

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	
)	Supreme Court No. 20220107
)	
)	
vs.)	District Court No. 51-2020-CR-01580
)	
)	
Zachary Archambault,)	
)	
Defendant/Appellant.)	

APPELLEE’S BRIEF

ORAL ARGUMENT REQUESTED

Appeal from the March 10, 2022, Criminal Judgment in Minot,
Ward County, State of North Dakota, in North Central District Court,
The Honorable Gary Lee, Presiding.

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STATEMENT OF ISSUES

[¶1] I. The brief continuance to address the late disclosure of the CAC interview was sufficient and did not significantly prejudice Defendant.

II. The trial judge's statement that Defendant had waived his presumption of innocence, following a three and half hour videotaped confession outside the presence of the jury, did not prejudice Defendant.

STATEMENT OF CASE

[¶2] The State agrees with Defendant's Statement of the Case. Defendant was sentenced to 40 years first to serve 25 years, with the balance suspended for a period of 5 years of supervised probation. (R133).

ORAL ARGUMENT

[¶3] Oral argument is requested in order to emphasize and clarify Appellant's written arguments.

STATEMENT OF FACTS

[¶4] This matter went to trial on June 28, 2021. (R101:transcript of jury selection). The State called two witnesses in its case-in-chief, Jane Doe and Detective Aaron Bowles (Bowles). (R102:27-37 & R102:39-41). Defendant's attorney (Baumann) gave an opening statement at the beginning of the proceedings, in which he stated that Jane Doe did not give a recorded statement during the course of the investigation. (R102:22-24). Bowles informed the prosecutor while Baumann was giving his opening that there was a CAC interview of Jane Doe. The prosecutor reviewed the file and found no mention of the CAC interview. The prosecutor informed Baumann at the first break that she had learned that there was a CAC interview that had never been sent to the State by Bowles. (R102:46-47). Ultimately, the CAC video was played for the parties outside the presence

of the jury. (R102:96:5-19)(R73).

[¶5] The parties discussed the available remedies at length on several occasions. The district court judge made the comment that Defendant had “pretty much given up his presumption of innocence[,]” in reference to the fact that Defendant had given a three and a half hour statement in which he repeatedly confessed to the crime. (R103:44:3-7). This statement was made outside the presence of the jury following defense’s repeated requests for a mistrial or dismissal.

[¶6] The district court determined that dismissal or mistrial was not warranted in this instance and fashioned the least severe remedy appropriate to remedy the problem. (R103:3-4). Defendant was convicted on the Count of Continuous Sexual Abuse of a Child.

STANDARD OF REVIEW

[¶7] In reviewing a district court’s decision regarding a discovery violation, this Court uses the abuse of discretion standard. State v. Rolfson, 2018 ND 51, ¶6. “A district court abused its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law.” State v. Rolfson, 2018 ND 51, ¶6. It is reversible error only upon a showing that that the defendant was denied substantial rights when the discovery violation is not of a constitutional magnitude. City of Fargo v. Levine, 2008 ND 64, ¶5. The defendant’s substantial rights are not affected when the defendant was not significantly prejudiced by the discovery violation. City of Fargo v. Levine, 2008 ND 64, ¶5.

LAW AND ARGUMENT

I. The brief continuance to address the late disclosure of the CAC interview was sufficient to address the matter and did not significantly prejudice Defendant.

[¶8] The district court has several options when a there is a discovery violation. It can order disclosure, grant a continuance, exclude the evidence, excuse the disclosure, or “enter any other order that is just under the circumstances.” City of Fargo v. Levine, 2008 ND 64, ¶5. (Internal citations omitted).

[¶9] Defendant argues that the continuance provided by the trial court was inadequate to fully remedy the violation in this matter. The district court found there was no bad faith in the late disclosure of the CAC interview and that it was not intentional. (R103:40:11-15). It further determined that, given the nature of the evidence, a short continuance, along with several other options provided to Defendant, were sufficient to remedy the issue. (R103:50:14-18 & R103:53-54).

[¶10] The State was made aware of the CAC interview during the opening statements of the defense. The State advised the defense attorney at the first break that there was a CAC interview that had never been uploaded to the State’s file. Detective Bowles was aware of the interview, but had not included it in the digital case file that goes to the State.

[¶11] The district court granted a continuance to the parties in order for an opportunity to review the CAC interview and decided how to proceed. (R103:53-54). The State noted that had they been aware of the interview it is not something that would have been played in its case-in-chief because the child was over 12 at the time of the interview and it would not be subject to the exception to hearsay pursuant to N.D.R. Evid. 803 (24). (R102:57:2-

4). The State did recognize that the interview could be used for impeachment purposes. (R102:57:5).

