

SUPREME COURT OF NORTH DAKOTA

Brewer v. State

2019 ND 69 (2019) · No. 20180254 · Decided March 13, 2019

SUMMARY

The North Dakota Supreme Court affirmed an order granting Michael Brewer post-conviction relief and a new trial on two gross sexual imposition convictions. The court held that counsel provided ineffective assistance by failing to renew an objection at trial to prior-act evidence potentially inadmissible under N.D.R.Ev. 404(b), thereby denying the district court an opportunity to reconsider the evidence in the trial context. The court also concluded that the prejudice affected both convictions.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Jerod E. Tufte, Justice; Jerod E. Tufte; Daniel J. Crothers; Lisa Fair McEvers; Jon J. Jensen; Gerald W. VandeWalle, C.J.
JURISDICTION	North Dakota
DECIDED	March 13, 2019
DOCKET	20180254
DISPOSITION	affirmed
PROCEDURAL POSTURE	The State appealed from a district court order granting Brewer post-conviction relief based on ineffective assistance of counsel and ordering a new trial on both gross-sexual-imposition convictions.
STANDARD OF REVIEW	Post-conviction findings of fact are reviewed for clear error under N.D.R.Civ.P. 52(a), while questions of law and ineffective-assistance claims, which are mixed questions of law and fact, are fully reviewable.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	State of North Dakota v. Michael Brewer

TOPICS

- ineffective assistance
- post-conviction relief
- evidence
- criminal procedure
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether trial counsel provided ineffective assistance by failing to renew at trial an objection to prior-bad-acts evidence after the pretrial motion in limine was denied.
2. Whether Brewer established prejudice under Strickland when the unobjected-to evidence was admitted without the required contextual Rule 404(b) analysis and Rule 403 balancing.
3. Whether post-conviction relief should apply to both gross-sexual-imposition convictions even though the prior-bad-acts evidence directly involved only one victim.

HOLDINGS

1. An attorney's failure to object when evidence is offered at trial, based on reliance on the record made during a pretrial motion in limine, is a basic legal error falling below an objective standard of reasonable professional assistance under Strickland.
2. Brewer established prejudice because the prior-bad-acts interview was not cumulative, created a significant risk of propensity reasoning, was admitted without the required Rule 404(b) analysis and Rule 403 balancing, and undermined confidence in the verdict.
3. The district court properly granted relief on both gross-sexual-imposition convictions because the prior-bad-acts evidence relating to one victim could prejudice the jury's determination of guilt on the charge involving the other victim.

KEY QUOTATIONS

"We conclude failing to object at trial because of reliance on the record made in a pretrial motion is a basic legal error that satisfies Strickland's prong one." (¶ 8)

"But, as discussed above, the objection must be renewed at trial so the court can consider the objection in context of trial, as well as to preserve the issue for appeal." (¶ 15)

"Brewer was prejudiced by the failure to object at trial regardless of whether the objection would have been sustained or overruled." (¶ 16)

FACTUAL BACKGROUND

Brewer was convicted of two counts of gross sexual imposition involving two minor victims. Before trial, the district court denied Brewer's motion to exclude an interview describing a separate incident in which one victim alleged Brewer touched her buttocks under her clothing, ruling the evidence admissible for non-propensity purposes under Rule 404(b). Counsel did not renew the objection when the interview was introduced at trial, explaining that he believed the pretrial record preserved the issue. The post-conviction court found that a trial objection likely would have resulted in exclusion of the evidence and that its admission undermined confidence in both verdicts.

PROCEDURAL HISTORY

Brewer was convicted of two counts of gross sexual imposition, and the North Dakota Supreme Court affirmed his convictions on direct appeal. Brewer then applied for post-conviction relief, arguing that trial counsel was ineffective for failing to renew an objection when the State offered prior-bad-acts evidence under North Dakota Rule of Evidence 404(b). After a post-conviction hearing, the district court found deficient performance and prejudice, granted relief, and ordered a new trial. The Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Brewer, 2017 ND 95, 893 N.W.2d 184
- Broadwell v. State, 2014 ND 6, ¶¶ 5, 7, 841 N.W.2d 750
- Rourke v. State, 2018 ND 137, ¶ 5, 912 N.W.2d 311
- Middleton v. State, 2014 ND 144, ¶¶ 5-6, 13, 849 N.W.2d 196
- Booth v. State, 2017 ND 97, ¶ 7, 893 N.W.2d 186
- Heckelsmiller v. State, 2004 ND 191, ¶ 3, 687 N.W.2d 454
- Garcia v. State, 2004 ND 81, ¶ 8, 678 N.W.2d 568
- State v. Steen, 2015 ND 66, ¶ 5, 860 N.W.2d 470
- State v. Schick, 2017 ND 134, ¶ 8, 895 N.W.2d 773
- Brouillet v. Brouillet, 2016 ND 40, ¶ 32, 875 N.W.2d 485
- State v. Doll, 2012 ND 32, ¶ 15, 812 N.W.2d 381
- State v. Thompson, 2010 ND 10, ¶ 13, 777 N.W.2d 617
- State v. Shaw, 2016 ND 171, ¶¶ 7-9, 883 N.W.2d 889
- State v. Schmeets, 2009 ND 163, ¶ 10, 772 N.W.2d 623
- State v. Lee, 2004 ND 176, ¶ 10, 687 N.W.2d 237
- State v. Balderama, 2004-NMSC-008, ¶ 20, 135 N.M. 329, 334, 88 P.3d 845, 848
- People v. Medina, 11 Cal. 4th 694, 727, 906 P.2d 2 (1995), as modified (Jan. 24, 1996)
- State v. Osier, 1997 ND 170, ¶¶ 4, 13, 569 N.W.2d 441
- State v. Tutt, 2007 ND 77, ¶ 13, 732 N.W.2d 382
- State v. Aabrekke, 2011 ND 131, ¶¶ 15-16, 800 N.W.2d 284