20210011

FILED
IN THE OFFICE OF THE
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JUNE 29, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

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

APPELLEE'S BRIEF

Criminal Judgment entered December 31, 2020

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

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

[¶1] Appellee is in agreement with the Jurisdictional Statement in the Amended Brief of Appellant.

STATEMENT OF THE ISSUE

[¶2] I. The jury received sufficient evidence to convict Appellant of Child Abuse

II. The district court properly granted the Demand for Change of Judge and Appellant was heard on the issue.

III. The district court properly denied Appellant's motion to dismiss and any speedy trial issues are moot.

IV. The evidence before the district court was properly admitted.

V. The district court did not rely on impermissible factors in sentencing.

VI. This Court should dismiss the appeal as Appellant's brief fails to comply with the North Dakota Rules of Appellate Procedure

STATEMENT OF THE CASE

[¶3] Appellant is appealing from a criminal judgment dated December 31, 2020. Appellee App. 15-24. Appellant was convicted of Child Abuse, in violation of N.D.C.C. § 14-09-22(1). Appellee App. 15.

[¶4] On October 11, 2019, the State charged Appellant with one count of Child Abuse in violation of N.D.C.C. § 14-09-22(1), a class B felony, five counts of Child Abuse in violation of N.D.C.C. § 14-09-22(1), class C felonies, and four counts of Child Neglect in violation of N.D.C.C. § 14-09-22.1, class C felonies. Appellant App. 14-17. An initial appearance was held on October 14, 2019, in front of the Honorable Gary H. Lee, who promptly recused himself and as Presiding Judge of the North Central Judicial District assigned the matter to the Honorable Douglas L. Mattson. Appellant App. 7. The State filed

a Demand for Change of Judge prior to Judge Mattson hearing the matter. Appellant App. 28-29. Appellant filed a response in opposition. Appellant App. 30-31. North Central Judicial District Presiding Judge Gary H. Lee issued a Reassignment Order on October 15, 2019. Appellant App. 33-34. The North Dakota Supreme Court assigned the Honorable Michael P. Hurly to the matter on October 16, 2019. Appellant App. 36.

[¶5] A Preliminary Hearing was held on December 20, 2019, the district court found probable cause on the six counts of Child Abuse, but did not find probable cause on the four counts of Child Neglect and dismissed those charges. Appellant App. 42-43. Appellant filed a Motion to Dismiss on February 5, 2020. Appellant App. 44-59. The State responded on February 14, 2020. Appellee App. 3-5. A Hearing on Appellant's Motion to Dismiss was held on March 4, 2020. Appellant App. 9. The district court issued a Memoranda Decision and Order Denying Defendant's Motion to Dismiss on March 23, 2020. Appellant App. 82-90. Appellant filed a second Motion to Dismiss on April 2, 2020. Appellant App. 96-101. The State responded on April 6, 2020. Appellee App. 6-7. Appellant supplemented his second motion to dismiss on April 2, 2020. Appellant App. 108. The State responded to the supplement on April 9, 2020. Appellee App. 8-10. A hearing on the motion was held on April 28, 2020. Appellant App. 10. On May 1, 2020, the district court issued an Order Granting in Part, and Denying, in Part, Defendant's Motion to Dismiss, dismissing with prejudice three counts of Child Abuse. Appellant App. 111-115.

[¶6] On November 30, 2020, Appellant went to trial on the remaining three counts of Child Abuse. Appellant App. 12. At the close of the State's case Appellant's counsel made a Rule 29 Motion for Judgment of Acquittal on all counts. Appellant App. 147. The district court granted the motion for one count and let the other two counts go to the jury. Appellant

App. 147. The jury returned a guilty verdict on one count of Child Abuse and a not guilty on the remaining count. Appellant App. 146, Appellee App. 13.

[¶7] A Sentencing Hearing was held on December 23, 2020. Appellant App. 12. The district court sentenced Appellant to ten years with the Department of Corrections and Rehabilitation, first to serve five years, and three years of supervised probation. Appellee App. 15-24. Appellant filed a timely Notice of Appeal on January 14, 2021. Appellant App. 149-150.

