

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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SUPREME COURT NO.: 20190206  
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Orlando Joseph Brown,                    )  
    Petitioner/Appellant,                )  
  )  
    vs.                                        )  
  )  
State of North Dakota,                    )  
    Respondent/Appellee                 )

-----  
  APPEAL FROM THE CRIMINAL JUDGMENT  
  NORTH CENTRAL JUDICIAL DISTRICT  
  GRAND FORKS COUNTY CRIMINAL. NO. 18-2018-CR-00860  
  THE HONORABLE LOLITA G. HARTL ROMANICK PRESIDING  
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**BRIEF**

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  ORAL ARGUMENT REQUESTED  
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**TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

**TABLE OF CASES**

State v. Christensen, 1997 ND 57, 561 N.W.2d 631.	. . .	¶25, ¶28, ¶29, ¶32, ¶34
State v. Alvarado 2008 ND 203, 757 N.W. 2d 570 .	. . .	¶25, ¶28, ¶31, ¶32

**RULE OF CRIMINAL PROCEDURE**

Rule of Evidence 412	. . . . .	¶6, ¶25
Rule of Evidence 404 (b)	. . . . .	¶6, ¶25, ¶34
Rule of Evidence 609	. . . . .	¶6, ¶25

**Oral Argument:**

Oral argument has been requested to emphasize and clarify the Defendant’s written arguments on their merits.

## **ABBREVIATIONS**

Transcript – T.

Page - P.

Line - L.

## STATEMENT OF THE ISSUE

**[¶1] ISSUE 1: Did the trial judge err when she issued an order allowing into evidence, Orlando Joseph Brown’s history of domestic violence with R.B. on all 3 criminal charges over the two to three-month period prior to the date of the alleged incidents?**

## NATURE OF THE CASE

[¶2] There were three criminal charges against Orlando Joseph Brown (Orlando). They are:

- 1.) Aggravated assault – Against an adult – Domestic violence
- 2.) Gross sexual imposition – Sexual act-Force
- 3.) Gross sexual imposition – Sexual act – Force

[¶3] The Affidavit of probable cause and information were filed on April 24, 2018.

[¶4] An Amended information was filed on June 28, 2018.

[¶5] A preliminary hearing order was issued on August 6, 2018.

[¶6] An Order on Motions under Rule of Evidence 412, 404 (b) and 609 was filed on February 12, 2019.

[¶7] The Jury Trial began on February 12, 2019 and ended with a guilty verdict on all 3 criminal charges February 14, 2019.

[¶8] The Defendant was sentenced on June 17, 2019.

[¶9] A Criminal Judgement was filed on June 18, 2019.

[¶10] The notice of appeal and order for transcript were filed on June 28, 2019.

[¶11] The notice of filing the notice of appeal was filed on June 28, 2019.

[¶12] The clerk's certificate of appeal was filed on July 23, 2019.

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

### **STATEMENT OF FACTS**

[¶14] There are 3 criminal charges in this case:

- 1.) Aggravated assault – Against an adult – Domestic violence
- 2.) Gross sexual imposition – Sexual act-Force
- 3.) Gross sexual imposition – Sexual act – Force

[¶15] The alleged victim in each of these crimes is R.B. (B.). The Defendant is Orlando Joseph Brown (Orlando).

[¶16] The 3 crimes are alleged to have been committed in Grand Forks, North Dakota. The Grand Forks address where these 3 crimes were alleged to have been committed is 421 First Avenue. At that address are apartments. One apartment there is rented to Elaine Brown, Orlando's mother, and another apartment there is rented to Ivy Brown, Orlando's sister. From August of 2017 to April 23, 2018 Orlando and B. were residing in either the apartment rented by his mother or sister.

[¶17] Orlando and B., prior to April 23, 2018, had an on again-off again relationship and on occasion physical violence was a part of their relationship.

[¶18] On April 23, 2018 Orlando and B. have two different stories as to what occurred. According to Orlando there was some arguing. He and B. had consensual sex. At no time on April 23, 2018 did he hit, slap, choke, or kick B.

[¶19] According to B. on April 23, 2018 she argued with Orlando. He hollered at her, choked her, slapped her, grabbed her tooth, and kicker her once. Then Orlando

had sex with her against her will, and without her consent, he inserted a dildo into her vagina.

[¶20] At the trial the state's witnesses were B., Thomas Ruud, Brandis Lafrombois, Kelly Maaz, Steve Conley, and Robert Starr. The defenses witnesses were Ivy Brown, Orlando, and R.B.

