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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 21, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court No. 20190206
Plaintiff and Appellee,	)	
	)	
v.	)	District Court No. 18-2018-CR-00860
	)	
Orlando Joseph Brown,	)	
	)	
Defendant and Appellant.	)	

BRIEF OF APPELLEE

ON APPEAL FROM CRIMINAL JUDGMENT DATED JUNE 17, 2019,
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE LOLITA HARTL-ROMANICK, PRESIDING.

ORAL ARGUMENT REQUESTED

Sarah Gereszek
Assistant State's Attorney
ND Bar ID #07017
124 South 4th Street
P.O Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
E-Service: sasupportstaff@gfcounty.org
Email: sarah.gereszek@gfcounty.org
Attorney for Appellee

Paul Monnin
Third Year Certified Law Student
(On Brief)

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STATEMENT OF THE CASE

[¶1] Orlando Brown (Brown) appeals from a criminal conviction in District Court No. 18-2018-CR-00860. On April 24, 2018, Brown was charged with Aggravated Assault – Domestic Violence, a Class C Felony from an incident occurring on April 23, 2019. (Appellant App. p. 8-10). The Information in Count I stated Brown willfully caused serious bodily injury to R.B by strangling her and kicking her in the leg, causing an impediment of air flow or blood flow to the brain or lungs, and causing bruising and swelling. Id.

[¶2] The Information was amended on June 6, 2018. Two Gross Sexual Imposition charges were added to the Aggravated Assault charge as well as a charge of Simple Assault. Id. at p. 23-24.The Amended Information in Count II stated Brown willfully engaged in a sexual act with R.B. and compelled R.B. to submit by force or by threat of imminent death or serious bodily injury when the Defendant forced an object into R.B.'s vagina during a violent physical assault against R.B.. Id. Further, the Amended Information in Count III stated Brown willfully engaged in a sexual act with R.B. and compelled R.B. to submit by force or by threat of imminent death or serious bodily injury when the defendant forced his penis into R.B.'s vagina during a violent physical assault of R.B. Id. Lastly, concerning the Simple Assault charge, the Amended Information in Count IV stated Brown willfully caused bodily injury to a two-year old juvenile female when the defendant slapped the two-year old child in the head causing injuries including but not limited to physical pain. Id. The Simple Assault charge was later dismissed on February 7, 2019. (Appellant App. p. 50).

[¶3] The State filed a *Notice of Intent to Offer Evidence of Prior Acts under Rule 404(b) and Alvarado* (Appellant App. p. 38-45) on February 1, 2019. Brown filed a Response on February 4, 2019. On February 11, 2019, the district court issued an *Order on Motions under Rule of Evidence 412, 404(b) and 609* (Appellant App. p. 51-57) granting the State's request to introduce

evidence of Defendant's prior acts. A trial was held on February 12-14, 2019. The jury found Brown guilty of all three charges. Trial Tr. Vol IIII, pp. 664-665. Brown was sentenced on June 17, 2019.

STATEMENT OF FACTS

[¶4] On April 23, 2018, Orlando Brown assaulted his girlfriend, R.B., in the apartment rented by Brown's mother in Grand Forks, North Dakota. R.B. testified at trial that the night of the incident she and Brown got into an argument. Trial Tr. Vol. I p. 230 l. 24. Brown got on top of her and held her down with his arm over her neck. Trial Tr. Vol. I p. 231 l. 9-13. Brown then started strangling her and told her "Nobody is going to believe you." Id. at l. 14-18. R.B. then testified Brown strangled her until she lost consciousness. Trial Tr. Vol. I p. 232 1. 21-25. R.B. stated she lost consciousness about eight or nine times. Id. R.B. testified Brown ripped off her clothes. Trial Tr. Vol. I p. 234 l. 6-11. R.B. stated Brown inserted his penis and a dildo into her vagina at the same time. Trial Tr. Vol. I p. 236 l. 8-9. Brown kept inserting the dildo, which hurt R.B. Trial Tr. Vol. I p. 236 l. 9-10. R.B. testified she told Brown to stop multiple times and he failed to do so. Trial Tr. Vol. I p. 237 l. 11-15. R.B. also did not consent to Brown using the dildo on her on April 23, 2018. Trial Tr. Vol. I p. 235 1. 6-8. One of the children peeked into the room and told Brown to stop. Trial Tr. Vol. I p. 237 1. 11-15. Brown jumped up and left the apartment. Id. R.B. testified she went to Altru Emergency Hospital. Officer Lafrombois arrested Brown and he was transported to the Grand Forks County Corrections. Trial Tr. Vol. II p. 332 l. 17-19.

