

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	Supreme Court No. 20210011
)	Ward County District
Plaintiff/Appellee)	North Central Judicial District
)	Court Case No. 51-2019-CR-02004
vs.)	
)	
Brent Allan Castleman,)	
)	
Defendant/Appellant)	
)	

Appeal from the

Criminal Judgment entered December 31st, 2020.

District Court, Ward, North Dakota
The Honorable Michael P. Hurley, Presiding

AMENDED BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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I. Jurisdictional Statement

[¶1] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI § 6, the North Dakota legislature enacted Sections 29-28- 03 and 29-28-06, N.D.C.C., which provides as follows: “An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

II. Statement of the Issues

[¶2] Whether the evidence presented at trial was sufficient to convict Mr. Castleman of the offense of child abuse- mental injury.

[¶3] Whether the Court erred in granting a Demand for Change of Judge requested by the State without affording Mr. Castleman the opportunity to be heard.

[¶4] Whether the District Court erred in denying Mr. Castleman’s motion to dismiss based on an alleged speedy trial violation and prosecutorial misconduct.

[¶5] Whether the District Court erred in allowing evidence of prior bad acts to be admitted at trial without conducting the necessary analysis or providing a limiting instruction.

[¶6] Whether the District Court relied on impermissible factors in sentencing.

III. Oral Argument Justification

[¶7] Mr. Castleman believes that there are compelling reasons for this Court to hold oral argument in this matter. At a minimum, this case requires this Court to determine the definition of mental injury under North Dakota Law, which previously has not been determined in any prior opinions of this Court. Furthermore, there are significant questions regarding alleged improprieties by the State that warrant further examination by this Court.

IV. Statement of the Case

[¶8] Brent Castleman, the Appellant (herein after Mr. Castleman) appeals from a criminal judgment dated December 31st, 2020 (App.149). Mr. Castleman was originally charged via Complaint with two counts of Child Abuse, both Class C Felonies, in violation of N.D.C.C. 14-09-22(1) in Ward County case No. 51-2019-CR-01006. Mr. Castleman promptly filed a Demand for Speedy Trial in that file and the matter was set for trial to commence on August 20th, 2019. On August 12th, 2019, the State filed a motion to dismiss the charges, which the Court granted that same day without affording Mr. Castleman the opportunity to respond although an objection was filed on the same day by Mr. Castleman. The Court entered an Order dated August 14th, 2019 setting out criteria for the State to comply with in the event they wished to bring the charges against Mr. Castleman forward again.

[¶9] On October 11th, 2019, the State re-filed the child abuse charges and added an additional 8 charges (App.14), including a Class B Felony charge of child abuse under N.D.C.C. §14-19-22(1).

[¶10] An initial appearance was held before the Honorable Judge Gary Lee on October 14th, 2019 at which point, Judge Lee recused himself from the matter. The case was then re-assigned to Judge Doug Mattson, who had previously handled the originally filed child abuse charges. The State then promptly filed a demand for change of judge (App.28), which was granted over Mr. Castleman's objection without affording Mr. Castleman a hearing. The case was then reassigned out of District to Judge Michael Hurley (App.33). A Preliminary Hearing was then held in front of Judge Hurley on December 20th, 2019, at which time, the Court found probable cause for counts 1-6, but found that probable cause was not established for counts 7-10 (App.42).

[¶11] On February 5th, 2020, Mr. Castleman filed a motion to dismiss (App.46) alleging prosecutorial misconduct as well as a speedy trial violation and also demanded a hearing on the previously granted demand for change of judge. Mr. Castleman further demanded a Bill of Particulars be issued. On March 23rd, 2020, the Court denied Mr. Castleman's motions to dismiss and motions regarding the previously granted demand for change of judge but did grant Mr. Castleman's motion for a Bill of Particulars (App.79)

[¶12] On April 2nd, 2020, Mr. Castleman again filed a motion to dismiss (App.97), alleging that the State's filed Bill of Particulars did not provide him with any means of actually preparing a defense, along with a supplement to that motion filed a few days later alleging a double jeopardy violation, which was granted in part by the Court on May 1st, 2020.

