

[¶ 1] **TABLE OF CONTENTS**

TABLE OF AUTHORITIES ¶ 2

JURISDICTION ¶ 3

STATEMENT OF THE ISSUES..... ¶ 5

ORAL ARGUMENT JUSTIFICATION..... ¶ 7

STATEMENT OF THE CASE..... ¶ 9

STATEMENT OF THE FACTS ¶ 13

STANDARD OF REVIEW ¶ 18

LAW AND ARGUMENT..... ¶ 20

CONCLUSION ¶ 24

[¶ 2] TABLE OF AUTHORITIES

| <u>North Dakota Supreme Court Cases</u> | <u>¶ #</u> |
|--|-------------------|
| <u>State v. Igou</u> , 2005 ND 16, 691 N.W.2d 213..... | ¶¶ 19, 25 |
| <u>State v. Knowels</u> , 2003 ND 180, 671 N.W.2d 816..... | ¶¶ 19, 25 |
| <u>State v. Schmeets</u> , 2007 ND 197, 742 N.W.2d 513..... | ¶ 19 |
| <u>State v. Skarsgard</u> , 2007 ND 160, 739 N.W.2d 786 (N.D. 2007)..... | ¶ 19 |
| <u>Statutes / Rules</u> | <u>¶ #</u> |
| N.D.C.C. § 12.1-20-03(1)(d) | ¶ 10 |
| N.D.C.C. § 12.1-32-02(11)..... | ¶ 11 |
| N.D.C.C. § 27-05-06..... | ¶ 12 |
| N.D.C.C. § 29-28-03..... | ¶ 4 |
| N.D.C.C. § 29-28-06..... | ¶ 4 |
| N.D.R.App.P. 4..... | ¶ 12 |
| <u>Constitutional Provisions</u> | <u>¶ #</u> |
| N.D. Const. art. VI, § 2..... | ¶ 4 |
| N.D. Const. art. VI, § 6..... | ¶ 4 |
| N.D. Const. art. VI, § 8..... | ¶ 12 |

Transcript References:

The jury trial for this matter was held on January 11-13, 2021. The transcript of that trial is referred to as Tr. in this brief.

[¶ 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] Whether the district court abused its discretion by denying Mr. Lindeman’s motion for acquittal.

[¶ 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] Mr. Lindeman appeals from a Criminal Judgment, dated May 28, 2021. (A.A. at 9.) Mr. Lindeman was charged with violating N.D.C.C. § 12.1-20-03(1)(d), Gross Sexual Imposition – Sexual Act-Victim under 15 – Defendant over 22. (A.A. at 3.) Following a three-day jury trial, Mr. Lindeman was found guilty. (A.A. at 8.)

¶ 11] The district court ordered a PSI Risk Assessment after the conviction, pursuant to N.D.C.C. § 12.1-32-02(11). (A.A. at 6; Index # 93.) Following the submission of the PSI Risk Assessment on May 6, 2021, the district court sentenced Mr. Lindeman on May 21, 2021. (A.A. at 6.) Mr. Lindeman was sentenced to 45 years with the North Department of Corrections and Rehabilitation, with 10 years suspended followed by 50 years of Supervised Probation. (A.A. at 9.)

¶ 12] Mr. Lindeman, by and through trial counsel, filed a timely notice of appeal on June 1, 2021, pursuant to N.D.R.App.P. 4. A.A. at 16. The District Court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8.

¶ 13] STATEMENT OF THE FACTS

¶ 14] On December 7, 2019, Jane Doe confronted her father, Mr. Lindeman, via text message about his molestation of her. Tr. 38. According to Jane Doe, Mr. Lindeman had molested her over a two-year period; either two or four years prior to the December 7th date. Tr. 34. Jane Doe testified that Mr. Lindeman would threaten her mother or sister if Jane Doe ever told anyone about the molestation. Tr. 37.

¶ 15] Then, per Jane Doe's testimony, when she learned that Mr. Lindeman had engaged in a sexual relationship with another woman, other than her mother, Jane Doe confronted Mr. Lindeman about her molestation. Tr. 38. Jane Doe testified that her motivation behind the confrontation was solely the affair Mr. Lindeman had with another woman. Tr. 45.

¶ 16] Following this exchange of text messages Jane Doe called the Minot Police Department and reported the molestation. Tr. 138-139. Immediately following the report

by Jane Doe, the officer who took the report was notified that Mr. Lindeman had come to the Minot Police Department to turn himself in for molesting his daughter. Tr. 139.

[¶ 17] Mr. Lindeman then provided a recorded statement about the molestation to law enforcement officers. Tr. 140. However, Mr. Lindeman’s statement was highly inconsistent with that of Jane Does. Mr. Lindeman’s timeline of the events was years off of Jane Doe’s Tr. 146. Mr. Lindeman’s estimate of the number of times it happened was less than 30, whereas Jane Doe alleged it happened multiple times a week for two years. Tr. 145-146. Jane Doe that the molestation continued to happen when the family moved to Minot, whereas Mr. Lindeman’s statement was that the molestation ended prior to moving to Minot. Tr. 147. Then on December 9, 2019, approximately two days after the report and statement, Mr. Lindeman was officially charged and arrested for the crime of Gross Sexual Imposition – victim less than 15, defendant at least 22. (A.A. at 4, Index # 1) Mr. Lindeman has remained in custody ever since.

