

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

STATE OF NORTH DAKOTA,)	
)	
Plaintiff and Appellee,)	Supreme Court No.
)	20210303
vs.)	
)	District Court No.
JEREMY JOHN FROHLICH,)	08-2019-CR-00564
)	
Defendant and Appellant.)	
)	

APPELLANT’S BRIEF

**Appeal from Criminal Judgment Entered on September 29,
2021 by Burleigh County District Court, South Central Judicial
District, State of North Dakota, The Honorable Cynthia Feland
Presiding.**

ORAL ARGUMENTS REQUESTED

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* The August 6, 2020, Competency Hearing transcript shall be referenced throughout this brief as Comp. Tr.

** The September 28, 2021, Trial Transcript shall be referenced throughout this brief as Trl. Tr.

[¶ 3] JURISDICTION

[¶ 4] 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 §§ 2 & 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

[¶ 5] STATEMENT OF THE ISSUES

[¶ 6] The district court erred in its decision that Jeremy Frohlich was competent to stand trial.

[¶ 7] ORAL ARGUMENT JUSTIFICATION

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

[¶ 9] STATEMENT OF THE CASE

[¶ 10] This is an appeal from a criminal judgment of conviction dated September 29, 2021, arising out of a criminal action filed against Jeremy Frohlich, defendant, in district court, Burleigh County, North Dakota. Doc. # 218 & 1 respectively. Frohlich was convicted upon the following charges:

- a. On the charge of Gross Sexual Imposition – sexual act – victim under 15 - defendant at least 22 in violation of N.D.C.C. § 12.1-20-03(1)(d), Frohlich was sentenced to life without the possibility of parole. Doc. # 218.
- b. On the charge of Gross Sexual Imposition – sexual contact – victim under 15 in violation of N.D.C.C. § 12.1-20-03(2)(a), Frohlich was sentenced to twenty years. Id.

[¶ 11] On October 27, 2021, 28-days later, Frohlich timely appealed his convictions. Doc. # 219. The undersigned was appointed to represent Frohlich on November 5, 2021

[¶ 12] Frohlich, on the appeal contends he was not competent to stand trial on September 29, 2021.

[¶ 13] STATEMENT OF THE FACTS

[¶ 14] In February 2019 law enforcement received a report of alleged sexual abuse of a minor child, C.C., by Frohlich, C.C.'s mother's then boyfriend. Doc. # 2. The disclosure was a delayed reporting, in that the conduct was alleged to have happened between December 2010 and April 2016. Id. On February 13, 2019, a forensic interview was conducted of C.C. Id.

[¶ 15] During the interview C.C. provided a timeline of the allegations via an ‘event’ as a proximate date holder. Id. The ‘event’ was a car crash wherein C.C. was a passenger and Frohlich was the driver. Id. Officers were able to ascertain this date through police records as occurring on December 15, 2010. Id. As C.C.’s allegations were that the conduct occurred after that date and while C.C. lived with Frohlich in an apartment, law enforcement was able to ascertain that the conduct occurred between December 15, 2010 to April 15, 2016. Id.

[¶ 16] In the course of the investigation, law enforcement discovered another child who made similar allegations against Frohlich. Id. Pursuant to these multiple, isolated, and consistent allegations, law enforcement obtained a search warrant for Frohlich’s residence. Id. In the residence law enforcement discovered evidence that corroborated the two separate children’s allegations. Id.

[¶ 17] Frohlich was immediately arrested on charges of Gross Sexual Imposition and Sexual Assault Id.

[¶ 18] After being arrested and charged, Frohlich’s counsel motioned the district court for competency to stand trial and a criminal responsibility evaluation on March 14, 2019. Doc. #'s 17-26. Following the evaluations and a competency hearing, the district court issued an order finding Frohlich incompetent to stand trial and committed Frohlich to the North Dakota State Hospital for competency restoration and treatment on August 14, 2019. Doc. # 60. Then, on November 14, 2019, Dr. Rodlund of the State Hospital submitted a report to the district court finding Frohlich to be malingering. Doc. # 64.

[¶ 19] Following multiple filings regarding Frohlich’s competency and COVID-19 related delays, the matter of Frohlich’s competency came before the district court again

on August 6, 2020. Despite the State and Defense’s July 8, 2020, stipulation that Frohlich remains incompetent to stand trial, the district court ruled Frohlich was competent to stand trial on October 23, 2020. Doc. # 113.