[¶13] On November 30th, 2020, Mr. Castleman was brought to trial on the remaining three counts. Mr. Castleman was found guilty on Count 1- Class B Felony Child Abuse and was acquitted by the jury of Count 2- Class C Felony Child Abuse. Mr. Castleman's trial counsel made a Rule 29 Motion for Judgment of Acquittal on all counts, although the Court only granted the Rule 29 as it pertained to Count 3. On December 23rd, 2020, Mr. Castleman was then sentenced to 10 years with the Department of Corrections with the requirement that he serve 5 of those years and be placed on supervised probation for a period of 3 years. Mr. Castleman then timely filed a Notice of Appeal on January 14th, 2021 (App.149).

V. Statement of the Facts

[¶14] The charges in this case stem from Child Advocacy Center interviews that took place in May of 2019. During the course of those interviews, allegations of physical abuse were disclosed by two of Mr. Castleman's children, identified at trial and throughout the proceedings by pseudonyms of John Doe 1 and John Doe 2. Mr. Castleman's daughter, referred to by the pseudonym of Jane Doe 3, was not abused herself, but did indicate during the interview that she had observed Mr. Castleman and his now ex-wife in physical altercation. As a result of these disclosures, the State elected to proceed with 2 C Felony counts of Child Abuse under N.D.C.C. 14-09-22(1) by way of a criminal complaint filed on May 23rd, 2019. The case was assigned to Judge Doug Mattson. Shortly after his Initial Appearance, Mr. Castleman asserted his right to a speedy trial, which the District Court accommodated by scheduling a trial to commence on August 20th,

2019. On the eve of trial, August 12th, 2019, the State moved to dismiss the 2 charges against Mr. Castleman indicating that they did not have the requisite medical records to actually prove the charge against him. Without affording Mr. Castleman the opportunity to respond to the State's motion to dismiss, the Court granted the State's motion the same day the motion was filed, and Mr. Castleman promptly filed an objection to that order resulting in the Court issuing an Order on August 14th, 2019, requiring the State to meet certain criteria prior to re-filing the charges, which included at a minimum, affording Mr. Castleman to argue against the re-filing of any such charges. The State did not appeal this Order or take any action adverse to it.

[¶15] On October 11th, 2019, less than 2 months after dismissing the charges against Mr. Castleman, the State resumed prosecution without conducting any additional investigation or gathering any new information and elected to charge a 10-count information accusing Mr. Castleman of a variety of different acts of child abuse as well as a number of different charges of child neglect. The State did not in any fashion attempt to comply with or even acknowledge Judge Mattson's prior Order relating to these same charges, although precisely the same conduct was being alleged. An Initial Appearance was held before the Honorable Gary Lee on October 14th, 2019. At the Initial Appearance, Judge Lee recused himself and the matter was then set for an appearance in front of Judge Mattson that same day.

[¶16] The State then promptly filed a demand for change of judge (App.28) asserting that they were making this request in good faith and that Judge

Mattson had not issued any prior orders relating to this case. Both assertions were demonstrably false but nevertheless, the Court granted the request for re-assignment despite the fact that Judge Lee had recused himself previously. No hearing was afforded to Mr. Castleman despite his specific request for one. The matter was then re-assigned out of district to Judge Michael Hurley (App.33).

[¶17] A Preliminary Hearing was held on September 20th, 2019, at which time the District Court found that the State had failed to meet its burden of probable cause for Counts 7-10 by specifically finding that no evidence had been presented to sustain those charges. (App.42)

[¶18] On February 5th, 2020, Mr. Castleman filed a motion to dismiss (App.46) alleging that there had been prosecutorial misconduct in re-filing the charges and that the State had intentionally circumvented Mr. Castleman's demand for a speedy trial in previously dismissing the charge on the eve of trial and then re-filing the charge 2 months later with numerous additional charges that were not born from any investigation and indeed were not supported by any probable cause. Mr. Castleman further alleged that the State intentionally engaged in misconduct by circumventing an Order issued by Judge Mattson by seeking to have him removed from the case despite asserting that they did not intend to do so in their demand for change of judge. Mr. Castleman also filed a motion for a Bill of Particulars (App.63) alleging that it was impossible to prepare for a defense based on the vague assertions in the charging document and other information provided in discovery.

[¶19] The District Court ultimately denied the Motion to Dismiss and the motion relating to the demand for change of judge (App.76 but did grant a motion for a Bill of Particulars (App.79). The Court's Order regarding the Bill of Particulars required the State to identify the specific dates of the alleged criminal conduct they were accusing Mr. Castleman of. The State was provided a specific deadline to provide that information.