[¶ 18] **STANDARD OF REVIEW**

[¶ 19] “A district court abuses its discretion when it misinterprets or misapplies the law, or when it acts in an arbitrary, unreasonable, or capricious manner.” State v. Skarsgard, 2007 ND 160, ¶ 16, 739 N.W.2d 786 (N.D. 2007). The appellate standard of review regarding a claim of insufficiency of evidence is well-established. In State v. Schmeets, 2007 ND 197, ¶ 8, 742 N.W.2d 513, the court stated: “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 an inference reasonably tending to prove guilt and fairly warranting a conviction.” State v. Igou, 2005 ND 16, ¶ 5, 691 N.W.2d 213. The defendant bears the burden of showing the evidence

reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. Id. “A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor.” State v. Knowels, 2003 ND 180, ¶ 6, 671 N.W.2d 816

[¶ 20] LAW AND ARGUMENT

[¶ 21] The essential elements of the crime of Gross Sexual Imposition – victim less than 15, defendant at least 22 are as follows:

1. On or about January 1, 2016, through December 7, 2019, in Ward County, North Dakota, the Defendant, Barry Mervyn Lindeman, willfully engaged in a sexual act with Jane Doe; and
2. Jane Doe was less than fifteen (15) years of age; and
3. The defendant was at least (22) years of age at the time of the offense.

Final Jury Instructions, Pg. 6 – Index # 90

[¶ 22] Jane Doe herself testified that the family did not live in Surrey until 2017. Tr. 34: 18-20. Therefore, at the outset, the State’s charging document, which defined the essential elements, has incorporated a timeframe that is impossible. The entire year of 2016 is an impossible timeframe, yet for a verdict of guilty, the jury was required to find the sexual acts happening during that ‘impossible’ timeframe.

[¶ 23] Furthermore, the testimony from Jane Doe was that after four-years of fear and subjugation at the hands of her father, she was only able to overcome that fear when she learned of her father with another woman. In fact, Jane Doe’s fury over this other woman goes so far as to her making demands and threats to the man that she allegedly

believed was going to murder her mother and sister if Jane Doe ever told anyone about the molestation. See Tr. 45-48 & 53. Jane Doe goes on to testify that this dangerous and threatening man, her father, would never make a threat over text message, “[b]ecause he knows I would have something to get him in trouble.” Tr. 63. Yet this man, who is so clandestine to not make threats over text, so as to not give ammunition to his daughter to get him trouble, supposedly would readily admit to molestation over text. Contrast Tr. 49: 7-9, to, Tr. 63: 9-11. It is the sole testimony of Jane Doe and the wildly inconsistent statements made by Mr. Lindeman that led this jury to believe beyond a reasonable doubt, essential elements that were impossible to be true.

[¶ 24] CONCLUSION

[¶ 25] For the foregoing reasons, Mr. Lindeman requests this Court vacate his criminal judgment, due to the lack of sufficient evidence. Moreover, that the evidence that was presented reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. Igou, 2005 ND 16 at ¶ 5, 691 N.W.2d 213. Furthermore, this conviction, that rests upon insufficient evidence, because no rational fact finder could have found the defendant guilty beyond a reasonable doubt. Even after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor. Knowels, 2003 ND 180 at ¶ 6, 671 N.W.2d 816.

Respectfully submitted this Monday, September 20, 2021.



Samuel A. Gereszek (ND Bar ID # 07040)

GERESZEK LAW OFFICE P.L.L.C.
3001 32nd Ave. S., Ste. 1A
Grand Forks, ND 58201
Phone: (701) 786-6068
Eservice: eserve@gereszek.law
ATTORNEY FOR THE APPELLANT

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

| | | |
|-------------------------------|---|------------------------------------|
| STATE OF NORTH DAKOTA, |) | |
| |) | |
| Appellee, |) | Supreme Court No.: 20210159 |
| vs. |) | |
| BARRY MERVYN LINDEMAN, |) | District Court No.: |
| |) | 51-2019-CR-02391 |
| Appellant. |) | |

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

[¶1] **COMES NOW** Samuel A. Gereszek, attorney for the Appellant, **Barry Mervyn Lindeman**, 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 = **1,707**; Page Count = **8** (N.D.R.App.P 32(a)(8))
- b. Appellant’s Appendix – (N.D.R.App.P.25(a))

[¶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 Friday, September 17, 2021.



Samuel A. Gereszek (ND Bar ID # 07040)
GERESZEK LAW OFFICE P.L.L.C.
3001 32nd Ave. S., Ste. 1A
Grand Forks, ND 58201
Telephone: (701) 786-6068
Eservice: eserve@gereszek.law
ATTORNEY FOR APPELLANT

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

| | | |
|------------------------|---|--------------------------------------|
| STATE OF NORTH DAKOTA, |) | |
| |) | |
| |) | Supreme Court No.: 20210159 |
| Plaintiff, |) | |
| vs. |) | District Court No.: 51-2019-CR-02391 |
| |) | |
| BARRY MERVYN LINDEMAN, |) | |
| |) | |
| Defendant. |) | CERTIFICATE OF SERVICE |
| |) | |
| |) | |

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. ~~Amended~~ Appellant's Brief (.pdf and Word)

was filed via electronically through the Court Electronic Filing System on Monday, September 20, 2021, and served upon:

State of North Dakota
Attorney for Appellee
51wardsa@wardnd.com

Barry Lindeman, #62257
ND State Penitentiary
PO Box 5521
Bismarck, ND 58506

Dated this Monday, September 20, 2021



Samuel A. Gereszek (ND Bar ID # 07040)
GERESZEK LAW OFFICE P.L.L.C.
3001 32nd Ave. S., Ste. 1A
Grand Forks, ND 58201
Telephone: (701) 786-6068
Eservice: eserve@gereszek.law
ATTORNEY FOR THE APPELLANT