

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20210303
)	
-vs-)	Burleigh County Case No.
)	08-2019-CR-00564
Jeremy John Frohlich,)	
)	
Defendant/Appellant)	

BRIEF OF APPELLEE

APPEAL FROM CRIMINAL JUDGMENT ENTERED ON SEPTEMBER 29, 2021

Burleigh County District Court
South Central Judicial District
The Honorable Cynthia Feland, Presiding

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ORAL ARGUMENT IS REQUESTED

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The august 6, 2020 Competency Hearing is cited as Comp. Tr.

JURISDICTIONAL STATEMENT

[¶1] The appellant, Jeremy Frohlich (hereinafter “Frohlich”), appeals the trial court’s criminal judgment entered, a jury found him guilty of Gross Sexual Imposition, a Class AA Felony and Gross Sexual Imposition, a Class A Felony on September 28, 2021. The North Dakota Supreme Court has jurisdiction to hear such appeal under North Dakota Century Code § 29-28-06(1).

ORAL ARGUMENT REQUESTED

[¶2] The State requests oral argument in this matter to emphasize and clarify the arguments contained herein. The State feels oral argument will be beneficial to the Court given the fact-intensive nature of this appeal.

STATEMENT OF THE ISSUES

[¶3] Did the district court err in its decision that Jeremy Frohlich was competent to stand trial?

STATEMENT OF THE CASE

[¶4] Frohlich was charged with Gross Sexual Imposition, a class AA felony and Gross Sexual Imposition, a class A felony on February 25, 2019 alleging Frohlich willfully engaged in sexual acts with his girlfriend’s juvenile daughter, between December 15, 2010 and April 15, 2016 in an apartment in Bismarck, North Dakota. (R1). Pursuant to N.D.R.App.P. 14(a)(5), the juvenile will be referred to as “C.C.”.

[¶5] On February 10, 2019, C.C. disclosed to her stepmother that she had been sexually assaulted by her biological mother’s boyfriend, Jeremy Frohlich. (R2).

[¶6] On February 13, 2019, a Children’s Advocacy Center (CAC) interview was conducted with C.C.

[¶7] A December 15, 2010 motor vehicle accident involving Frohlich as a driver and C.C. as a passenger was used as a marker for C.C.'s memory of Frohlich's sexual acts upon her. (R2).

[¶8] The affidavit stated that sometime after December 15, 2010, Frohlich brought C.C. into his bedroom, held her down on the bed, and digitally penetrated her vagina with his finger. Frohlich then put his penis in her hand and she pulled away from Frohlich. Frohlich then took a white tube of "Cream" out of the area of his dresser or nightstand, and put some of this substance onto her hand. C.C. struggled against Frohlich, and then he ceased further action at that time. C.C. stated that Frohlich threatened her, telling her not to tell anyone what had occurred. This event occurred in an apartment shared by Frohlich and C.C.'s mother located in Bismarck, North Dakota. C.C. also resided at the residence and her approximate age was 1st to 5th grade. (R2).

[¶9] Frohlich had a preliminary hearing on November 13, 2020, at which probable cause was found and Frohlich entered a not guilty plea.

[¶10] Trial was held on September 28, 2021. The State filed one exhibit. During deliberations, the jury asked a number of questions.

[¶11] The jury found Frohlich guilty of both counts on September 28, 2021. (R217).

[¶12] On count 1, Frohlich was sentenced to life without parole, with credit of 732 days served with the Department of Corrections, collection of DNA, and fingerprinting. On count 2, Froelich was sentenced to 20 years, with credit of 732 days served with the Department of Corrections, concurrent to count one. (R218).

[¶13] Frohlich filed his notice of appeal, including a preliminary statement of issues on October 28, 2021. (R219).

STATEMENT OF THE FACTS

[¶14] This case involves sexual acts that occurred between December 15, 2010 and April 15, 2016 in Bismarck North Dakota, between Frohlich and a juvenile, C.C.

A. JEREMY FROHLICH'S COMPETENCY

[¶15] On March 14, 2019, Defendant's Attorney Justin Balzer (hereinafter "Attorney Balzer"), motioned the Court for Psychological Evaluations as to Frohlich's Competency and Criminal Responsibility. (R17-26).

[¶16] The Court granted Attorney Balzer's above Motions on March 15, 2019. (R27 and 28).

[¶17] The State filed Responses to Defendant's Motion for Psychological Evaluations as to Criminal Responsibility and Competency stating no objections on March 21, 2019. (R31-33).