[¶20] The State originally filed a Bill of Particulars on April 1st, 2020 (App. 91) inexplicably asserting for the first time they did not know what the dates were. Mr. Castleman then promptly filed a motion to dismiss (App.97) based on non-compliance with the District Court's Order. A subsequent supplement to the Bill of Particulars was then filed on the deadline established by the Court on April 3rd, 2020 (App.105), which prompted Mr. Castleman to file a supplemental motion to dismiss on April 9th, 2020 (App.108) asserting that a number of the charges were barred by the principles of double jeopardy and res judicata and further asserting prosecutorial misconduct based on the continually shifting nature of the dates being alleged. On May 1st, 2020, the District Court granted in part Mr. Castleman's motion dismissing (App.111) an additional 4 criminal charges based on the issues of double jeopardy and res judicata, although the District Court denied the motion to dismiss the remaining charges based on prosecutorial misconduct.

[¶21] This matter then came to trial on November 30th, 2020. At trial, the State introduced testimony from 3 witnesses, the mother of Jane Doe 3, Jane Doe 1 testified regarding the Class B Felony Child Abuse count. Jane Doe 1 testified to

an event during an argument with Mr. Castleman that a physical altercation ensued between herself and Mr. Castleman when Jane Doe 3 was present (Tr. 41) At the time of this event, Jane Doe 3 was 3 years old. A recording was introduced through Jane Doe 1's testimony purporting to be of this occurrence. In the recording, a child's cry can be heard, and it is this crying that the State contended throughout the entirety of the trial and specifically in closing argument, that a child crying satisfies the definition of mental injury. No testimony from counselors or other mental health professionals was introduced, nor was there even the allegation that Jane Doe 3 suffers from some sort of mental defect or diagnosed mental disorder as a result of this occurrence.

[¶22] John Doe 1 and John Doe 2 also testified at trial regarding specific acts of alleged abuse perpetrated by Mr. Castleman. Specifically, they contended that they were both physically assaulted by Mr. Castleman on multiple occasions. However, John Doe 2 testified to alleged acts of abuse outside of what had been identified (Tr. 71) by the State in the Bill of Particulars and as such, when a Rule 29 Motion for Judgment of Acquittal was made by defense at the close of evidence, the Court granted that motion as it pertained to Count 3. However, the District Court submitted the remaining charges for the jury's consideration despite Mr. Castleman's contention in making a Rule 29 motion on Count 1 specifically, that there was no evidence of a mental injury presented.

[¶23] Throughout the trial, there were regularly made references to Mr. Castleman's requirement for supervised visitation with his children, (Tr. 60, 61, 115, 147, and 148) references to a bad marriage (Tr. 59, 62, 63, 149, and 150)

and generally other information outside the confines of the case (Tr. 115, 139, 143). Although these were clearly prior bad acts evidence, no objection was ever brought forward by Mr. Castleman's trial attorney, nor did the District Court issue any form of limiting instruction regarding this evidence of prior bad acts.

[¶24] When the case was submitted to the jury, the jury submitted a question on what mental injury was defined as, and they were not afforded any direction from the district court who simply directed them to turn to their instructions (Ap. 4). Ultimately, the jury found Mr. Castleman guilty of Class B Felony Child Abuse-Mental Injury, although they acquitted him of the Child Abuse charge against John Doe 1.

[¶25] Sentencing was then held on December 23rd, 2020. At the sentencing hearing, a number of different individuals from Mr. Castleman's ex-wife's family were permitted to testify prior to the imposition of sentence. The lion's share of this testimony had absolutely nothing to do with Jane Doe 3 or any perceived mental injury to her, and instead focused on a variety of other different slights or other concerns these individuals had with Mr. Castleman. Most notably, nothing was submitted to demonstrate any sort of actual harm to this child, or any indication as to what sort of ongoing problems were present with Jane Doe 3, and again, it should be reiterated that Jane Doe 3 did not testify at this proceeding or any proceeding in this matter. As a result of the statements provided in sentencing, Mr. Castleman was then sentenced to 10 years with the Department of Corrections with the requirement that he serve 5 years with 3 years of probation to follow. Mr. Castleman then timely appealed (Ap.4).

VI. Law and Argument

Whether the evidence presented at trial was sufficient to convict Mr. Castleman of the offense of child abuse- mental injury (Victim 6 years old or younger).