STATEMENT OF FACTS

[¶8] In the early morning hours of December 15, 2017, Appellant went into his youngest daughter's bedroom where his wife was sleeping next to the child. Tr. Vol. II, page 41, line 16-24. Appellant screamed at his wife, held her by the neck, and pushed her face into the pillow. Tr. Vol. II, page 41, line 24 to page 42, line 1. Appellant's wife pushed their four year-old daughter away from the assault to put distance between the child and Appellant. Tr. Vol. II, page 42, line 5-15. The child was scared, shaking and crying. Tr. Vol. II, page 42, line 18-19. Appellant's wife made a video recording of the assault using her hidden cell phone, resulting in an audio recording of the assault. Tr. Vol. II, page 43, line 5-12. The four year-old girl can be heard crying in the recording. Tr. Vol. II, page 48, line 8-13. After assaulting his wife, Appellant left the bedroom, leaving his wife and four year-old daughter crying. Tr. Vol. II, page 48, line 25. Based upon his actions, the State charged Appellant with B felony Child Abuse for willfully inflicting mental injury to his four year-old child by assaulting her mother in front of her. Appellee App. 11-12.

LAW AND ARGUMENT

I. The jury received sufficient evidence to convict Appellant of Child Abuse.

[¶9] This Court's role in determining sufficiency of the evidence is well established.

> Appellate review of the sufficiency of the evidence for a jury verdict is very limited. 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 a 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. We have held, a jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty.

State v. Demarais, 2009 ND 143, ¶7, 770 N.W.2d 246, 249 (internal citations omitted).

[¶10] Appellant was convicted of B felony Child Abuse for willfully inflicting or allowing the infliction of mental injury to his four year-old child. Appellant App. 135. The basis for conviction was the Appellant assaulting his wife in front of their four year-old daughter. Appellee App. 11. Since Appellant's now ex-wife recorded the assault, the jurors could hear for themselves Appellant's violent assault on his wife as well as the impact to his four year-old daughter. Appellant's now ex-wife testified that witnessing this assault left the four year-old crying and needing her mother for emotional support. Tr. Vol. II, page 48, line 25 to page 49, line 1. The jury rightly determined there was sufficient competent evidence that the trauma inflicted upon his four year-old daughter by Appellant made him guilty.

[¶11] Appellant failed to preserve any issues regarding a definition of mental injury by not objecting to the jury instruction on mental injury. "Unobjected-to jury instructions become the law of the case whether right or wrong." Baatz v. State, 2013 ND 172, ¶7, 837 N.W.2d 387, 390 (internal citations omitted). Without an objection, Appellant is bound by the instruction or lack thereof on what constitutes mental injury. Furthermore, under N.D.C.C. § 1-02-02, "[w]ords used in any statute are to be understood in their ordinary

sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained." Since there is no contrary intention to the term "mental injury" and the word is not explained in the Century Code, the jury was rightly required to understand the term in its ordinary sense. Appellant's argument as to how other jurisdictions define the term "mental injury" is irrelevant.

II. The district court properly granted the Demand for Change of Judge and Appellant was heard on the issue.

[¶12] The State filed a timely Demand for Change of Judge prior to the Honorable Douglas L. Mattson ruling on any matter addressed in the current matter. Appellant App. 28-29. Appellant responded to the State's Demand for Change of Judge the same day. Appellant App. 30-31. Notably, at no point in Appellant's response to the State's demand did Appellant request a hearing on the matter. Appellant App. 30-31. The Presiding Judge of the North Central Judicial District, the Honorable Gary H. Lee, followed the statutory requirements of N.D.C.C. § 29-15-21(6) and reassigned the matter, requesting this Court assign a judge from outside the North Central Judicial District as the other three judges in the district recused themselves. Appellant App. 33-34. Judge Lee's order specifically notes the objection made by Appellant, meaning he was heard by Judge Lee prior to the issuance of the reassignment order. Appellant App. 33, ¶3.

