
 IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File No.
)	20210261
)	
Plaintiff and Appellee,)	Cass County No.
)	09-2019-CR-607
)	
v.)	
)	
Mackenzy Bazile,)	APPELLANT'S BRIEF
)	
Defendant and Appellant.)	

**Appeal from the criminal judgment entered September
20, 2021 in Cass County district court, East Central
Judicial District, North Dakota, the Honorable John C.
Irby presiding**

**APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED**

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Oral Argument:

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

Transcript References:

The Defendant's jury trial was conducted on April 20, 2021 through April 22, 2021. The transcripts of that trial are referred to as [Tr.] in this brief.

JURISDICTION

[¶ 1] The Defendant, Mackenzy Bazile, timely appealed the final criminal judgment arising out of the district court. 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.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court abused its discretion by denying Mr. Bazile's motion for acquittal.

STATEMENT OF CASE

[¶ 3] This is a criminal matter on direct appeal from East Central Judicial District, Cass County Criminal Judgment. This case was before the district court in *State v. Bazile*, 09-2019-CR-0607. The initial criminal information was filed with the court on February 11, 2019. *See* RoA Index #1. The Defendant was charged with one count of gross sexual imposition, in violation of N.D.D.C. § 12.1-20-03(1)(d), a class A Felony. Mr. Morrow filed a certificate of representation on behalf of Mr. Bazile February 13, 2019. *See* RoA Index # 8. The information was amended on February 15, 2019. *See* RoA Index # 17.

[¶ 4] The preliminary hearing and arraignment was held on April 17, 2019. Mr. Bazile entered a plea of not guilty. The State moved to amend the criminal information again on November 13, 2020. *See* RoA Index # 56. The court granted the motion on December 4, 2020. *See* RoA Index # 65. The case proceeded to a jury trial and witnesses were sequestered upon the State's motion. Tr. p. 7.

[¶ 5] Mr. Morrow made a motion for acquittal under Rule 29. N.D.Crim.R.P. 29; Tr. p. 199. The court denied the motion and the defense

proceeded with their case. During Cross-examination of Mr. Bazile the prosecution made objectionable statements. Tr. p. 331, ln 16-18, 24-25; p. 332 1. Mr. Morrow moved for a mistrial. Tr. p. 333. The trial court denied the motion.

[¶ 6] Mr. Bazile was found guilty on April 22, 2021. Tr. p. 385. Mr. Bazile was sentenced on September 20, 2021, to 5 years with the North Dakota Department of Corrections with all but 90 days suspended for a period of five years of supervised probation. Mr. Bazile timely appealed the criminal judgment.

STATEMENT OF FACTS

[¶ 7] T.Y.C. (here after referred to as Ms. Clark, a pseudonym) and her mother came from the east coast to Fargo, North Dakota July 27, 2017 to help Ms. Clark's aunt. Tr. pp. 27-28. They stayed in Fargo until July 31, 2017. Tr. p. 92. Ms. Clark and her mother stayed with Jeunide, or June, Ms. Clark's aunt, in her apartment in Fargo. Tr. pp. 29, 99. Mr. Bazile, Ms. Clark's cousin, was not currently at the apartment when she arrived. Tr. p. 30.

[¶ 8] Mr. Bazile slept in a room with Ms. Clark and Jenny, another cousin of Ms. Clark's, while Ms. Clark was visiting Fargo. Tr. pp. 39-40, 76. Ms. Clark returned home and began experiencing pain. At the time Ms. Clark was thirteen and her mother took her to a doctor. Tr. p. 112. Ms. Clark was informed she was pregnant. Tr. pp. 54, 56. Ms. Clark testified at trial that Mr.

Bazile had sexual intercourse with her while she was in Fargo in July of 2017. Tr. p. 109.

[¶ 9] DNA testing was done with samples taken from Ms. Clark, Mr. Bazile and Ms. Clark's child. Tr. p. 193. The state crime lab when they performed the DNA testing did so based on unrelated individuals. Mr. Bazile and Ms. Clark are related, and Ms. Penner's testimony was that would have impacted the results of the test. Tr. p. 192. Ultimately, Ms. Penner testified that based on the data, Mr. Bazile could not be excluded as the father. Tr. p. 194.

[¶ 10] Mr. Bazile testified in his own defense at trial. During cross-examination the State said, "Now, you of course were aware that everyone in the family is supporting you and not supporting Marie and [Ms. Clark]; is that correct?" Tr. p. 331. When Mr. Bazile denied the State's assertion the State responded, "But in this case didn't you happen to notice that your family members, your grandfather in particular, none of them watched [Ms. Clark] and Marie testify?" Tr. pp. 331-332. The prosecution explained to the trial court that they were asking Mr. Bazile those questions specifically to show a lack of support by his family members. Tr. p. 334, ln 9-11.