[¶26] In State v. Kinsella:

When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. When considering insufficiency of the evidence, we will not reweigh conflicting evidence or judge the credibility of witnesses.... A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty.

State v. Kinsella, 2011 ND 88 ¶7, 796 N.W.2d 678 (N.D. 2011)

[¶27] The case at bar concerns a charge of Child Abuse – Mental Injury (Victim 6 years old or younger), a Class B Felony under N.D.C.C. 14-09-22(1). As relevant to this case, the criminal conduct under that statute occurs when “a

parent, adult family or household member, guardian, or other custodian of any child . . . willfully inflicts or allows to be inflicted upon the child mental injury . . .”

Unlike bodily injury, substantial bodily injury, or serious bodily injury, which are defined under N.D.C.C. 12.1-01-04, no definition of “mental injury” exists under Titles 12.1 or 14 of the North Dakota Century Code.

[¶28] At trial in this matter, the State argued that Mr. Castleman inflicted mental injury on his daughter, who was less than six years of age, by getting in a physical altercation with the child’s mother while the child was present in the room. An audio recording was played for the jury which purported to be of this altercation, and included screaming and threats from Mr. Castleman directed towards the child’s mother. As argued by the State, that recording also included the sound of the child victim crying. No counselors or mental health professionals testified. The child herself did not testify. No medical records or any form of diagnosis of a mental health disorder were offered. A vague allusion to the child potentially needing counseling in the future was offered by the child’s mother, but was not elaborated on or supported with anything of substance.

[¶29] The State emphasized in closing argument that it was this particular cry that was the “mental injury”. The State offered no citations to statute, case law, or any form of authority to support this definition. No jury instructions were offered by either party to define mental injury, and Mr. Castleman contends that no jurisdiction in the United States has ever adopted the State’s definition of “mental injury”.

[¶30] At the conclusion of the State’s case, trial counsel for Mr. Castleman made a motion under N.D.R.Crim.P. 29 for a judgment of acquittal. Mr. Castleman’s trial counsel specifically argued that the State had failed to demonstrate a mental injury had taken place. The district court denied that motion, relying seemingly on the vague and legally unsupported definition of mental injury provided by the State. The district court did not articulate what authority it was relying on to side with the State’s definition.

[¶31] Other jurisdictions have wisely adopted more clear definitions of what constitutes “mental injury” rather than merely invoking the word itself. For example, Minnesota defines “Mental injury” as “. . . an injury to the psychological capacity or emotional stability of a child as evidenced by an observable or substantial impairment in the child's ability to function within a normal range of performance and behavior with due regard to the child's culture.” Minn.Stat. § 626.556, subd. 2(g). Rather than providing a vague definition that invites speculation and the formation of legal definitions by the untrained lay people that will vary wildly from case to case depending on the makeup of that jury, such a definition provides objective criteria for a reviewing court to consider. When there is a statutory definition for something as straightforward as “bodily injury” this Court should not leave something as nebulous and elusive as “mental injury” to the whims of randomly selected laypeople.

[¶32] It is anticipated that the State will respond by heavily emphasizing the evidence presented at trial that Mr. Castleman had assaulted his now ex-wife, and that by focusing on physical abuse of another person, this Court should

somehow translate that into evidence of a mental injury. Were this a case merely involving a physical assault on another person, that argument would have a great deal of merit. However, that does not translate into any objectively observable mental injury, and has no bearing on whether a mental injury did in fact occur.

[¶33] Additionally, any argument the State presents that it was permissible for the jury to fashion their own definition of mental injury based on a young child crying must fail. As noted above, no jurisdiction has ever upheld a conviction for “mental injury” based on merely causing a child to cry, nor should this Court.

[¶34] In the event this Court upholds a conviction under these circumstances, virtually any conduct could constitute a serious B Felony conviction. For example, raising your voice at a misbehaving child and causing them to cry would reach the same level of conduct being alleged here. Asking a child to eat a type of food they don’t care for and causing them to cry would satisfy the definition of mental injury present here. Not getting your child the right present for their birthday and upsetting them would meet the State’s definition of “mental injury” as argued to the jury. Notably, there is no requirement under the statute that the mental injury must be inflicted through some nefarious conduct, as the State will likely attempt to argue differentiates this matter from the benign conduct mentioned above. Yet because the statute does not require proof of that, upholding Mr. Castleman’s conviction would allow virtually anyone to be sentenced to up to 10 years in person merely for making a child cry.