[¶13] Appellant filed a Motion for Hearing on Demand for Change of Judge on February 3, 2020. Appellant App. 68-69. Appellant's motion was filed more than three months after Appellant's Initial Appearance in front of the Honorable Michael P. Hurley. Appellant App. 7-8. Appellant's February 3, 2020 motion on the State's previously granted Demand for Change of Judge essentially requests Judge Mattson be reassigned to the matter. Appellant App. 68-69. Appellant's motion was untimely as Judge Hurley had already made

several rulings in the matter. Appellant App. 76, ¶3. "The party seeking to disqualify a judge must file a timely request before that judge has ruled upon any matter pertaining to the case" State v. Zueger, 459 N.W.2d 235, 236 (N.D. 1990), citing N.D.C.C. § 29-15-21(2) and (4).

[¶14] Furthermore, Appellant's objection to the Demand for Change of Judge was based entirely on supposed issues regarding the previously dismissed two counts of C felony Child Abuse in State v. Brent Castleman, 51-2019-CR-01006. Appellant App. 47-59, 68-69. Those charges were refiled in this matter. Appellee App. 11-12. Appellant was acquitted at trial of same. Appellant App. 146, 147. Appellant is asking the Court give an advisory opinion on an abstract legal question.

> It is well established that courts will not give advisory opinions on abstract legal questions, and an action will be dismissed if there is no actual controversy left to be determined and the issues have become moot or academic. An action may become moot by the occurrence of events that results in a court's inability to render effective relief.

Poochigian v. City of Grand Forks, 2018 ND 144, ¶10, 912 N.W.2d 344, 347 (internal citations omitted). The district court's ruling on Appellant's N.D.R.Crim.P. 29 motion was based upon the factual elements presented at trial. Tr. Vol. II, page 106, line 2 to 10. The State is barred from appealing that charge "due to the Double Jeopardy Clause of our federal and state constitutions." State v. Weight, 2015 ND 219, ¶14, 868 N.W.2d 821, 825 (internal citations omitted). The State is barred from appealing the jury verdict on the other acquitted charge for the same reason. The State is further barred from refiling these charges against Appellant due to the Double Jeopardy Clause of our federal and state constitutions. There is no effective relief this Court can render when no further action on these issues can take place. The issue is moot.

III. The district court properly denied Appellant's motion to dismiss and any speedy trial issues are moot.

[¶15] Appellant's brief fails to identify which motion to dismiss denial he is appealing. Appellant Brief, ¶40-51. Appellant filed two separate motions to dismiss in this matter, on February 14, 2020 and April 2, 2020. Appellant App. 44-59, 96-101. Instead Appellant makes broad arguments regarding the refiling of charges against Appellant, alleged bad faith by the State, and an alleged speedy trial violation. Appellee will analyze these issues separately.

A. Refiling of Criminal Charges

[¶16] Special Ward County Assistant State's Attorney Marie Miller determined she did not have sufficient evidence to proceed to trial in file 51-2019-CR-01006 and filed a motion to dismiss reflecting her position. Appellant App. 83, ¶6. Appellant filed an objection to the motion to dismiss file 51-2019-CR-01006, but did not file a renewal of the objection when the charges were refiled in 51-2019-CR-02004. Appellant App. 84, ¶ 12.

> The plain language of Rule 48(a) applies to dismissal of a criminal charge and "does not require the prosecuting attorney to take any specific action before a charge dismissed without prejudice can be refiled." [State v.] Chacano, [2012 ND 113], at ¶11 [, 817 N.W.2d 369, 372]. When criminal charges are dismissed under Rule 48(a), a defendant arguing the government acted for an improper purpose ordinarily must object both when the government files its motion to dismiss and when the charges are refiled. Id. at ¶ 7 (citing U.S v. Reyes, 102 F.3d 1361, 1367 (5th Cir. 1996)).
> In Case 1006, [Appellant] filed a response to the State of North Dakota's motion to dismiss. However, once the Court granted dismissal and once the subsequent order was issued, [Appellant] did not appeal, nor renew his objection to the dismissal and order. This Court concludes [Appellant] effectively "waives his right to later object to the government's motive." Chacano, at ¶7.