[¶5] At trial, R.B. testified Brown instigated a non-consensual sexual act with her two weeks prior to April of 2018. Trial Tr. Vol. I p. 208 1. 16-17. R.B. testified in her direct examination at that time Brown came at her with a knife and raped her by knifepoint. Trial Tr. Vol. I p. 211 l. 19-24. She further testified Brown stated, "Who's going to believe you? The cops are right there. They can't even help you. Nobody can come in here and help you," and had his

hand over her mouth. Trial Tr. Vol. I p. 212 l. 1-4. Detective Starr and Detective Conley asked Brown about the non-consensual sexual act from two weeks prior to April of 2018 with R.B. Trial Tr. Vol. I p. 210 l. 2. They took Brown's statement, where he denied it occurring. Id. at l. 3-4. R.B. also testified at trial that Brown hit her, slapped her and hit her in the head with a closed fist. Trial Tr. Vol. 1 p. 208 l. 5-7. These acts left R.B. in pain and caused her injuries and bruising. Id. at l. 8-12.

LAW AND ARGUMENT

[¶6] In the case at hand, Brown argues the district court erred in its *Order on Motions under Rule of Evidence 412, 404(b), and 609* allowing into evidence Brown's history of domestic violence with R.B. on all three criminal charges over the two to three-month period prior to the date of the incident Brown was charged.

I. THE DISTRICT COURT DID NOT ERR IN ALLOWING EVIDENCE OF BROWN'S HISTORY OF DOMESTIC VIOLENCE WITH R.B.

A. Brown did not raise this argument at the trial court level and cannot raise it for the first time on appeal.

[¶7] Brown argues the evidence should have been admitted for the charge of Aggravated Assault but not regarding his two charges of Gross Sexual Imposition. Appellant's Brief at ¶ 26. He also states the Gross Sexual Imposition charges are separate and independent crimes. Id. at ¶ 27. Brown raises this argument for the first time on appeal. His attorneys filed a brief in *Response to State's Notice of Intent to Offer Evidence of Prior Acts under Rule 404(b) and Alvarado*, (Appellant App. p. 38-45) arguing prior instances of domestic violence that occurred between Brown and R.B. should not be admitted at trial. However, Brown did not argue the evidence should only apply to the Aggravated Assault charge nor that the Gross Sexual Imposition charges are separate and independent crimes from the Aggravated Assault charge in the district court.

[¶8] The North Dakota Supreme Court has long held issues not raised or considered in the district court cannot be raised for the first time on appeal. State v. Docker, 2019 ND 203, ¶ 8, 932 N.W.2d 98. As the Court explained:

> The purpose of an appeal is not to give the appellant an opportunity to develop new strategies or theories; rather, the purpose is to review the actions of the district court. The requirement that a party first present an issue to the trial court, as a precondition to raising it on appeal, give that court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective review of the decision.

Id.

[¶9] The argument Brown makes on appeal to have the evidence applied to his Aggravated Assault charge but not his Gross Sexual Imposition charges was never raised in front of the district court and therefore was never given a chance to be considered in the district court. There were no motions made by Brown to have separate trials on the three different charges nor were there any objections concerning Brown's argument throughout the proceedings. Brown did not raise this issue before the district court; therefore, it is improper to raise it as an argument for the first time on appeal before this Court. The district court tried all three of Brown's charges in one trial, to which Brown did not object. Therefore, since there were no motions or objections pertaining to Brown's argument on appeal, Brown forfeited the issue and it can only be reviewed for obvious error. State v. Smith, 2019 ND 237, ¶ 14, 934 N.W.2d 1.

[¶10] In order to prove obvious error on appeal, Brown has the burden to show: (1) error, (2) that was plain, and (3) that affected his substantial rights. Id. Further, to constitute an obvious error, "the error must be a clear deviation from an applicable legal rule under current law." State v. Pemberton, 2019 ND 157, ¶8, 930 N.W.2d 125. In order to prove the error is "a clear deviation from an applicable legal rule under current law," the deviation must also "affect 'substantial rights', that is, it must have been prejudicial, or affected the outcome of the proceeding." State v. Pemberton, 2019 ND 157, ¶8, 930 N.W.2d 125; State v. Olander, 1998 ND 50, ¶12, 575 N.W.2d

658. An obvious error "seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings" may be corrected by this Court. Olander, 1998 ND 50 at ¶16; see *also* N.D.R.Crim.P. 52(b).