[¶ 20] After being found competent to stand trial, the parties entered into in a plea agreement, wherein the change of plea was held on May 5, 2021, and the district court ordered pre-sentence investigation report pursuant to N.D.C.C. § 12.1-32-02(11). Doc. #'s 149-153. The pre-sentence investigation report and addendum was submitted to the district court on July 13, 2021. Doc. #'s 163 & 164. Then, after the submission of the pre-sentence investigation report, Frohlich motioned the district court to withdraw his guilty pleas. Doc. # 171. After a hearing on the matter, the district court allowed Frohlich to withdraw his guilty plea and further ordered that the amended information, pursuant to the plea agreement, was to be withdrawn as well on August 9 and 20, 2021 respectively. Doc. #'s 177 & 183.

[¶ 21] Finally, on September 28, 2021, the case proceeded to a one-day jury trial. The jury convicted Frohlich on both counts against him. Doc. # 217. After the verdict, the district court, with the jury still seated and impaneled, immediately proceeded to sentencing, over defendant’s objection. See Trl. Tr. Pgs. 159-161. Frohlich was sentenced to life without the possibility of parole on Count 1 and twenty-years concurrently on Count 2. Doc. # 218.

[¶ 22] STANDARD OF REVIEW

[¶ 23] The Standard of Review for challenging a district court’s finding on the issue of competency has been succinctly articulated as follows:

“Whether or not a defendant is competent to stand trial is a question of fact for the trial judge[,]...[a]nd the

trial judge's finding on the issue of competency will not be set aside on review unless it is clearly erroneous." "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made."

State v. Dahl, 2010 ND 108, ¶ 6, 783 N.W.2d 41 (citations omitted).

[¶ 24] LAW AND ARGUMENT

[¶ 25] The district court's order finding Frohlich competent to stand trial was based on incorrect and even contrary evidence. Even the minutia of evidence that does support the district court's order is monumentally overshadowed by the evidence to the contrary. The district court cherry picked evidence and testimony to support its position while ignoring the exact same evidence that undermined its own opinion.

[¶ 26] The standard for determining if a criminal defendant is competent to stand trial is set forth in State v. Gleeson:

It has long been held the conviction of a mentally incompetent accused is a violation of constitutional due process. Dusky v. United States, 362 U.S. 402 (1960). The United States Supreme Court has summarized the test for determining if an accused is mentally competent to stand trial. Id. A defendant is incompetent when he lacks (1) 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' or (2) 'a rational as well as factual understanding of the proceedings against him.' Dusky, 362 U.S. at 402. This test is essentially codified at section 12.1-04-04, N.D.C.C., which states: 'No person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against the person or to assist in the person's own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.'

2000 ND 205, ¶ 9, 619 N.W.2d 858.

[¶ 27] In the present case, Frohlich was declared incompetent to stand trial. Doc # 60. The parties subsequently stipulated to Frohlich's incompetence to stand trial following conflicting evaluations. Doc # 92. After the district court refused to sign off on the proposed stipulation, a competency hearing was held on August 6, 2020. See Doc # 113, ¶6.

[¶ 28] At the competency hearing, testimony was provided by two doctors who had conducted independent evaluations of Frohlich at separate times and reached contrary positions. Dr. Rodlund from the State Hospital and Dr. Weisz from Chisolm & Blohm Psychological Services, P.C., and independent firm.

[¶ 29] Albeit a district court is in a superior position to assess credibility which leads to this Court's reluctance to reweigh conflicting evidence. State v. Tollefson, 2003 ND 73, ¶ 9, 660 N.W.2d 575 (quoting State v. Heitzmann, 2001 ND 136, ¶ 8, 632 N.W.2d 1). This case has a set of facts, with testimony, reports, and a multitude of filings that fundamentally fail to support the district court's findings. Most notably, that Dr. Rodlund only diagnosed Frohlich with malingering, Dr. Rodlund provided no testimony or evidence that Frohlich could understand the proceedings against him nor that he possessed present ability to consult with lawyer and assist in his own defense. The district court simply leapt to the conclusion that Frohlich was able to understand the proceedings and that he could assist in his own defense based solely on a diagnosis of malingering, without any testimony or evidence to support these findings.

[¶ 30] In order to support this leap, the district court itself conducted approximately 30 pages of examination of the doctors out of the 118 pages of testimony, 12 of which was borderline cross-examination of Dr. Weisz. See Comp. Tr. No testimony was provided by the original evaluator, Dr. Heidi J. Paulson. Doc # 42. Two licensed and

clinically trained psychologists, Dr. Paulson and Dr. Weisz, found Frohlich to be incompetent to stand trial from two independent and separate evaluations, unbeknownst to each other. Doc #'s 42 & 82. Dr. Rodlund is the only one of three licensed, trained, and experienced psychologists to find that Frohlich was competent to stand trial. Doc #'s 64 & 106.