[¶18] A Fitness to Proceed and Criminal Responsibility Evaluation was filed with the Court on June 13, 2019. (R42).

[¶19] The State amended the information to add or remove witnesses but made no changes to the offenses or the specific language of the charges. (R53).

[¶20] On June 13, 2019, the State filed a Motion for Competency Hearing. (R43-44).

[¶21] A Competency Hearing was held on July 23, 2019.

[¶22] On July 23, 2019, the State filed the North Dakota Department of Human Services Evaluation held on April 22, 2019 pursuant to N.D.C.C. 12.1-04 and/or 12.1-04.1 signed by Heidi J. Paulson, PsyD. on June 13, 2019. marked as Exhibit 1. (R57).

[¶23] Following the Competency Hearing, an Order Finding Defendant Incompetent and Committing for Evaluation and Treatment was signed by Judge Gail Hagerty on August 14, 2019. (R60).

[¶24] A Transport Order for Frohlich to undergo competency restoration at the North Dakota State Hospital was issued by Judge Gail Hagerty on October 10, 2019. (R63).

[¶25] A Psychological Evaluation of Frohlich was completed by Mark Rodlund PhD, LP on November 14, 2019 and this report was filed with the Court on November 15, 2019. Dr. Rodlund's recommendation was for Frohlich to proceed with his adjudication. (R64).

[¶26] Frohlich filed a Response to the North Dakota State Hospital's Psychological Evaluation and Request for Competency Evaluation and Competency Hearing; and also a Proposed Order Granting Request for Competency Evaluation and Competency Hearing on November 26, 2019. Frohlich requested to be reevaluated by Chambers & Blohm Psychological Services pending the completion of that evaluation. (R66-68). The Order Granting Request for Competency Evaluation and Competency Hearing by Judge Gail Hagerty was filed with the Court on November 26, 2019. The Preliminary Hearing scheduled for December 2, 2019 at 8:15 AM was also postponed until the completion of a competency evaluation and competency hearing. (R69).

[¶27] State's Motion to return Defendant to Custody at the Burleigh Morton Detention Center was filed with the Court on November 29, 2019. (R70-72). The Order was approved by Judge Hagerty on November 29, 2019. (R73). On December 3, 2019, Frohlich filed a Response to State's Motion to Return Defendant to Custody at the

Burleigh Morton Detention Center requesting the Court deny the State's above Motion and Frohlich remain at the North Dakota State Hospital. (R79-81).

[¶28] Shannon Weisz, PsyD, LAC, Clinic Psychologist of Chambers & Blohm Psychological Services, P.C. conducted a psychological evaluation of Frohlich on January 28, 2020 and the report was filed with the Court on March 31, 2020. (R82).

[¶29] Attorney Balzer filed a Request for a Competency Hearing on April 1, 2020. (R84).

[¶30] A status Conference was held on May 13, 2020. The Request for a Competency Hearing was granted on record at this hearing.

[¶31] A Stipulation for Canceling the Competency Hearing was filed with the Court on July 8, 2020. Attorney Balzer and the State stipulated to cancelling the July 10, 2020 competency hearing and finding Frohlich not competent to stand trial under N.D.C.C. § 12.1-04-08. In addition, it was stipulated for Frohlich to be committed to the Life Skills and Transition Center in Grafton, North Dakota in an attempt to restore competency to stand trial under N.D.C.C. § 12.1-04-08 and a competency review hearing after six months should Frohlich not regain competency within six (6) months. (R92).

[¶32] A status conference was held on July 10, 2020.

[¶33] A July 6, 2020 Trial Competency Evaluation by Mark Rodlund, PhD was filed with the Court on July 16, 2020. This report was an addendum to the evaluation written by Dr. Rodlund on November 14, 2019. Dr. Rodlund's conclusion was that Frohlich is to be restored to trial competency. An evaluation of November 14, 2019 determined he was trial competent and malingering incompetency. A further review of his treatment notes

revealed that a number of his health care providers came to the same conclusion. It was again recommended Frohlich proceed with his adjudication. (R106).

[¶34] An Order Finding Defendant Competent to Stand Trial by Judge Feland was filed with the Court on October 23, 2020. The clerk's office was directed to then schedule a preliminary hearing that was held on November 13, 2020. (R113).

B. PLEA AGREEMENT

[¶35] Attorney Balzer filed a Request for Cancellation of Trial scheduled for May 19, 2021, along with a Proposed Order on Request for Resetting Hearing. This Request was granted by Judge Feland on April 21, 2021. (R149-152)

[¶36] A Change of Plea was scheduled for May 5, 2021 at 2:30 PM via ZOOM.