[¶ 11] Here, the district court did not err in its *Order on Motions under Rule of Evidence 412, 404(b), and 609*. The district court's Order was not a clear deviation from an applicable legal rule under current law. The evidence was not prejudicial as the district court applied the necessary steps under N.D.R.Evid. 404(b) and N.D.R.Evid. 403 to admit the evidence under the Order. It is also unclear as to whether the evidence would have affected the outcome of the proceedings. Brown failed to raise his argument to separate the charges with the district court or to have the prior domestic violence evidence only apply to one of the three charges. Therefore, under State v. Smith, Brown forfeited the issue unless there was an obvious error committed by the district court, which there was not. The Court does have the power to correct obvious error, however it should not do so here as obvious error was not committed by the district court that seriously affected the fairness or integrity of the proceedings. Brown was charged with three separate counts based on the same act or transaction, which is allowed under N.D.R.Crim.P. 8(a). The district court followed the applicable legal rule of N.D.R.Crim.P. 8(a) and it was not a clear deviation. Therefore, Brown's argument on appeal should be rejected and the district court's Order should be affirmed.

B. Brown misapplies the holdings behind Christensen and Alvarado.

[¶12] The evidence of prior domestic violence against R.B. by Brown was submitted not to introduce prior acts by the Appellant, but to introduce the mindset of R.B. at the time of the incident and to give a more complete story of the relationship between Brown and R.B. The two cases the district court used to help determine admissibility of the evidence in its Order were State v. Christensen (1997 ND 57, 561 N.W.2d 631) and State v. Alvarado (2008 ND 203, 757 N.W.2d 570). Brown argues since the facts and charges are different in both cases compared to the case at

hand, the reasoning is flawed. The State does not argue there are different facts between Alvarado and Christensen and the case at hand. However, the holding from these cases concerned the defendant's history of domestic violence or grooming behavior with the victim, the very kind of evidence Brown argues should not apply to all three of his charges. The defendant in Christensen was also charged with two counts of Gross Sexual Imposition. Moreover, the holdings, reasoning and rules enacted by the Court in each case is of importance to the case at hand, not the difference of facts between the cases.

[¶13] This Court held in Christensen:

> "Rule 404(b) only excludes evidence of other acts committed by the Defendant when they are independent of the charged crime and do not fit in the rule's exception. Rule 404(b) was not intended . . . to exclude evidence of activity in furtherance of the same criminal activity."

State v. Christensen, 1997 ND 57, ¶ 8, 561 N.W.2d 631. The Court also held in Alvarado evidence of a defendant's prior conduct was admissible "to provide a more complete story of the crime by putting it in context of happenings near in time and place." Alvarado, 2008 ND 203, at ¶ 16, 757 N.W.2d 570. Therefore, the Court held prior acts of domestic violence are not independent acts but rather are evidence of activity in furtherance of the same criminal activity of domestic violence and thus, it is an exception to N.D.R.Evid. 404(b). Id. at ¶ 12.

[¶ 14] The Court went further to state that even under a N.D.R.Evid. 404(b) analysis, prior bad act evidence could be admitted if it is "substantially relevant for some purpose other than to point out defendant's criminal character and thus, to show the probability that he acted in conformity therewith." Id. at ¶ 14. The Court then set forth a three part analysis for admission of the evidence, including (1) the purpose for which the evidence is offered; (2) the evidence must be substantially reliable or clear and convincing; and (3) in criminal cases, there must be sufficient

independent proof of the crime charged which would permit the trier of fact to establish the defendant's guilt or innocence independent of the evidence of bad acts. Id.

[¶ 15] Here, the district court did not err in allowing the evidence as it was admitted introducing R.B.'s mindset and the evidence presented "a more complete story of the crimes by putting them in context of happenings near in time and place." Id. at ¶ 16. Furthermore, the history of domestic violence between Brown and R.B. is considered satisfied under the three-part analysis of N.D.R.Evid. 404(b) as the Court stated in Alvarado. As the district court stated in its *Order on Motions under Rule of Evidence 412, 404(b) and 609* (Appellant App. p. 51-57):

> The evidence was submitted for the purpose of showing the victim's mindset and it presented "a more complete story of the crimes by putting them in context of happenings near in time and place." The testimony was given by the victim and thus, is sufficiently reliable. There was also ample other evidence independent from the evidence at hand which the jury could determine Defendant's guilt or innocence on the crimes charged.

The other evidence included testimony from R.B. concerning her rape and assault, as well as from law enforcement and from the SANE nurse who examined her. There was also testimony from Thomas Rudd, who testified he observed Brown physically striking R.B. within a few weeks of the incident. Therefore, the evidence does meet the three-part analysis under N.D.R.Evid. 404(b).