[¶35] Even taking every factual contention offered by the State at face value, namely that Mr. Castleman assaulted his ex-wife and caused his young child to

cry while witnessing it, does not establish that Mr. Castleman willfully inflicted mental injury on his child. As such, the district court erred by denying Mr. Castleman's motion for a judgment of acquittal, and this Court should remand with instructions to the district court to enter the appropriate judgment of acquittal.

Whether the Court erred in granting a Demand for Change of Judge requested by the State without affording Mr. Castleman the opportunity to be heard, and when the demand was not made in good faith.

[¶36] “[A] party is entitled to a peremptory challenge of an assigned judge, without alleging bias or prejudice.” *Traynor v. Leclerc*, 1997 ND 47, ¶ 11, 561 N.W.2d 644. This Court is not bound by a party's label and may look to the substance of the motion to determine the proper classification. *Eagleman v. State*, 2016 ND 54, ¶ 18, 877 N.W.2d 1. One of the prerequisites to reassignment of the case under N.D.C.C. § 29-15-21 is certification by the moving party that the assigned judge “has not ruled upon any matter pertaining to the action or proceeding in which the moving party was heard or had an opportunity to be heard.” N.D.C.C. § 29-15-21(4). Additionally, “no demand for a change of judge may be made after the judge sought to be disqualified has ruled upon any matter pertaining to the action or proceeding in which the demanding party was heard or had an opportunity to be heard.” N.D.C.C. § 29-15-21(3).

[¶37] In this particular case, the Honorable Gary Lee was originally assigned based on the standard rotation of judges in that judicial district. At the initial appearance, Judge Lee advised the parties he was recusing himself based on

his involvement in adjudicating Mr. Castleman's recent divorce. Mr. Castleman notified the district court through his attorney that the State had failed to comply with a prior order by Judge Mattson prohibiting the State from refiling these charges without judicial approval. The case was then reassigned to the Honorable Judge Doug Mattson, who had handled the prior matter and had prohibited the State from refiling the charges without affording Mr. Castleman the opportunity to be heard on his objection to the prior dismissal of the charges.

[¶38] In the handful of hours between the appearance in front of Judge Lee and the scheduled appearance in front of Judge Mattson, the State filed a preemptory demand for change of judge. In doing so, the State asserted two demonstrable falsehoods. First, they State contended Judge Mattson had issued no prior orders pertaining to the matter dispute the ruling mentioned above, a ruling that had been specifically brought to the State's attention right before the demand was filed. Additionally, the State contended the demand was made in good faith, a clear misrepresentation from the State when made in this context.

[¶39] Despite having recused himself a few hours prior, Judge Lee inexplicably "un-recused" himself for a brief period to act on the demand for change of judge. In doing so, Mr. Castleman was denied the opportunity to even respond to the demand and oppose it. This error was then compounded when a hearing was held on the objection, whereby Judge Hurly denied the challenge based on the length of time the case had been pending. This ultimately resulted in error that warrants reversal in the event that this Court determines there was sufficient evidence to support a finding of guilt.

Whether the District Court erred in denying Mr. Castleman's motion to dismiss based on an alleged speedy trial violation and prosecutorial misconduct.

[¶40] Mr. Castleman contends that there were two independent bases for dismissing the present action, which the District Court erred in rejecting. The first is that the State improperly dismissed the original child abuse file, Case No. 51-2019-CR-01006 without affording Mr. Castleman the opportunity to be heard when he alleged that the dismissal was done in bad faith. That was compounded when the State re-filed the charges without complying with Judge Mattson's pre-filing order. The second issue is whether the State, in doing so, had violated Mr. Castleman's right to a speedy trial and whether that prior dismissal was done for precisely that purpose.

