This opinion is subject to petition for rehearing
Filed 4/10/18 by Clerk of Supreme Court
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2018 ND 95

State of North Dakota, Plaintiff and Appellee

v.

Amira Olivia Gunn, Defendant and Appellant

No. 20170138

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable John W. Grinsteiner, Judge.

AFFIRMED.

Opinion of the Court by McEvers, Justice.

Marina Spahr, Assistant State's Attorney, Bismarck, ND, for plaintiff and appellee.

Michael R. Hoffman, Bismarck, ND, for defendant and appellant.

McEvers, Justice.

[¶1] Amira Gunn appeals from an order deferring imposition of sentence after a jury found her guilty of attempted gross sexual imposition, a class A felony. Gunn argues the evidence against her was insufficient, she was convicted of speech protected by the First Amendment, and the jury instructions were improper. We affirm.

I

[¶2] In November 2015, Gunn and Calvin Till communicated in private conversations on MeetMe.com, a social networking website. Gunn and Till exchanged more than 700 messages between November 11 and 13, 2015. In a portion of the conversations, Gunn gave explicit and lewd instructions to Till on how to groom and sexually assault his young daughter and how to abduct and sexually assault Till's two neighbor children.

[¶3] On December 16, 2015, Bismarck Police Department Detective Brandon Rask and Homeland Security Special Agent Randy Helderop interviewed Gunn. During the interview, Gunn admitted to having the conversations with Till. Gunn acknowledged she knew of Till's sexual fetish for children including his own daughter. Gunn stated she believed Till's daughter was approximately six years old. Gunn characterized the conversations with Till as role-playing.

[¶4] At trial, Detective Rask testified he believed the initial conversations between Gunn and Till involved role-playing. Rask testified he believed the role-playing eventually ceased and Gunn and Till

reassumed their own identities. Rask testified that later in the conversations Till relayed to Gunn that he was sexually assaulting his daughter in real-time. The jury found Gunn guilty of attempted gross sexual imposition. The district court deferred imposition of sentence for a period of five years.

II

[¶5] Gunn argues there is no evidence of a victim in this case. Gunn also claims that since Till did not commit the crime of gross sexual imposition, there is no evidence that Gunn aided Till to commit the crime.

[¶6] Gunn raised these arguments at trial through a motion for acquittal under N.D.R.Crim.P. 29, which the district court denied. Before granting a motion for acquittal, the court must find the evidence is insufficient to sustain a conviction. *State v. Montplaisir*, 2015 ND 237, 1135, 869 N.W.2d 435. Our standard of review for claims of insufficient evidence is well established:

> [W]e look only to the evidence and reasonable inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt. In considering a sufficiency of the

> evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses.

Id. (quoting *State v. O'Toole*, 2009 ND 174, ¶ 8, 773 N.W.2d 201).

[¶7] The State alleged in its sixth amended information that Gunn committed the crime of attempted gross sexual imposition, a class A felony. The State charged Gunn with criminal attempt under N.D.C.C. § 12.1-06-01(2):

> A person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt if the conduct would establish his complicity under section 12.1-03-01 *were the crime committed by the other person, even if the other is not guilty of committing or attempting the crime*, for example, because he has a defense of justification or entrapment.

(Emphasis added.) Contrary to Gunn's argument, the plain language of the statute does not require the crime actually be committed by the other person. The State was not required to prove Till committed gross sexual imposition.

[¶8] The attempt statute also references the accomplice statute, N.D.C.C. § 12.1-03-01:

> 1. A person may be convicted of an offense based upon the conduct of another person when:
>
> a. Acting with the kind of culpability required for the offense, he causes the other to engage in such conduct;

> b. With intent that an offense be committed, he commands, induces, procures, or aids the other to commit it, or, having a statutory duty to prevent its commission, he fails to make proper effort to do so; or
>
> c. He is a coconspirator and his association with the offense meets the requirements of either of the other subdivisions of this subsection.

[¶9] The district court's instructions to the jury defined "accomplice" as "a person who with intent that an offense be committed, commands, induces, procures or aids another to commit a crime." This definition mirrors the language in N.D.C.C. § 12.103-01(1)(b). Thus, for the jury to find Gunn guilty of attempted gross sexual imposition, the State must prove Gunn's conduct commanded or aided Till to commit gross sexual imposition, had the crime been committed by Till. An accomplice may command or aid another to commit a crime by electronic means. *See Saari v. State*, 2017 ND 94, ¶¶ 2, 9, 893 N.W.2d 764 (defendant instructed his girlfriend over the phone on how to forge a check); *see also State v. Soltis*, 2009 WL 2596096, *5 (Minn. Ct. App. 2009) (defendant instructed individual over the phone to take sexually explicit photos of minor child).