[¶16] The district court then reviewed the evidence as to whether it should be allowed under N.D.R.Evid. 403 to determine whether the probative value of the evidence outweighs any prejudicial effect. The evidence was correctly allowed as it was relevant to show the R.B.'s mindset as well as present a more complete story of the relationship between Brown and R.B. Therefore, as the evidence was correctly admitted using the three part analysis under N.D.R.Evid. 404(b) and its probative value would outweigh any prejudicial effect, the district court did not err in allowing the evidence.

C. A sexual act with R.B. was not consensual and there is evidence to indicate Brown had sexual intercourse with R.B. at knifepoint prior to April 23, 2018.

[¶17] Brown states in his brief:

> He believes these GSI (Gross Sexual Imposition) charges are separate and independent crimes. His belief is based on the facts that:
>
> 1) Both he and R.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 R.B.

App. Brief at ¶ 27. The State agrees that Brown and R.B. were adults at all times relevant to this case. However, the State does disputes Brown's second and third assertions. R.B. testified at trial that there was a non-consensual sexual act between Brown and R.B where he used domestic violence.

[¶18] During her direct testimony on day one of the trial, R.B. testified to an incident two weeks prior to the alleged offense wherein Brown held a knife to her throat. Trial Tr. Vol 1. p. 211 l: 19-23. The detectives questioned Brown about the allegation and he denied it. The incident was discussed at the Motion Hearing on February 11, 2019. Motion Hearing Tr. p. 32-33. The district court decided until it heard the testimony, it could not "make a determination that it would or would not be admissible." Id. The incident was then testified to by R.B. and the testimony was admitted during R.B's testimony. Trial Tr. p. 211 l. 3-8. R.B. stated at trial during her direct examination:

> He come in there with a knife. He held me down. He had it at my throat, and then I felt like he raped me then, but I didn't say anything. I was scared at the time because he kept telling me then, 'who's going to believe you? You're right here by the jail.'

Trial Tr. Vol 1. p. 211 l. 19-23. Therefore, two weeks prior, Brown held down R.B. with a knife and forced R.B. to have sexual intercourse with him at knifepoint. R.B. testified that Brown told

her "Who's going to believe you? The cops are right outside. Nobody can do anything. Nobody is going to do anything anyways." Trial Tr. Vol. 1 p. 213 l. 15-17.

[¶19] This incident between Brown and R.B. was not consensual and R.B. herself provided testimony that Brown used domestic violence two weeks prior to the incident on April 23, 2019. Therefore, Brown is incorrect to argue all sexual acts between himself and R.B. were consensual and there is no evidence to indicate as such. The trial transcript indicates otherwise as there was an act of domestic violence prior to April 23, 2019, used during a nonconsensual sexual act. This evidence was prior domestic violence evidence that further put R.B.'s mindset into context and further explain the relationship of Brown and R.B. to the jury.

D. There was no limiting instruction requested at the trial court level and the issue is not adequately preserved for review.

[¶20] In order to adequately preserve an issue on appeal, the defendant must ask the trial court for a limiting instruction to be instructed to the jury. N.D.R.Crim.P. Rule 30(a). As the Court held in State v. Flanagan:

> Under N.D.R.Crim.P. 30, if the trial court gives counsel an opportunity to object to proposed instructions, counsel must designate objectionable parts of the instructions and thereafter only the parts so designated are deemed excepted to by counsel.

State v. Flanagan, 2004 ND 122, ¶5, 680 N.W.2d 241. A failure to do so fails to adequately preserve the issue for review. Id. Brown did not ask the district court to issue a limiting instruction to the jury concerning the application of Brown's history of domestic violence at the Motion Hearing on February 11, 2019. Nor did he make any objections or motions regarding a limited instruction at trial. Therefore, the issue was not adequately preserved for review. Thus, since there was no limiting instruction requested nor motion or objections made by Brown, his argument in should be rejected and the district court's Order should be affirmed.

Conclusion

[¶21] The district court did not err admitting into evidence Brown's history of domestic violence against R.B. in regards to all three charges. First, Brown's argument stating his Gross Sexual Imposition charges were separate and independent crimes was not raised at the trial court level and thus should not be considered on appeal. Second, the evidence of Brown's history of domestic violence with R.B. was properly allowed by the district court under the court's N.D.R.Evid. 404(b) analysis and was not unfairly prejudicial towards Brown under N.D.R.Evid 403. Third, there was an incident indicating Brown used domestic violence two weeks before April 23, 2019, to perform a sexual act at knifepoint towards R.B. which was not consensual. Fourth, Brown did not ask the district court for a limiting instructing on applying Brown's history of domestic violence with R.B. to only the Aggravated Assault charge. Based on the foregoing law and conclusion, the State respectfully requests this Court affirm the district court's rulings and the criminal judgment in this case.