LAW AND ARGUMENT

I. **Whether the district court abused its discretion by denying Mr. Bazile’s motion for mistrial.**

Standard of Review

[¶ 11] A district court has broad discretion in ruling on a motion for a mistrial and will not be reversed on appeal unless the court abused its discretion, or a manifest injustice would occur. *State v. Rende*, 2018 ND 33, ¶ 5, 905 N.W.2d 909. A court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or it misinterprets or misapplies the law. *Kremer v. State*, 2020 ND 132, ¶ 5, 945 N.W.2d 279 (N.D. 2020).

[¶ 12] In *Berger* over 80 years ago, the US Supreme Court warned prosecutors “to refrain from improper methods calculated to produce a wrongful conviction....” *Berger v. United States*, 295 U.S. 78, 88 (1935). The Court in *Darden*, clarified that a prosecutor’s improper comments violate the Constitution if they “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464 (1986), *See also State v. Kruckenberg*, 2008 ND 212, ¶ 20, 758 N.W.2d 427 (“prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process”). Here the prosecutor intentionally elicited a question with the purpose of creating sympathy for the complaining witness and hostility towards Mr. Bazile and his family, rather than persuade the jury based upon the evidence presented.

[¶ 13] At closing arguments, “Counsel’s argument must be limited to the facts in evidence and the inferences that flow from those facts.” The prosecutorial misconduct occurred prior to closing argument in this case. It was a deliberate attempt to derail the defense’s case. For claims of prosecutorial misconduct, this Court has said, “first [we] determine whether the prosecutor’s actions were misconduct and, if they were, then we examine whether the misconduct had prejudicial effect.” *State v. Cone*, 2014 N.D. 130, ¶ 18, 847 N.W.2d 761 (N.D. 2014).

[¶ 14] The questions by the prosecutor were misconduct. He even acknowledged that he committed error. Tr. p. 333, ln 23. He tried to downplay the consequences of his actions. However, it is clear the prosecutor made a motion to sequester witnesses and then wanted the jury to think poorly of Mr. Bazile and sympathetically toward Ms. Clark because those family members as he put it, did not support Ms. Clark. He was intentional and methodical in his set up of Mr. Bazile to be vilified and Ms. Clark to be pitied by the jury. The comments had a prejudicial effect because that was the goal of that particular line of questioning. See Tr. p. 334 ln 10-11. As defense counsel explained to the trial court when he requested the mistrial, this was an intentional act by the prosecutor to taint the jury. The jury’s sympathy for a young woman who they now heard was not supported by her family at the trial greatly prejudiced Mr. Bazile.

[¶ 15] The trial court denied the mistrial and gave no reasons on the record as to why he was denying the motion. Evidentiary rulings, like motions for mistrial are reviewed for an abuse of discretion. In *Wolfer* this Court explained the “motion to suppress could have provided a more detailed explanation of the district court’s findings, [but] we will not automatically reverse for more definite findings if the trial court’s reasoning is fairly discernible by deduction or inference.” *State v. Wolfer*, 2010 N.D. 63, ¶ 8, 780 N.W.2d 650 (N.D. 2010) quoting *State v. Schmitz*, 474 N.W.2d 249, 251 n. 5 (N.D.1991). The lack of any factual findings or conclusions of law to support the court’s denial of Mr. Bazile’s motion for mistrial was an abuse of discretion.

[¶ 16] An evidentiary ruling under N.D.R.Ev. 803(24) requires explicit findings as to what evidence the trial court relied upon regarding the factors and to explain the court’s rationale for either admitting or excluding the testimony. *State v. Poulor*, 2019 N.D. 215, ¶ 18, 932 N.W.2d 534 (N.D. 2019). This is required so the defendant can be confident the required appraisal has been made. This is akin to the denial of a motion for mistrial where the allegation was prosecutorial misconduct. The trial court must determine if there was misconduct and whether it was prejudicial. Without any factual findings on the two prongs the defendant has no assurances, nor does the reviewing Court, that the appropriate appraisal was made. The trial court abused its discretion in denying the motion, and specifically denying the motion without apply the two-part test. Because of the trial court’s abuse of

discretion, Mr. Bazile's right to a fair trial was infringed by prosecutorial misconduct.

CONCLUSION

[¶ 17] Prosecutorial misconduct created reversible error in this case requiring reversal of the verdict and judgment of the trial court. WHEREFORE the Defendant respectfully requests the Court to reverse the district court's order denying the motion for mistrial and grant Mr. Bazile a new trial.

Dated this 18th day of November, 2021

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v.)	
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Mackenzzy Bazile,)	CERTIFICATE OF COMPLIANCE
)	
Defendant and Appellant.)	

[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: November 19, 2021

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Mackenzzy Bazile,)	CERTIFICATE OF SERVICE
)	
Defendant and Appellant.)	

[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix
Certificate of Compliance

And that said copies were served upon:

Ryan Younggren, Assistant State's Attorney, sa-defense-notices@casscountynd.gov
by electronically filing.

Dated: November 22, 2021

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Defendant and Appellant.)	

[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief with non-substantive changes

And that said copies were served upon:

Ryan Younggren, Assistant State's Attorney, sa-defense-notices@casscountynd.gov

by electronically filing.

Dated: November 26, 2021

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