Appellant App. 84, Memoranda Decision and Order Denying Defendant's Motion to Dismiss, ¶11-12. Appellant waived any objections to the refiling of the charges by not objecting to the refiled charges.

[¶17] Furthermore, there is no requirement under N.D.R.Crim.P. 48(a) that a prosecutor have additional evidence before refiling a charge. Appellant's conduct was within the applicable statutory period. "A criminal charge dismissed without prejudice may be refiled within the applicable statutory period." Chacano, at ¶11 (internal citations omitted).

[¶18] Appellee notes Appellant was acquitted of the two charges from 51-2019-CR-01006 that were refiled in 51-2019-CR-02004. As argued previously in paragraph 14 of this brief, Appellant is requesting this Court issue an advisory opinion on a matter which is now moot and academic. This Court does not issue such opinions.

B. Appellant's Allegation of Bad Faith by Appellee

[¶19] Appellant limits his argument regarding allegations of bad faith by Appellee to the charges previously filed against Appellant in file 51-2019-CR-01006, which were refiled by the Appellee in file 51-2019-CR-02004. Appellant Br. ¶40-51. As argued previously in paragraph 14 of this brief, Appellant is requesting this Court issue an advisory opinion on a matter which is now moot and academic. This Court does not issue such opinions. Additionally, a defendant arguing a prosecutor's charging decisions are based in bad faith "must present clear evidence" of bad faith to the court. State v. Francis, 2016 ND 154, ¶25, 882 N.W.2d 270, 280, citing United States v. Armstrong, 517 U.S. 456, at 465 (1996). The district court properly determined Appellant failed to meet his burden of presenting such evidence to the court. Appellant App. 88, ¶25, 115, ¶22.

C. Appellant's Allegation of Speedy Trial Violation

[¶20] Appellee notes Appellant failed to file a speedy trial demand in file 51-2019-CR-02004. Appellant App. 5-13. Appellant fails to support his argument that a speedy trial demand on charges dismissed in a prior file carry over after charges are refiled in a new

file. See State v. Meador, 2010 ND 139, ¶15, 785 N.W.2d 886 ("[A]n argument is without merit when a party does not provide supportive reasoning or citations to relevant authorities."); State v. Cone, 2014 ND 130, ¶19, 847 N.W.2d 761 (finding conclusory assertions are not sufficient; courts do not need to consider arguments that are not adequately supported and briefed); McMorrow v. State, 2003 ND 134, ¶12, 667 N.W.2d 577 (conclusory arguments are without merit unless supported by reasoning to relevant authorities). As shown previously, any issues regarding a speedy trial violation of the two acquitted charges is moot and academic, therefore Appellee will focus on the sole count of the conviction for analysis.

[¶21] The method for analyzing an alleged speedy trial violation was established in Barker v. Wingo. 407 U.S. 514, 530 (1972).

> The United States Supreme Court has developed a four-factor test to determine whether the right to a speedy trial has been violated: (1) the length of the delay, (2) the reason for the delay, (3) the accused's assertion of his right to a speedy trial, and (4) the prejudice to the accused. No single factor is controlling; the court must weigh all the factors in a difficult and sensitive balancing process.

City of Grand Forks v. Gale, 2016 ND 58, ¶6, 876 N.W.2d 701, 705, citing to Barker, at 530-33, (remaining internal citations omitted).

