) the district attorney is not surprised at trial by the alibi defense, and there is no need for a continuance to investigate and prepare. The pretrial investigation may indicate that the alibi probably is false and/or that defendant's witnesses are not credible. The district attorney can prepare his case accordingly.

4 -- Alibis which are presented at trial will be accorded more respect. Alibi, because of the ease with which it can be manufactured, is treated by some jurisdictions as a 'second-class' affirmative defense, and when an alibi is in issue and the jury is charged, the judge is allowed to disparage the defense.

5 -- Finally, as previously developed, this rule is important in the context of more liberal discovery in criminal cases.

David M. Epstein, *Advance Notice of Alibi*, 55 J. Crim. L. Criminology and Policy 29, 31-32 (1964). The Court went on to conclude that “a court ought to take into account, among other particulars of the case, the actual prejudice that will redound to the prosecution if the testimony is allowed and whether the defendant’s failure to inform was in good faith and for good cause.” Flohr, 301 N.W.2d at 372.



[¶14] In the present case, the State received the Notice of Alibi on October 3, 2016, fourteen (14) days before trial. The Notice did not explain why it was filed months after the Motions' Deadline, and counsel never supplemented the record with an explanation for the late disclosure. The Notice did not contain the child's legal name and the State responded, indicating that it would not be able to locate the child and perform an interview for pretrial investigation in such a limited amount of time. The State responded in such a manner because the State did not have notice of the alibi witness and did not know the legal name of the alibi witness.

[¶15] The defendant replied to the State's objection, noting that the solution to finding out the minor child's name was simple; but the defendant again did not provide good faith or good cause for the late filing of the Notice. Moreover, the State would point to the defendant's own response, arguing that it is extremely significant that the defendant did not argue that the State had been advised in any way, much less in formal notice served upon the State as required by Rule 12.1, that John Doe would be testifying; the defendant only indicated that she had previously communicated with the State regarding Sharee Lafromboise. After Judge Lee suppressed the testimony of Doe, defense counsel suggested the State knew of the alibi witness, which controverts the reply brief Mr. Bradshaw filed regarding the State's objection to the Notice of Alibi.

[¶16] The record, through the State's response to Notice of Alibi shows that the State argued that it was prejudiced by the late disclosure, that it did not have the identity of the minor child or any notice of his testimony prior to the Notice of Alibi, and that Belgarde had no good cause for the late notice. The State had an interest in investigating the facts that may be presented by an alibi witness for all the reasons articulated by Williams v. Florida, specifically in a case where a minor child is testifying as an alibi

witness on his own mother's behalf. The threat of a manufactured alibi is very real and the State was unable to contact John Doe and investigate any statement he may have made in such a short amount of time.

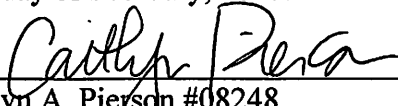
[¶17] Judge Lee did not act unreasonably, arbitrarily, or capriciously, and he did not misinterpret or misapply the law. The plain language of the statute requires the filing of the Notice by the date of the Motions' Deadline. Belgarde provided the Notice months after the Motions' Deadline, only fourteen (14) days before trial began, without any explanation or good cause for the late disclosure. Furthermore, the State articulated that it was prejudiced by the late disclosure of the alibi witness. Judge Lee did not abuse his discretion in excluding the alibi testimony.

[¶18] Belgarde did not comply with the plain language of N.D.R.Crim. P. Rule 12.1. Consequently, the trial court did not abuse its discretion in excluding the alibi testimony of John Doe.

### **CONCLUSION**

[¶19] The trial court did not err in denying Belgarde's Notice of Alibi under N.D.R.Crim P. Rule 12.1. As such the trial court's ruling should be affirmed.

Respectfully submitted this 28 day of February, 2017.

  
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Plaintiff/Appellee,	)	Supreme Court No. 20160364
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Jessica Belgarde	)	District Court No. 51-2016-CR-00527
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**AFFIDAVIT OF SERVICE**

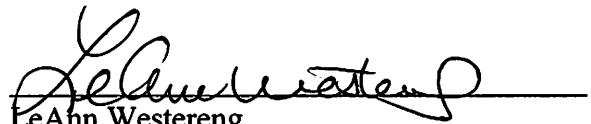
LeAnn Westereng, being first duly sworn, deposes and says:

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 1<sup>st</sup> day of March, 2017, this Affiant provided a true and correct copy of the following documents in the above entitled action:

**BRIEF OF PLAINTIFF/APPELLEE**

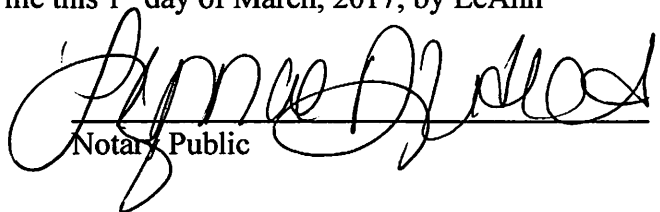
By ELECTRONIC SERVICE to the following:

**CHARLES A STOCK**  
**ATTORNEY AT LAW**  
[cstock@crookstonlaw.com](mailto:cstock@crookstonlaw.com)



LeAnn Westereng

Subscribed and sworn to before me this 1<sup>st</sup> day of March, 2017, by LeAnn Westereng



Notary Public

LYNNAE RUDLAND  
Notary Public  
State of North Dakota  
My Commission Expires April 26, 2022