[¶37] State filed the Second Amended Information, Motion to Amend Information, Brief in Support of Motion to Amend Information, and Proposed Order on May 5, 2021 to Amend Information to amend count one due to a plea agreement. (R154-159). The Order to Amend Information was approved by Judge Feland on May 5, 2021. (R161).

[¶38] The Court filed an Order for Pre-Sentence Investigation (PSI) and Evaluation for a Sexual Offender Risk Assessment on May 5, 2021. (R160). The Presentence Investigation and Presentence Investigation Addendum was filed with the Court on July 13, 2021. (R163-164)

[¶39] A status conference was held on July 21, 2021 at 10:00 AM.

C. FROHLICH'S WITHDRAW OF GUILTY PLEA

[¶40] Frohlich filed a Request to Withdraw Guilty Plea on August 5, 2021 and also a Proposed Order on Defendant's Request to Withdraw Guilty Plea. (R171-173)

[¶41] A hearing took place on August 9, 2021 at 9:00 AM.

[¶42] An Order Granting Request to Withdraw Guilty Plea was signed by Judge Feland and filed with the Court on August 9, 2021. (R177). An Order to Withdraw Guilty Plea and Withdraw Second Amended Information was signed by Judge Feland and filed with the Court on August 20, 2021. (R183).

LAW AND ARGUMENT

I. The district court did not err in its decision that Jeremy Frohlich was competent to stand trial.

A. Whether or not a defendant is competent to stand trial is a question of fact for the trial judge.

[¶43] The standard the district court would use in determining if a criminal defendant is competent to stand trial is outlined in *State v. Glesson*, 2000 ND 205, ¶9, 619 N.W.2d 858,

It has long been held the conviction of a mentally incompetent accused is a violation of constitution law due process. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788. 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 understand” or (2) “a rational as well as factual understanding of the proceedings against him.” *Dusky*, 362 U.S. at 402, 80 S.Ct. 788. 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 sentence for the commission of an offense so long as such incapacity endures.”

State v. Glesson, 2000 ND 205, ¶9, 619 N.W.2d 858.

[¶44] The State and the defendant did enter a stipulation to have the defendant declared incompetent and sent to the State Hospital for treatment. (R92). This Court has long held that the State has the burden of proving that the defendant is competent to stand trial.

State v. Heger, 326 N.W.2d. 855, 858(N.D. 1982). The State must show that the

defendant is competent by a preponderance of the evidence at an evidentiary hearing. *Id.* It never harms the State's case to stipulate with the defense and have the defendant receive additional psychological treatment. In fact, it only bolsters the State's case if the defendant receives this additional psychological treatment. A district court is under no obligation to accept a stipulation. The district court can instead hold an evidentiary hearing as was the case here.

[¶45] There were three psychologists who did an evaluation of Frohlich. The first was Dr. Paulson who completed an evaluation of Frohlich at Life Skills and Transition Center in Grafton North Dakota. (R42). After that a hearing was held finding Frohlich incompetent and sending him to the North Dakota State Hospital for restoration. (R60). The order transporting Frohlich to the State Hospital was signed on October 10, 2019. (R63). Because Frohlich was later evaluated by Dr. Rodlund who found him to be malingering and competent to stand trial, the State felt Dr. Paulson's testimony was not needed at the August 6, 2020 competency hearing. Comp. Tr., pg. 81, ln. 15-19.

[¶46] The district court held an evidentiary hearing to determine if Frohlich was competent to stand trial. The district court heard the testimony of two psychologists, Dr. Shannon Weisz and Dr. Mark Rodlund. This Court has held that "[c]onflicts in testimony will be resolved in favor of affirmance, as we recognize the trial court is in a superior position to assess credibility of witnesses and weigh the evidence." *State v. Overby*, 1999 ND 47, ¶5, 590 N.W.2d 730, quoting *State v. Kitchen*, 1997 ND 241, ¶ 11, 572 N.W.2d 106.

[¶47] Frohlich brings up in his brief that Dr. Rodlund testified he worked with Frohlich for approximately two months. Appellant's brief ¶32. Frohlich argues that Dr. Rodlund's

own testimony disputes that fact as he recalls Frohlich arriving at the State Hospital on October 16, 2019, and his report was written on November 14, 2019. *Id.* While those dates would seem to contradict one another, what was not testified to but is clearly in the record is that Frohlich was not ordered back to the Burleigh Morton Detention Center until November 29, 2019. (R73). Dr. Rodlund’s testimony that he worked with Frohlich for “approximately two months” would fit that timeframe. Comp. Tr., pg. 72-73.