[¶22] Appellant was charged by way of a Complaint issued on October 11, 2019. Appellant App. 14-17. Appellant had his first initial appearance in front of the Honorable Gary H. Lee on October 14, 2019 and his final initial appearance in front of the Honorable Michael P. Hurly on October 21, 2019. Appellant App. 7. Appellant was brought to trial on November 30, 2020. Appellant App. 12. At first glance this appears to be a delay of approximately thirteen months, which is a considerable period of time as laid out in State v. Littlewind. 417 N.W.2d 361 at 364 (N.D. 1987). However, Appellant fails to take into

consideration Administrative Order 25 issued by this Court in response to the COVID-19 pandemic. Even if Appellant had filed a speedy trial demand in this matter, which he did not, "the period from March 16, 2020 to July 1, 2020 shall be deducted from the date by which trial must be commenced." Administrative Order 25, ¶5, § 4. The issue "was tolled as a matter of law." State v. Lafromboise, 2021 ND 80, ¶23. Appellant provides no argument or supportive reasoning that an actual delay from arrest to trial of approximately nine months establishes a presumptively prejudicial delay. The first factor favors the Appellee.

[¶23] The second factor is the reason for the delay. As was found by the district court:

> Once [Appellant] was recharged, the present delay can be attributed to delays associated with assignment of a judge, normal delays in court calendaring and also motions filed by [Appellant]. There is no evidence of intentional delay or dilatory tactics on the part of the State of North Dakota, other than a bare assertion by [Appellant].

Appellant App. 25, ¶88. Appellant continues to make a bare assertion Appellee delayed the matter when the only party found to delay the matter was Appellant. The second factor favors the Appellee.

[¶24] The third factor is the accused's assertion of his right to a speedy trial. As has been noted multiple times, Appellant failed to assert his right to a speedy trial in this matter. The third factor favors the Appellee.

[¶25] The fourth factor is the prejudice to the accused.

> The United States Supreme Court has instructed this factor be assessed in light of the interest the right to a speedy trial was meant to protect: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.

Gale, ¶ 18, citing Barker, at 532. Appellant posted his initial bond on October 22, 2020, resulting in a period of incarceration of 11 days. Appellant App. 7. Subsequent periods of

incarceration followed when Appellant violated the terms of his bond. Appellant violated the terms of his bond by getting new charges. Appellant App. 78, ¶1. These charges were Driving Under the Influence of Alcohol and Driving with Cancelled/Revoked Altered Plate/Card, Aggravated Assault on a Peace Officer, Criminal Trespass, Preventing Arrest, and Disobeying a Movement Control Order. Appellant App 78, ¶1. The district court revoked Appellant's bond on March 20, 2020. Appellant App. 78. The district court issued an Amended Order Modifying Bond on May 4, 2020, resulting in Appellant again bonding out of custody. Appellant App. 116-117. Appellant remained free until his conviction. Appellant was incarcerated 11 days prior to posting his first bond and 45 days after his bond was revoked due to his own actions. This factor favors the Appellee.

[¶26] The second sub-factor is to minimize anxiety and concern of the accused. Appellant makes a bare assertion "he has massive anxiety and concern over these particular charges." Appellant Br. ¶49. Appellant makes no citations to the record to support his bare assertion. With nothing shown in the record in support of his assertion, this factor favors the Appellee.

[¶27] The final sub-factor is to limit the possibility that the defense will be impaired. Appellant concedes "it is difficult, if not impossible for [Appellant] to determine how his defense may be impacted due to the passage of time." Appellant Br. ¶50. Appellant agrees he cannot show an impairment to his defense. This factor favors the Appellee.

[¶28] Reviewing the Barker factors, there was no violation of Appellant's speedy trial right.

IV. The evidence before the district court was properly admitted.

[¶29] Appellant raises two separate issues regarding evidence put before the district court, (1) Appellant's supervised visitation of his children and involvement of social services, and (2) alleged other criminal acts. Appellant Br. ¶55.

[¶30] References to supervised visitation and involvement of social services were brought forward by Appellant at trial. Tr. Vol. II, page 60, line 23-25 to page 61, line 25. Appellant opened the door to this testimony. See State v. Jensen, 282 N.W.2d 55, 68-69 (N.D. 1979), State v. Purdy, 491 N.W.2d 402, 410 (N.D. 1992), State v. Hernandez, 2005 ND 214, ¶20, 707 N.W.2d 449, 457. "On appeal a party cannot complain about error that is of their own making." Lorenz v. Lorenz, 2007 ND 49, ¶21, 729 N.W.2d 692, 699. Appellant is barred from litigating this issue on appeal.