[¶12] The CAC video was played for the parties outside the presence of the jury. (R103:3:21-25 & 4:1-6). In the video Jane Doe states that she is not comfortable discussing what happened with Defendant. (R103:4:3-5)(R73). The district court advised Defendant that it was willing to call any of the witnesses back to the stand, play the video for the jury, or allow a deposition of Ashley Powers (Powers), the foster care worker in Jane Doe's case. (R103:24:4-5). Defendant was given opportunity to speak with Powers to determine whether she would be called as a witness. (R103:58-61). Defendant decided that he would not call Powers. (R103:61:16-25).

[¶13] Ultimately, the district court gave Defendant multiple options short of a mistrial or dismissal in order to remedy the situation. (R103:23:1-17). He was given a continuance, allowed to call any of the State's witnesses back to the stand, show the CAC interview to the jury, and was given an opportunity to talk to Powers to determine whether she would be called as a witness. The remedies in this instance were more than sufficient to cure any prejudice to Defendant resulting from late disclosure of the CAC interview.

II. The trial judge's statement that Defendant had waived his presumption of innocence, following a three and half hour videotaped confession outside the presence of the jury, did not prejudice Defendant.

[¶14] A defendant has the right to an impartial, neutral, and disinterested tribunal. State v. Jacobson, 2008 ND 73 ¶6. A judge is presumed by law to be unbiased and not prejudiced. Id. Whether a judge needs to recuse himself or herself from a case is determined by the North Dakota Code of Judicial Conduct, Canon 2.11, which provides:

A. A judge shall disqualify in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
- (2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:
 - (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
 - (b) acting as a lawyer in the proceeding;
 - (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
 - (d) likely to be a material witness in the proceeding.
- (3) The judge knows that the judge, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.
- (4) The judge, while a judge or a judicial candidate has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
- (5) The judge:
 - (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
 - (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the matter, or has publicly expressed in such capacity an opinion concerning the merits of the matter in controversy;
 - (c) was a material witness concerning the matter; or
 - (d) previously presided as a judge over the matter in another court.

[¶15] In this matter there was not a reason for Judge Lee to disqualify himself from the case prior to trial. The statements made by Judge Lee were made outside the presence of

the jury after having watched Defendant in a three and a half hour police interview in which Defendant confesses to the crime. Defendant not only confesses to the crime in the police interview but he gives detailed information and provides the details of other instances in which he sexually abused the victim in this case. (R72).

[¶16] The judge's statement was made in relation to how Defendant thought he was going to overcome the three and a half hour confession. The district court was addressing facts already in evidence. The admissibility of Defendant's videotaped statement is not being challenged. The district court was addressing the difficulty of overcoming such a damning piece of evidence. This comment was made outside the presence of the jury. The jury did not consider the district court's comment in reaching its verdict since it was never aware of the comment.

CONCLUSION

[¶17] The State requests that this Court affirm the jury's finding of guilt.

Respectfully submitted this 6th day of September, 2022.

/s/ Leah J. Viste

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CERTIFICATE OF COMPLIANCE

[1] The undersigned hereby certifies that the Brief of Petitioner/Appellee, is in compliance with Rule 32 of North Dakota Rules of Appellate Procedure and the brief contains 9 pages.

Dated 6th this day of September, 2022.

/s/Leah J. Viste
Leah J. Viste, NDID #05692

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AFFIDAVIT OF SERVICE

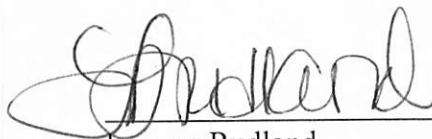
Lynnae Rudland, being first duly sworn, deposes and says:

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 6 day of September, 2022, this Affiant provided a true and correct copy of the following documents in the above entitled action:

APPELLEE'S BRIEF

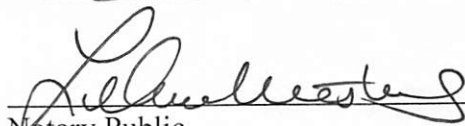
By ELECTRONIC SERVICE to the following:

BENJAMIN PULKRABEK
ATTORNEY AT LAW
pulkrabek@lawyer.com



Lynnae Rudland

Subscribed and sworn to before me this 6 day of September, 2022, by
Lynnae Rudland



Notary Public

LEANN WESTERENG
Notary Public
State of North Dakota
My Commission Expires April 21, 2026