Respectfully submitted this 26th day of November, 2019.

/s/ Sarah Gereszek
Sarah Gereszek
Assistant State's Attorney
ND Bar ID #07017
124 South 4th Street
P.O Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
E-service: sasupportstaff@gfcounty.org
Email: sarah.gereszek@gfcounty.org

/s/ Paul Monnin
Paul Monnin
Third Year Certified Law Student

Request for Oral Argument

[¶ 1] The Appellant has requested oral arguments. The State has also requested oral arguments because if the Court grants oral arguments, the State would like an opportunity to provide a full discussion of the issues.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Orlando Joseph Brown,	)	
	)	
Plaintiff and Appellant,	)	**Supreme Court No. 20190206**
	)	
vs.	)	
	)	
State of North Dakota,	)	**Grand Forks County District Court**
	)	**Case No. 18-2018-CR-00860**
Defendant and Appellee.	)	

CERTIFICATE OF COMPLIANCE

[¶1] The State of North Dakota, by and through Assistant State's Attorney Sarah Gereszek hereby certifies that the attached brief complies with the page limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The electronically filed brief contains 13 number of pages.

Dated this 21st day of November, 2019.

/s/ Sarah Gereszek
Sarah Gereszek
Assistant State's Attorney
ND Bar ID #07017
124 South 4th Street
P.O Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
E-service: sasupportstaff@gfcounty.org
Email: sarah.gereszek@gfcounty.org

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	)	
v.	)	District Court No. 18-2018-CR-00860
	)	
Orlando Joseph Brown,	)	
	)	
Defendant and Appellant.	)	

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

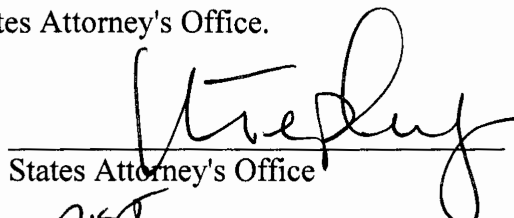
The undersigned, being of legal age, being first duly sworn deposes and says that on the 21st day of November, 2019, she enclosed in envelopes true copies of the following documents:

- **BRIEF OF APPELLEE**
- **CERTIFICATE OF COMPLIANCE**

and that she addressed and deposited said envelopes, with the contents therein, in the U.S. Mails at Grand Forks, North Dakota, mail postage prepaid to the following:

Orlando Joseph Brown (ID #56332)
ND State Penitentiary
3100 E Railroad Ave
Bismarck, ND 58506

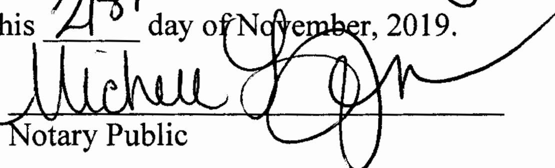
At the office of the Grand Forks County States Attorney's Office.



States Attorney's Office

Subscribed and sworn to before me this 21st day of November, 2019.

MICHELLE L JENSON
Notary Public
State of North Dakota
My Commission Expires Jan. 31, 2023



Notary Public

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	)	
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vs.	)	
	)	
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/s/ Sarah Gereszek
Sarah Gereszek
Assistant State's Attorney
ND Bar ID #07017
124 South 4th Street
P.O Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
E-service: sasupportstaff@gfcounty.org
Email: sarah.gereszek@gfcounty.org

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State of North Dakota,	)	**Grand Forks County District Court**
	)	**Case No. 18-2018-CR-00860**
Defendant and Appellee.	)	

AFFIDAVIT OF SERVICE
BY ELECTRONIC FILING

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 26th day of November, 2019, she served true copies of the following documents:

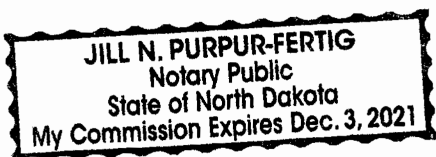
- **Certificate of Compliance**
- **Brief of Appellee**
- **Notice of Certified Student Representation**

Electronically through the Court Electronic Filing System to:

Benjamin C. Pulkrabek
402 First Street NW
Mandan, ND 58554-3118
pulkrabek@lawyer.com

States Attorney's Office

Subscribed and sworn to before me this 26th day of November, 2019.



Notary Public