[¶48] During Frohlich’s time at the State Hospital. Dr. Rodlund conducted approximately four (4) sessions to help Frohlich regain competency, and another psychologist, Dr. Engel, met with Frohlich approximately ten (10) times. Comp. Tr., pg. 73, ln. 6-23. The State Hospital also used several tests. The first test was the Kaufman Brief Intelligence Test which showed Frohlich had low cognitive functioning. Comp. Tr., pg. 74, ln. 12-16. The second test was a validity indicator profile, that also tested for malingering, which showed Frohlich “was very likely to be either not trying very hard or exaggerating his cognitive defects.” Comp. Tr., pg. 74 – 75. The State Hospital also administered the competency assessment test for mental retardation (CAST*MR). Comp. Tr., pg. 75, ln. 7-8. Frohlich scored extremely poor on the CAST*MR, scoring poorer than when he was tested in 2004 and by Dr. Paulson in 2019. Comp. Tr., pg. 75, ln. 13-19. Frohlich’s “total score of 14 was significantly poorer than a total score than the typical range of people who were found not competent to stand trial and had mental disabilities, which was very unusual.” Comp. Tr., pg. 75, ln. 13-19. Dr. Rodlund testified that conflicted with what he and others saw from Frohlich, “especially since he seemed to lose his knowledge of the legal system over time.” Comp. Tr., pg. 76, ln. 2-5.

[¶49] Dr. Rodlund's experience is also important here. The fact that he has not only done 200 competence evaluations but approximately 1500 psychological evaluations is very relevant to the court's ruling. Comp. Tr., pg. 67, ln. 14-17. It is based on that experiency that Dr. Rodlund was able to decern that Frohlich was malingering. Dr. Rodlund stated that the clues he used to determine that Frohlich was malingering was in part the test scores, but also the fact that Frohlich would make comments about not wanting to go to prison. Comp. Tr., pg. 78, ln. 11-14. Frohlich stated, "he knew that if he was found competent he would go to prison and he did not want that." Comp. Tr., pg. 78, ln. 14-16. Dr. Rodlund also noted the fact that Frohlich had the ability to learn a twenty-nine (29) page handbook to fill out a form on his own, and that Frohlich would explain things to other patients. Comp. Tr., pg. 78-79. Regarding the fact Frohlich did better on the Cast*MR in 2004 than he did on Dr. Rodlund's test in 2019 is not typical to see a loss of information except in cases of dementia, stroke, or head injury. Comp. Tr., pg. 80-81. According to the medical information available to Dr. Rodlund, none of those applied to Frohlich. Comp. Tr., pg. 80-81. These were all factors Dr. Rodlund took into account during his evaluation.

[¶50] Dr. Weisz used a test that did have a measure for malingering. That test was the evaluation of competency to stand trial. Comp. Tr., pg. 16, ln. 20-22. That test has an indication if the defendant is feigning. Comp. Tr., pg. 19, ln. 1-8. Dr. Weisz did not find that Frohlich was feigning based off that test. However, by his own testimony, Dr. Weisz only observed Frohlich for approximately 3 hours. Comp. Tr., pg. 32, ln. 11-12. Dr. Rodlund, on the other hand observed Frohlich a significantly longer period of time, and Frohlich was observed outside of evaluations doing normal life routines. Dr. Weisz also

testified that it was possible for someone to look for the questions that are indicators of feigning and not answer any of them in the affirmative. Comp. Tr., pg. 45-46. Even Dr. Rodlund agreed that it would be possible for someone to pass the malingering part of the ECST-R but still show poorer scores in the other sections. Comp. Tr., pg. 117, ln. 12-15.

[¶51] A Kaufman Brief Intelligence Test (KBIT) was performed at the State Hospital in October of 2019 which placed Frohlich in the mild level intellectual disability. Comp. Tr., pg. 106-107. While Dr. Rodlund could not recall the exact score, he did testify that there would be a numeric score. Comp. Tr., pg. 107 ln. 5-6. Dr. Rodlund stated he was very suspicious of the KBIT score Dr. Weisz obtained from January 2020 as it was over two standard deviations from Frohlich's three previous intelligence scores including a 73 in 1995, 64, 1998 and a 60 in 1991 on the WISC-III. Comp. Tr., pg. 107, ln. 19-25. Despite the dramatic change in intelligence test scores Dr. Weisz did not have any concerns about the different scores. Comp. Tr., pg. 52-55.