[¶41] Addressing the first issue, "generally, the prosecuting attorney is considered to be in the best position to evaluate the charges and the evidence to determine if prosecution should continue." *United State v. Salinas*, 693 F. 2d. 348, 51 (5th Cir. 1982). However, that right is not absolute and is subject to review by the trial court under N.D.R.Cr.P. 48(a) *State ex rel. Kopyy v. Graff*, 484 NW 2d 855. Rule 48(a) has been viewed as a way to check the absolute power of the executive. *Salinas*, 693 F. 2d at 351. Although the prosecutor has discretion in this area, the trial court should not merely serve as a "rubber stamp" for the prosecutor's decision. *United States v. Ammidown*, 497 F. 2d 615, 622 (DC Cir.) 1973. The prosecutor should be denied a dismissal, if the trial court is satisfied the prosecutor is acting in bad faith, contrary to public interest, or intentionally harassing the Defendant. *Graff* at 857. This determination should be

made by clear and convincing evidence. Mr. Castleman continues to allege that the original dismissal in this matter was done in a bad faith attempt to contravene Mr. Castleman's speedy trial demand.

[¶42] In order to establish that the dismissal is in good faith. This has generally required that there be a showing of: 1. That the government was without sufficient evidence for prosecution and sustained conviction and 2. The dismissal is not for the purpose of subjecting a defendant to harassment by the commencement of prosecution at a different time or place deemed more favorable to the prosecution. *Id.* Addressing each prong independently, it is clear that the State was acting in bad faith and cannot be presumed to have done so in a good faith effort.

[¶43] The first prong, that the government is without sufficient evidence to warrant prosecution and sustained conviction, is clearly not what the State of North Dakota believes in this instance. Although special assistant attorney Marie Miller phrased her motion to dismiss originally in the context that an investigation was ongoing and information needed to continue to be collected throughout this process, that is not ultimately what took place when the charges were re-filed. As noted above, and as is reflected in both of the preliminary hearing transcripts from the original file, Case No. 51-2019-CR-01006 and 51-2019-CR-02004, it is clear that the evidence in this case has not changed materially in any fashion. Thus, it is somewhat baffling that the State would have chosen to dismiss the prior charges on the eve of trial rather than proceed as the evidence has not

changed. This heavily indicates that the State was engaging in a bad faith dismissal.

[¶43] The second, that the dismissal is not for the purpose of subjecting the defendant to harassment by commencement of another prosecution at a different time or at a place deemed more favorable to the prosecution, also cannot be shown to be a good faith effort by the State. In particular, a couple of actions warrant the attention of this Court. The first is that the State pretended to be completely unaware of a pre-filing order issued by Judge Mattson in this case, which required them to go through a clearly defined process prior to re-filing the charges against Mr. Castleman. They completely neglected that process and approached a different District Judge, the Honorable Richard L. Hagar, to submit the proposed warrant for Mr. Castleman's arrest. When the order itself was again brought to the State's attention during Mr. Castleman's initial appearance in October of 2019, the State then proceeded to file a bad faith demand for change of judge in an attempt to remove Judge Mattson from the case. The reason for doing so could not be more clear. They did not want to comply with Judge Mattson's prior order and wanted to remove him from the case so as to not be held accountable in front of Judge Mattson. In essence, what the State did here, is seek a more favorable time, place, and judge to pursue this charge without having done anything different.

[¶44] Additionally, these charges have subjected Mr. Castleman to significant harassment. Despite the allegations being quite old and the evidence being significantly weak, the State has sought extensively high bonds for Mr.

Castleman and have drastically increased the number of charges based on the skimpiest evidence. Mr. Castleman spent several months in pre-trial detention.

[¶45] The Court should also consider the speedy trial violation that is taking place in this matter. United States Supreme Court has developed a four-factor test to determine whether the right to a speedy trial has been violated and this Court has adopted that test. The factors are: 1. The length of the delay. 2. The reason for the delay. 3. The accused assertion of his right to a speedy trial. 4. The prejudice to the accuse. *City of Grand Forks v. Gale*, 2016 ND 58 ¶6. No single factor is controlling. The Court must weigh “all the factors in a difficult and sensitive balancing process.”

[¶46] The first factor, the length of the delay, defines a threshold in the inquiry: a delay long enough to be prejudicial. *United States v. Loudhawk* 474 US 302, 314 (1986). “If the delay is longer than the delay usually allowed for criminal prosecutions, the delay is presumptively prejudicial, and a court must complete a speedy trial analysis. A presumptively prejudicial delay alone does not create a speedy trial violation, and other factors must be weighed.” *Gale* at ¶9. This Court has generally held that a delay of approximately one year is considerable. *State v. Little Wind*, 417 NW 2d 361, 364 (ND 1987). This case took over a year to be brought to trial. This creates a presumptively prejudicial delay that triggers the analysis of a speedy trial violation.