[¶31] Appellant was granted a motion for judgment of acquittal, and yet complains about the testimony regarding that count. Appellant Br. ¶ 55. Appellant provides no supporting reasoning or citations to authority that the district court erred when he was given the exact relief he requested. See paragraph 20 of this brief.

[¶32] Appellant concedes he failed to object to the introduction of any other alleged criminal acts. Appellant Br. ¶ 56. "One of the touchstones for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court so it could intelligently rule on it." State v. Osier, 1999 ND 28, ¶14, 590 N.W.2d 205, 210. "Even though [Appellant] waived his right to seek review of this issue, N.D.R.Crim.P. 52(b) allows this Court to notice obvious errors not raised at the trial court. We exercise our power to consider obvious error cautiously and only in exceptional situations where the defendant has suffered serious injustice." State v. Anderson, 2003 ND 30, ¶8, 657 N.W.2d 245, 248 (internal citations omitted). Appellant is required to show the obvious error and that it affected his substantial rights. State v. Glass, 2000 ND 212, ¶4, 620 N.W.2d 146,

148. Establishing obvious error requires Appellant show "(1) error, (2) that is plain, and (3) affects substantial rights." State v. Olander, 1998 ND 50, ¶14, 575 N.W.2d 658, 663. "In analyzing obvious error, [this Court's] decisions require examination of the entire record and the probable effect of the alleged error in light of all the evidence." Olander, ¶12.

[¶33] Appellant makes the bare assertion "the jury still nevertheless heard at length testimony regarding other criminal acts allegedly perpetrated by [Appellant]. Appellant Br. ¶ 55. Appellant then cites to the entirety of the trial transcript as his citation to the record, all 201 pages. Appellant Br. ¶ 55. Appellant fails to identify any particular criminal acts his client perpetrated. This Court reviewed a similar situation recently in Somerset Court, LLC v. Burgum, finding:

> We have explained that a party waives an issue by not providing supporting argument and, without supportive reasoning or citations to relevant authorities, an argument is without merit. A party abandons an argument by failing to raise it in the party's appellate brief. We have declined to conduct a de novo review of issues when a party relies on bare assertions and fails to provide any supportive reasoning or citations to legal authority.

2021 ND 58, ¶13, 956 N.W.2d 392, 395 (internal citations omitted). This Court also looked at this issue in State v. Noack:

> We have stated we are not ferrets and we will not consider an argument that is not adequately articulated, supported, and briefed. We will not engage in unassisted searches of the record for evidence to support a litigant's position. Judges are not expected to be psychics, with the ability to divine a party's true intentions. The parties have the primary duty to bring to the court's attention the proper rules of law applicable to a case.

2007 ND 82, ¶8, 732 N.W.2d 389, 392. Appellant seeks to make this Court ferrets and psychics of the facts in this case, the Court cannot consider this argument.

V. The district court did not rely on impermissible factors in sentencing.

[¶34] Appellant concedes his sentence falls within the statutory limits for a class B felony. Appellant Br. ¶58.

[¶35] At sentencing, the Honorable Michael P. Hurly told Appellant "So, Mr. Castleman, I will let you know, I was initially thinking of just sentencing you to ten years and that's it. However, I'm suspending the five because at the last moment, you actually talked about your daughter, which gives me a little bit of hope." Tr. Sentencing and Status Conferences, page 69, line 5-9. Judge Hurly also went through the sentencing factors under N.D.C.C. § 12.1-32-04. Tr. Sentencing and Status Conferences, page 57, line 23 to page 63, line 2. "Section 12.1-32-04, N.D.C.C., provides a nonexclusive list of factors for consideration in sentencing. Because the list is nonexclusive, a court does not err merely because it considered a factor not on the list." State v. Huether, 2010 ND 233, ¶17, 790 N.W.2d 901, 907. Appellant fails to identify anything in the record supporting his position the district court relied on impermissible factors, instead offering a bare assertion. Appellant Br. ¶58, 59. As the issue is not adequately articulated, supported, and briefed, this Court cannot consider the argument.