[¶ 31] The district court, in finding Frohlich competent to stand trial, misstates and exaggerates Dr. Rodlund's testimony from the competency hearing while ignoring the exact same with regard to Dr. Weisz. The district court stated, "According to Dr. Rodlund, Frohlich verbally stated to him that he knew if he was found to be competent he would have to go to prison, and he did not want that." Doc # 113, ¶20. Yet Dr. Rodlund's actual testimony was as follows:

Q. Just to I'm clear, some of these statements he made, did Mr. Frohlich ever make statements to you that caused you to have concern for his competency or whether he was malingering or not?

A. Noting direct. Well, yes, there was. He said he really liked it here. He wanted to stay here. He did not want to go to jail.

Comp. Tr., pg. 96.

[¶ 32] The district court's order was not referencing a verbatim quote of Dr. Rodlund, however, Dr. Rodlund never personally heard Frohlich refer to his own competency despite the district court's opinion. The district court also bolsters Dr. Rodlund's time evaluating Frohlich. In its order, the district court states, "Dr. Rodlund testified that he worked with Frohlich for approximately two months." Doc # 113, ¶16. Yet again, Dr. Rodlund's testimony would disagree:

Q. And when did he come to your facility with the directive that you were to try to get him to attain fitness to proceed?

A. I believe it was 10/16/2019.

Comp. Tr., pg. 102. Contrary to the district court's "two months", Dr. Rodlund's report finding Frohlich to be malingering came just 29 days later on November 14, 2019. Doc # 64.

[¶ 33] In finding Dr. Rodlund's report to be more "convincing and credible" the district court criticized Dr. Weisz for not reviewing Dr. Rodlund's November 14, 2019, report. Doc # 113, ¶12. Then, a mere three paragraphs later, praised Dr. Rodlund for filing an addendum to his November 14, 2019, report on July 6, 2020, but has nothing to say regarding the fact that Dr. Rodlund failed to review Dr. Weisz' January 28, 2020, evaluation, and report. See Id. at ¶ 15. This does not even include the fact that Dr. Rodlund failed to even know that there was past IQ testing done on Frohlich from 2004, that Dr. Weisz and Dr. Paulson both knew of and even included in their reports. See Comp. Tr., pg. 109; Contrast with Doc #'s 42 & 82.

[¶ 34] The district court went to a great length to minimize Dr. Weisz' experience while bolstering Dr. Rodlund's in its order. Dr. Weisz' testimony was that he has conducted "[a] little over a hundred" criminal responsibility and competency evaluations over the last 10 years. Comp. Tr., pg. 11. During the district court's cross-examination of Dr. Weisz, Dr. Weisz stated that of those 100 evaluations, an "estimate around 50" would be for competency alone. Id. at 49. Dr. Rodlund's testimony was that he has conducted "1,500 *psychological* evaluations and...nearly 200 competency to stand trial evaluations...." Comp. Tr., pg. 67.

[¶ 35] In its order, the district court references the minimized number of 50 competency alone evaluations while completely not even referencing his overall total number of criminal responsibility and competency evaluations. Doc # 113, ¶11. In contrast the district court makes a point of Dr. Rodlund's 1,500 '*psychological evaluations*'. *Id.* at ¶14. Moreover, during the district court's cross-examination of Dr. Weisz, testimony was elicited that Dr. Weisz conducts Sex Offender Risk Assessments. Comp. Tr., pg. 47. Then, despite Dr. Rodlund testifying that he does risk assessments, he later testified "I have not done sex offender risk assessments here." Compare Comp. Tr., pgs. 87 to 101.

[¶ 36] Assuming Dr. Rodlund to be more convincing and credible as the district court put it, Dr. Rodlund undermines his own results, thereby the district court's findings. Dr. Rodlund diagnosed Frohlich with "malingering." Comp. Tr., pg. 105. Per Dr. Rodlund's testimony the ECST-R is the test that has a specific assessment malingering. *Id.* pg. 113. Yet Dr. Rodlund used the CAST*MR test. *Id.* pg. 112. Whereas Dr. Weisz utilized the ECST-R and failed to find any sign of malingering. *Id.* pg. 18. Thus, despite Dr. Rodlund being more credible and convincing, by his own testimony, he failed to administer the very test that has an assessment to specifically test for malingering. Yet Dr. Rodlund was able to diagnose Frohlich with malingering.

[¶ 37] Dr. Rodlund's diagnosis of malingering was based on Frohlich; 1) not wanting to go to jail; 2) inconsistency in cognitive functioning testing; 3) testing that showed Frohlich was either exaggerating his disabilities or not putting forth his best effort. This diagnosis was not derived from any specific malingering assessment testing. However, Dr. Weisz did utilize specific malingering assessment testing and found no signs.