[¶47] The next factor for the Court to consider is the reason for the delay. “A Defendant has no duty to bring himself to trial: the State has that duty.” *Barker v. Wingo*, 407 US 514 at 527. However, if the defendant causes the delay, this

factor weighs against him. The defendant's burden under that factor depends on the governments diligence in bringing the case forward. *United States v. Cardona*, 302 F. 3d at 494, 497 (5th Cir. 2002). This requires the government to diligently pursue the accused. That has not taken place here. Mr. Castleman never requested any continuances, while the State drug this matter out well over a year by filing and re-filing charges. This factor should weigh heavily against the State.

[¶48] The third factor is the assertion of a defendant's right to a speedy trial. In May of 2019, Mr. Castleman asserted his right to a speedy trial. Mr. Castleman has at no point ever requested a continuance in these matters. Additionally, Mr. Castleman objected to the dismissal of the prior charges on the basis that he insisted on going to trial.

[¶49] The fourth factor is prejudice to the defendant. The United States Supreme Court has instructed this factor be assessed in light of the interests the right to a speedy trial is meant to protect, and this is 1. To prevent oppressive pre-trial incarceration. 2. To minimize anxiety and concern of the accused. 3. To limit the possibility that the defense will be impaired. Mr. Castleman was incarcerated for several months prior to trial. Additionally, he is subjected to an extremely restrictive pre-trial release order, which significantly curtails his freedom and prohibits contact with his children. The second factor should weigh heavily in the favor of Mr. Castleman in that he has massive anxiety and concern over these particular charges. He has had these charges hanging over his head for going on close to a year at this point, with no end in sight.

[¶50] Regarding the final sub-element, the possibility that the defense would be impaired, it is difficult, if not impossible for Mr. Castleman to determine how his defense may be impacted due to the passage of time. It should be noted that the primary evidence against Mr. Castleman was a recording from three years prior. As testified to at trial, the authenticity of this recording was in doubt and there is not much one can do 3 years later to dispute.

[¶51] Thus, a proper analysis of the 4 Barker factors should require this Court to take the significant step in dismissing the charges against Mr. Castleman. In the alternative, this Court should determine that the State's bad faith efforts in dismissing the charge against Mr. Castleman to circumvent his speedy trial request also warrants dismissal. Mr. Castleman acknowledges that that is generally a drastic step for the Court to take. However, strong action is needed in the face of such a blatant effort to circumvent Mr. Castleman's rights and for the prosecutorial misconduct perpetrated by the State.

Whether the District Court erred in allowing evidence of prior bad acts to be admitted at trial without conducting the necessary analysis or providing a limiting instruction.

[¶52] A district court's evidentiary ruling is reviewed under an abuse-of-discretion standard. *State v. Roe*, 2014 ND 104, ¶ 10, 846 N.W.2d 707. "A district court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably, or it misinterprets or misapplies the law." *State v. Chisholm*, 2012 ND 147, ¶ 10, 818 N.W.2d 707.

[¶53] A district court's error in admitting evidence under N.D.R.Ev. 404(b) is subject to review under N.D.R.Crim.P. 52. *State v. Thompson*, 552 N.W.2d 386, 390 (N.D. 1996). Under N.D.R.Crim.P. 52, an error is harmless or obvious. A harmless error does not affect a defendant's substantial rights and must be disregarded. N.D.R.Crim.P. 52(a). An obvious error affects a defendant's substantial rights and is grounds for reversal. N.D.R.Crim.P. 52(b). To establish obvious error, a defendant must show error that is plain and affects substantial rights. *State v. Steen*, 2015 ND 66, ¶ 7, 860 N.W.2d 470. "In analyzing obvious error, our decisions require examination of the entire record and the probable effect of the alleged error in light of all the evidence." *Id.* (quoting *State v. Olander*, 1998 ND 50, ¶ 12, 575 N.W.2d 658).

[¶54] This Court has "warned of the dangers inherent in allowing evidence of other acts to show propensity and of tempting a jury to convict a defendant for actions other than the charged misconduct." *State v. Aabrekke*, 2011 ND 131, ¶ 8, 800 N.W.2d 284 (quoting *State v. Schmeets*, 2009 ND 163, ¶ 15, 772 N.W.2d 623). N.D.R.Ev. 404(b) lists the permissible uses for this type of evidence, none of which are applicable here, as no request to admit this type of evidence was submitted by the State.