[¶21] The jury found Orlando guilty of all 3 charges. Judgment against Orlando was entered and he was sentenced.

[¶22] Orlando appealed the judgment and the case is now before the North Dakota Supreme Court.

### **ISSUE PRESENTED**

[¶23] **ISSUE 1: Did the trial judge err when she issued an order allowing into evidence, Orlando Joseph Brown's history of domestic violence with B. on all 3 criminal charges over the two to three-month period prior to the date of the alleged incidents?**

### **ARGUMENT**

[¶24] There are three criminal charges against Orlando in this case. They are:

- 1.) Aggravated assault – Against an adult – Domestic violence
- 2.) Gross sexual imposition – Sexual act-Force (GSI)
- 3.) Gross sexual imposition – Sexual act – Force (GSI)

[¶25] The trial judge in this case in her Order of Motions Under Rule of Evidence 412, 404 (b) and 609 Order (See Appendix Ps. 54-60) relied on two North Dakota cases when she decided to admit into evidence Orlando's prior acts of domestic

violence. These cases are - State v. Christensen, 1997 ND 57, 561 N.W.2d 631 and State v. Alvarado 2008 ND 203, 757 N.W. 2d 570.

[¶26] Orlando disagrees with the trial judge's admitting his prior acts of domestic violence into evidence in this case as to charge 2 GSI and charge 3 GSI.

[¶27] He believes these GSI charges are separate and independent crimes. His belief is based on the facts that:

- 1.) Both he and B. were at all times relevant to this case adults.
- 2.) All sexual acts with B. prior to April 23, 2018 were consensual and
- 3.) There is no evidence to indicate he ever used domestic violence prior to April 23, 2018 in order to have sex with B.

[¶28] The trial judge in this case in her Order (see Appendix P.s 54-60) relied on two cases, State v. Christensen, 1997 ND 57, 561 N.W.2d 631 and State v. Alvarado 2008 ND 203, 757 N.W. 2d 570, when she analyzed Orlando's past acts of domestic violence decided they were admissible into evidence.

[¶29] The fact situations in Christensen and the case now before the court are completely different. In Christensen the victim was a minor and an expert witness testified how Christensen groomed her with prior acts to prepare her for sex. At the trial in Christensen:

“The State introduced the evidence to show part of the preparation, the "grooming," Christensen undertook before he engaged in the criminal act. The evidence showed Christensen had gained not only GBO's trust, but her parent's trust as well, and then used this trust to get closer to GBO. We believe the trial court viewed Christensen's actions in Minnesota as preparation for further activity. The trial court did not abuse its discretion in admitting evidence regarding the non-criminal acts which occurred in Minnesota.”



[¶30] In the case now before the Court Orlando and B. were at all times relevant to this case adults. The sex they had was consensual. There was no grooming. Orlando never used any domestic violence prior to April 23, 2018 to force B. to have sex with him.

[¶31] The charge in Alvarado was terrorizing. One of the charges in this case was Aggravated Assault against an adult. Orlando doesn't contest the trial judges ruling regarding admission of his past violent domestic acts of the Aggravated Assault charge. He does contest the admissions of his past violent domestic act in the 2 GSI charges. The reason he disagrees are set out above in [¶29].

[¶32] From what has been said above the issue involved in this case involves a trial judge evidentiary ruling. The standard of review of a trial judge evidentiary ruling is set out in Alvarado:

“We review a trial court’s evidentiary ruling under an abuse-of-discretion standard.” State v. Hatlewick, 2005ND 125, ¶9, 700 N.W.2d 717. “A trial court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably or if it misinterprets or misapplies the law.” Id.(quoting State v. Ramsey, 2005 ND 42, ¶ 8, 692 N.W.2d498). “We apply this deferential standard of review to provide the trial courts with greater control in the admissibility of evidence.” State v. Christensen, 1997 ND 57, ¶ 5,561N.W.2d 631 (citing Knudson v. Director, North Dakota Dep’t. of Transp.,530 N.W.2d 313, 316 (N.D. 1995)).

[¶33] Had the trial judge separately addressed three crimes charged in this case, and as to each crime analyzed how a prior violent domestic act or acts related to that crime there would be a way to determine how a violent domestic act related to a particular crime. Since the trial judge didn't address each of the crimes separately and instead decided to analyze all three crimes together there is no way of knowing how

she analyzed or decided how any prior violent act of Orlando related to any one of the three crimes.