[¶ 38] A review of the entire transcript of the August 6, 2020, competency hearing, and the district court's order finding Frohlich competent to stand trial shows unequivocally that the district court's fundamental argument against Dr. Weisz' findings is an IQ test result that appears to be outside of a standard deviation from all of Frohlich's previous IQ testing. Yet, of significance, Dr. Rodlund is unable to articulate his finding of Frohlich's IQ score. Compare Id. pg. 52-53 with 106-107 (district court arguing with Dr. Weisz that his assessed IQ score of 47 is in such stark contrast to all of Frohlich's previous IQ scores, *compared* to the district court questioning Dr. Rodlund and discovering that he cannot provide the court with a specific numerical score that was devised).

[¶ 39] Thus, if the IQ score and its deviation from previous scores was such an essential concern for the district court, it would stand to reason that the district court would find Dr. Rodlund's complete inability to articulate a score at all should be more concerning to the district court.

[¶ 40] Finally, Dr. Rodlund's testimony was that he utilized the CAST*MR assessment tool on Frohlich. Id. at 112. Dr. Rodlund stated this test is for those with an intellectual disability. Id. However, Dr. Rodlund spent most of his testimony, regarding Frohlich, indicating that he is smarter than he is letting on, so much so that Dr. Rodlund believes Frohlich was able to trick Dr. Paulson into a finding of incompetence in the June 13, 2019, assessment. Yet, Dr. Rodlund utilizes an assessment that is specifically designed for those with intellectual disabilities. Dr. Rodlund's inability to maintain a singular line of assessment regarding Frohlich should have been enough for the district court to find Dr. Weisz' testimony and report to be more credible and convincing.

[¶ 41] CONCLUSION

[¶ 42] Out of three Doctors of Psychology, two found Frohlich to be incompetent to stand trial, combined with the fact that the prosecution and defense were prepared to stipulate to Frohlich's incompetency to stand trial; was more than enough evidence that Frohlich was in fact incompetent to stand trial.

[¶ 43] The district court here clearly erred in that there is no evidence to support its findings. So much so, that the doctor the district court chose to find more credible and convincing, never actually made a recommendation regarding Frohlich's ability to assist in his own defense. Instead, merely diagnosed Frohlich with malingering, and because of this sole diagnosis, Dr. Rodlund declared Frohlich was competent to stand trial despite making no link between malingering and the ability to assist in his own defense, thereby answering any question about competency.

[¶ 44] However, should This Court disagree, the minutia of evidence from Dr. Rodlund that supports the district court's findings, is monumentally overshadowed by the evidence to the contrary which should lead This Court with a definite and firm conviction that a mistake has been made. Two separate independent Doctor's of Psychology, assessing Frohlich at separate times declared Frohlich incompetent to stand trial. Dr. Weisz' testimony and report actually addressed reasons why Frohlich was incompetent through via his IQ and lack of understanding. Even if this Court were to defer to the district court's ruling that Dr. Rodlund was more credible and convincing, there was no evidence before the district court from Dr. Rodlund that malingering is dispositive of competency. One can malingering, but still be incompetent, and therein lies the fundamental fault in the district court's ruling.

[¶ 45] Therefore, for the foregoing reasons, Frohlich respectfully requests this Court vacate the judgment against him, as the district court's ruling on his competency to stand trial was clearly erroneous, and remand with instructions that Frohlich be found incompetent to stand trial, and therefore be remanded to the custody of a treatment facility.

Respectfully submitted this Monday, March 7, 2022.

/s/ Samuel A. Gereszek
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Plaintiff and Appellee,)	Supreme Court No.:
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JEREMY JOHN FROHLICH,)	08-2019-CR-00564
)	
Defendant and Appellant.)	

**N.D.R.App.P. 32(e)
CERTIFICATE OF COMPLIANCE**

[¶1] **COMES NOW** Samuel A. Gereszek, attorney for the Appellant, **Jeremy John Frohlich**, and preparer of documents filed in association with the above captioned case on this day.

[¶2] Pursuant to N.D.R.App.P. 32(e) the documents filed on this day comply with the North Dakota Rules of Appellate Procedure as follows:

- a. Appellant’s Brief – Word count = **3,472**; Page Count = **15** (N.D.R.App.P 32(a)(8))

[¶3] This Certificate of Compliance is drafted to ensure the filings on this day are in compliance with the rules and specifically pursuant to N.D.R.App.P. 32(e).

Dated this Monday, March 7, 2022.

/s/ Samuel A. Gereszek
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IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

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Plaintiff and Plaintiff,)	
vs.)	District Court No.:
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JEREMY JOHN FROHLICH,)	
)	CERTIFICATE OF SERVICE
Defendant and Defendant.)	
)	
)	

I, Samuel A. Gereszek, attorney for the Defendant, and officer of the court, hereby certify that a true and correct copy of the following:

1. *Appellant's Brief*
2. *Certificate of Compliance*

was filed via **electronically through the Court Electronic Filing System** on Monday, March 7, 2022, and served upon:

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Dated this Monday, March 7, 2022

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