[¶55] Despite that, throughout the trial there were repeated references to "prior bad acts" allegedly perpetrated by Mr. Castleman. These include references to requirements that Mr. Castleman was required to exercised supervised visitation with his children several years after the alleged criminal conduct, involvement of social services with Mr. Castleman, and most alarmingly, John Doe II testified at

length regarding completely different criminal conduct than what had even been alleged. Although the allegations regarding John Doe II resulted in the district court granting a motion for judgment of acquittal, the jury still nevertheless heard at length testimony regarding other criminal acts allegedly perpetrated by Mr. Castleman. *State v. Castleman. II*, N.W.2d 19-219 (1st Dis, 2020).

[¶56] This situation draws identical parallels to this Court's holding in *State v. Shaw*, 2016 ND 171, 883 N.W.2d 889. In *Shaw*, the defendant was charged with murder. The State offered notice of intent to offer prior bad acts evidence, specifically a burglary that showed Shaw's plan, motive, and intent in committing the crime charged. Although there was a failure to properly object to the evidence, this Court reversed based on the trial court failing to conduct the necessary analysis under N.D.R.Ev. 404 and N.D.R.Ev. 403, as well as a failure to instruct the jury on the limited purpose of that evidence. In this matter, trial counsel for Mr. Castleman similarly failed to object, but the district court should have nevertheless conducted the necessary analysis under N.D.R.Ev. 404 and N.D.R.Ev. 403 as well as providing the jury with a limiting instruction. Given the weakness of the evidence presented here, there is such an overwhelming likelihood that Mr. Castleman was convicted *in toto* based on the admission of prior bad acts evidence than consideration of what was presented for the offenses that were submitted to the jury. As such, this Court should reverse the criminal judgment and remand for a new trial.

Whether the District Court relied on impermissible factors in sentencing.

[¶57] District courts have broad discretion in sentencing, and our review of a sentence is generally limited “to whether the court acted within the statutorily prescribed sentencing limits or substantially relied on an impermissible factor.” *State v. Clark*, 2012 ND 135, ¶ 18, 818 N.W.2d 739 (quoting *State v. Gonzalez*, 2011 ND 143, ¶ 6, 799 N.W.2d 402).

[¶58] Mr. Castleman concedes from the onset that his sentence falls within a permissible range available for sentencing on a Class B Felony. However, it is asserted that the district court improperly relied upon an extensive amount of extraneous information provided at the sentencing hearing that had nothing to do with the criminal conduct Mr. Castleman stood convicted of. A number of witnesses testified at sentencing, and their testimonies focused on a variety of different slights against other family members, such as Mr. Castleman’s ex-wife or his other children who were either not involved in the case or who allegations had been specifically rejected by the jury in this case, and juries in other criminal matters who had found Mr. Castleman not guilty of assaults or judicial order violations. In reviewing the transcript at sentencing, it is difficult to locate statements that were presented that had any bearing on the criminal conduct.

[¶59] Accordingly, because the district court impermissibly relied on impermissible factors such as uncharged criminal conduct or acquittals, this Court should reverse the criminal judgment with instructions for the district court to resentence without consideration of these impermissible factors.

VII. Conclusion

[¶ 60] Based on the foregoing, it is requested that the criminal judgment be reversed and remanded consistent with the arguments listed above.

VIII. Oral Argument Requested

[¶ 61] Mr. Castleman respectfully requests oral argument in this matter via reliable electronic means. Oral argument will be helpful to this Court in allowing for further clarification of facts and legal issues via argument by questioning of counsel.

IX. Certificate of Compliance

[¶62] The undersigned, as the attorney representing Appellant, Brent Castleman and the author of this Brief hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 46 pages.

[¶63] Dated this 10th day of May, 2021.

/s/ Kyle R. Craig

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff/Appellee,

Supreme Court No. 20210011

v.

Brent Allen Castleman,

Ward Co. Case No. 51-2019-CR-02004

Defendant/Appellant

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on May 19th, 2021, the following documents:

Motion to File Amended Brief and Amended Brief of Appellant

Were filed and served on the North Dakota Supreme Court E-Filing portal to the Clerk of the North Dakota Supreme Court at supclerkofcourt@ndcourts.gov and courtesy copies were served and mailed to the following:

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