[¶34] In paragraph [8] of document #130, Judge's Order on Motions Under Rules of Evidence, (Appendix P. 54-60) the order says that "when conduct is not independent of the crime charged but rather is evidence of activity in furtherance of the same criminal activity admission of evidence of that conduct does not raise an issue under 404 (b)". Paragraph [8] then goes on to cite state vs. Christensen 1997 ND 57 ¶ 8 551 NW 2<sup>nd</sup> 631 and how prior acts in that case groomed the victim into engaging in sexual acts.

[¶35] In regard to the prior sex acts of Orlando and B. they are both adults and there is nothing in the record to show that these sex acts weren't consensual prior to April 23, 2018. Also, there is no evidence connecting Orlando's prior violent domestic acts with the sexual acts of Orlando and B. prior to April 23, 2018.

[¶36] In paragraph [9] of document #130, Judge's Order on Motions Under Rules of Evidence (Appendix P.54-60) the Judge makes it clear that a prior bad act may be admitted for some purpose other than to point out Defendants criminal character and the probability he acted in conformity therewith.

[¶37] In this case there is no evidence to show any prior bad act of Orlando was related to him and B. having sex. Therefore, there is no way to conform a prior bad act to sexual acts between Orlando and B. prior to April 23, 2018.

[¶38] In paragraph [10] of document #130, Judge's Order on Motions Under Rules of Evidence (Appendix P. 54-60). The order says:

"Evidence of the domestic violence in the victim's relationship with Defendant during the two to three months prior to the date in question is

admissible to show the victim’s mindset and present “a more complete story of the crimes by putting them in context of happenings near in time and place.””

[¶39] What has been said above would relate to the charge of aggravated assault but it doesn’t relate to either GSI charge. This is because there is no evidence that connects Orlando’s past violent acts to he and B.’s consensual sex.

### **CONCLUSION**

[¶40] For the above and forgoing reasons the trial judge erred when she allowed evidence of past domestic violent acts of Orlando to go into evidence at a trial that involved GSI charges.

[¶41] This case should be remanded to the District Court with an Order requiring the District Court to give a new trial on both GSI charges.

DATED this 25<sup>th</sup> day of October, 2019.

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IN THE SUPREME COURT OF NORTH DAKOTA

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State of North Dakota	)	Supreme Court File No.
	)	20190206
	)	
Plaintiff and Appellee,	)	Grand Forks County No.
	)	18-2018-CR-00860
	)	
v.	)	
	)	
Orlando Joseph Brown,	)	CERTIFICATE OF
	)	COMPLIANCE
Defendant and Appellant.	)	

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[¶1] This Appellant’s Brief and Appendix complies with the page limit of 38 set forth in Rule 32 (a)(8)(A) of the North Dakota Rules of Appellate Procedure as the brief only has 13 pages and the appendix only has 81.

Date this 25<sup>th</sup> day of October, 2019.

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**CERTIFICATE OF SERVICE BY MAIL**

[¶42] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Office and is a person of such age and discretion as to be competent to serve papers. That on October 22<sup>nd</sup>, 2019, she served, by efilng and mailed a copy to the following:

**APPELLANT'S BRIEF  
APPELLANT'S APPENDIX**

**E-mailed:**

To: Andrew Eyre  
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Grand Forks County Courthouse  
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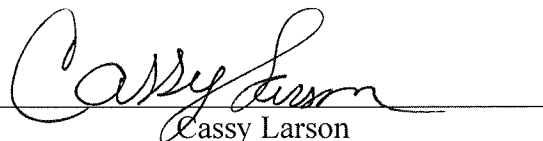
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Bismarck, ND 58505

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Bismarck, ND 58506-5521

The undersigned further certifies that on October 22<sup>nd</sup>, 2019, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS BRIEF and APPELLANT'S APPENDIX.

  
Cassy Larson  
Pulkrabek Law Office

**CERTIFICATE OF SERVICE BY MAIL**

[¶42] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Office and is a person of such age and discretion as to be competent to serve papers. That on October 25th, 2019, she served, by efileing and mailed a copy to the following:

**APPELLANT’S BRIEF  
APPELLANT’S APPENDIX**

**E-filed:**

To: Andrew Eyre  
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Grand Forks County Courthouse  
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Bismarck, ND 58505

**Mailed:**

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The undersigned further certifies that on October 25, 2019, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS BRIEF and APPELLANT’S APPENDIX.

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