VI. This Court should dismiss the appeal as Appellant's brief fails to comply with the North Dakota Rules of Appellate Procedure.

[¶36] "The supreme court may take appropriate action against any person failing to perform an act required by rule or court order." N.D.R.App.P. 13. "Failure to adhere to our rules of appellate procedure can result in the dismissal of an appeal." Krump-Wootton v. Krump, 2019 ND 275, ¶7, 935 N.W.2d 534.

[¶37] N.D.R.App.P. 28(b)(7)(A) requires Appellant's argument "must contain Appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." The only issue where Appellant provides a

citation to the parts of the record on which he relies is issue IV, "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." Appellant only provides this citation to the record "State v. Castleman. II, N.W.2d 19-219 (1st Dis, 2020)," [sic] citing to the entirety of the trial transcript. ¶ 55.

[¶38] Appellant fails to comply with N.D.R.App.P. 28(b)(7)(B) in that there is no "concise statement of the applicable standard of review" for Appellant's second, third, fourth, or fifth issues.

[¶39] Appellant fails to comply with N.D.R.App.P. 30(a)(1)(B) in that the second amended information is not included in Appellant's appendix.

[¶40] Appellant fails to comply with N.D.R.App.P. 30(a)(1)(G) in that the judgment being appealed is not included in Appellant's appendix.

[¶41] Appellant fails to comply with N.D.R.App.P. 30(b) as "Rule 30(b) clearly provides that the appellant *shall* include in the appendix the portions of the record designated by the appellee." In re Estate of Raketti, 340 N.W.2d 894, 897 (N.D. 1983) (emphasis in original). Appellant fails to include Appellee's responses to any of Appellant's motions included in his appendix. "The rule clearly require[s] [Appellant] to include portions of the record designated by [Appellee] in the appendix. Failure to comply with the Rules of Appellate Procedure, in the discretion of this Court, may be grounds for dismissal of the appeal." Id. at 897 (citations omitted).

[¶42] Since Appellant's brief and appendix do not comply with the North Dakota Rules of Appellate Procedure, this Court should "decline to address the alleged errors because the case is not properly before [the Court]." Noack, ¶ 9. As Appellant's "brief fails to provide [the Court] with the opportunity to meaningfully review his alleged errors." Id. at

¶ 10. Appellee requests "[the Court] exercise [its] authority under N.D.R.App.P. 3(a)(2) to dismiss the appeal." Id. at ¶ 10.

CONCLUSION

[¶43] For the foregoing reasons Appellee requests this Court dismiss Appellant's appeal or in the alternative affirm the district court.

Dated this 29th day of June 2021.

/s/Christopher W. Nelson
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CERTIFICATE OF COMPLIANCE

[1] The undersigned hereby certifies that the Brief of Plaintiff and Appellee, is in compliance with Rule 32 of North Dakota Rules of Appellate Procedure and the Brief contains 20 pages.

Dated this 29th day of June, 2021.

/s/Christopher W. Nelson
Christopher W. Nelson #08708

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REQUEST FOR ORAL ARGUMENT

[1] The State requests oral argument to clarify arguments and address questions regarding facts that may not be apparent from the record.

Dated this 29th day of June, 2021.

/s/Christopher W. Nelson
Christopher W. Nelson #08708

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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 29th day of June, 2021, this Affiant provided a true and correct copy of the following documents in the above entitled action:

APPELLEE'S BRIEF AND APPENDIX OF PLAINTIFF/APPELLEE

By electronic service to the following:

KYLE CRAIG
ATTORNEY FOR APPELLANT
kcraig@ackrelaw.com

LeAnn Westereng

Subscribed and sworn to before me this 29th day of June, 2021, by LeAnn Westereng

Notary Public

SHAWNTA JAMES
Notary Public
State of North Dakota
My Commission Expires November 28, 2021