[¶52] The judge is in the best place for weighing credibility in these cases. *Overby*, 1999 ND 47, ¶5. Judge Feland heard the testimony of both psychologists as outlined above and in the full transcript of the competency hearing. Judge Feland even asked some of her own questions to help her clarify the information. In this case, Judge Feland found Dr. Rodlund more credible not just because she cherry picked arguments that fit how she ruled, but based off all the testimony presented to her as well as the reports accepted as exhibits. These included: Dr. Rodlund being able to explain how scores dropped and that he did not observe any evidence of any reason Frohlich's score should so remarkably drop; that Frohlich was assisting other patients at the State Hospital. Frohlich's statements that he did not want to return to jail; and that Dr. Rodlund concluded that

Frohlich “was competent to stand trial.” Comp. Tr., pg. 81, ln. 15-19. Dr. Rodlund has extensive experience in the area of forensic evaluations and would not make that determination if he did not believe he could not meet both prongs on used in North Dakota. (R64,5).

B. The trial judge’s finding on the issue of competency will not be set aside on review unless it is clearly erroneous.

[¶53] This court has long held that a district courts decision in finding someone competent will not be overturned unless that decision is clearly erroneous. *State v. Heger*, 326 N.W.2d 855, 858(N.D. 1982).

“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.” *State v. Heger*, 326 N.W.2d 855, 858(N.D. 1982)(citations omitted). “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.” *Heckelsmiller v. State*, 2004 ND 191, ¶ 5, 687 N.W.2d 454.

State v. Dahl, 2010 ND 108, ¶ 6, 783 N.W.2d 41. Thus, there are three ways in which a competency decision can be clearly erroneous.

[¶54] First, a reviewing court can find a district court’s decision is clearly erroneous if it is not supported by law. *Dahl*, 2010 ND 108, ¶6. Here, Judge Feland clearly knew and applied the law. Judge Feland starts her Law and Decision section by quoting *Gleeson*. (R113 ¶9). She finishes her argument section “Frohlich has a factual understanding of the proceedings against him, and that he does have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” (R113, ¶28) It is clear that Judge Feland knew the law and applied that law in a reasonable manner.

[¶55] Second, a reviewing court can find a district court’s decision clearly erroneous “if it is not supported by any evidence.” *Dahl*, 2010 ND 108, ¶6. Here, there is a large amount of evidence between the testimony of two psychologists and three reports for Judge Feland to review in reaching her decision.

[¶56] Third, a reviewing court can find a district court’s decision clearly erroneous “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.” *Dahl*, 2010 ND 108, ¶6. Here, Judge Feland thoroughly reviewed the evidence before her. She heard the testimony of both psychologists as outlined in the above argument and in the transcript. She reviewed the reports provided by the psychologists. Judge Feland determined Dr. Rodlund was more credible based on all the evidence presented. This included the time Frohlich spent at the State Hospital, what Dr. Rodlund observed during that time, and the fact that Dr. Rodlund was able to give specific examples of “Frohlich’s own behavior and statements.” (R113 ¶¶ 26-27).

[¶57] Judge Feland’s decision in this case was not clearly erroneous. She made a clear and conscious decision in finding Frohlich was competent to stand trial. She did not cherry pick arguments that only fit her view, but took the evidence as a whole into account when she made her decision.

CONCLUSION

[¶58] Judge Feland was in the best position to review the credibility of both expert witnesses who testified, and the exhibits received. The amount of evidence in this case was extensive. Judge Feland considered all the evidence presented to her. She weighed the credibility of the two expert witnesses. She reached a decision that was clear and

conscious in reviewing all the information provided to her. Judge Feland's ruling was not clearly erroneous.

[¶59] Therefore, based upon the foregoing, the State requests that the jury's verdict be affirmed.

[¶60] Respectfully submitted this 6th day of April, 2022

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CERTIFICATE OF COMPLIANCE

[¶ 1] COMES NOW Joshua Amundson of Bismarck, North Dakota, and hereby certifies that the attached Brief of the Appellee is in compliance with Rule 32(a)(8)(A), North Dakota Rules of Appellate Procedure.

[¶ 2] The number of pages in the principal Brief, excluding any addenda, is seventeen (17) pages, according to the page count of the filed electronic document.

Dated this 6th day of April, 2022.

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I, Joshua Amundson, do certify that on April 6, 2022, I served the following documents:

1. Brief of Plaintiff - Appellee
2. Affidavit of e-service

by electronic filing to the following:

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