[¶10] Gunn argues that because Till's daughter was not present during the online conversations and that the neighbor children could have been imaginary, there was no evidence of a victim. Gunn also claims the conversations with Till were role-playing.

[¶11] The MeetMe messages between Gunn and Till were admitted into evidence and included numerous instances of Gunn instructing Till how to groom and sexually assault his daughter and neighbor children, a six-year-old girl and eight-year-old boy. Gunn stated in the interview with Detective Rask and Special Agent Helderop that she believed Till's daughter was approximately six years old.

[¶12] Rask testified about the online conversations between Gunn and Till. He testified the initial conversations involved role-playing, with Gunn acting as Till's nine or ten-year-old daughter. Rask testified he believed the role-playing eventually ceased and Gunn and Till reassumed their own identities. Rask testified that Till informed Gunn he had a daughter who would be visiting later in the day. Gunn then began instructing Till on how to groom and sexually assault his daughter. Rask testified that further along in the conversations Till began relaying to Gunn that he was sexually assaulting his daughter in real-time.

[¶13] The attempt statute under which Gunn was charged, N.D.C.C. § 12.1-06-01(2), did not require Till to commit the crime of gross sexual imposition. Rather, the statute provides that if the crime were committed, would Gunn's conduct have made her an accomplice to the crime under N.D.C.C. § 12.1-03-01(1)(b). Detective Rask testified that part of Gunn and Till's conversation was role-playing; however, the part of the conversation in which Gunn instructed Till to sexually assault his daughter appeared not to be role-playing. The context of those messages indicated that Till was sexually

assaulting his daughter in real-time under Gunn's instructions. The State presented sufficient evidence of who the victim would be were the crime committed by Till. When viewing the evidence in the light most favorable to the State, we conclude there is substantial evidence to warrant the conviction against Gunn.

III

[¶14] Gunn argues the conversations between her and Till are protected by the First Amendment.

[¶15] "Whether speech is constitutionally protected is a question of law, which is fully reviewable on appeal." *State v. Brossart*, 2015 ND 1, ¶ 10, 858 N.W.2d 275. We use caution when reviewing claims of constitutionally protected activity, and we independently examine the record when free speech arguments are made to decide whether the charged conduct is protected. *Id.* Evidence of constitutionally protected activity is not admissible to a jury. *State v. Barth*, 2005 ND 134, ¶ 10, 702 N.W.2d 1. A defendant should generally bring claims of constitutionally protected activity in a motion in limine. *Id.*

[¶16] "The First Amendment permits 'restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Brossart*, 2015 ND 1, ¶ 11, 858 N.W.2d 275 (quoting *Virginia v. Black*, 538 U.S. 343, 358-59 (2003)). "The freedom of speech has its limits; it does not

embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002). Sexual expression that is indecent but not obscene is protected by the First Amendment. *Id.* at 245. The United States Supreme Court has established a test for obscenity:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Reno v. Am. Civil Liberties Union, 521 U.S. 844, 872 (1997) (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

[¶17] In addition, the First Amendment does not protect speech integral to a crime. *See State v. Backlund*, 2003 ND 184, ¶ 29, 672 N.W.2d 431 ("freedom of speech does not extend to speech used as an integral part of conduct in violation of a valid criminal statute"); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (allowing a state to prohibit "advocacy [] directed to inciting or producing imminent lawless action and [] likely to incite or produce such action").

[¶18] Before trial, Gunn moved the district court to exclude the conversations, arguing they were protected

by the First Amendment. The court denied her motion. At trial, Gunn moved for an acquittal based on the conversations being protected by the First Amendment. Again, the court denied the motion. The court addressed the obscenity test under *Reno v. ACLU*, and analyzed whether the conversations were protected under the First Amendment:

> In the present case, the Court finds Gunn's statements constitute obscene speech that is not protected by the First Amendment. Under the obscenity test stated in *Roth [v. U.S.*, 354 U.S. 476, 485 (1957)], the lewd statements pertaining to sexual grooming of Till's daughter, as well as a plan for sexual abuse of the neighbor children, clearly meet the elements of obscene speech.
>
> First, the average person would find the statements to appeal to the prurient interests of Gunn. It is apparent the statements are of a nature having a tendency to excite lustful thoughts in Gunn.
>
> Second, the statements depict and describe sexual conduct in a patently offensive way as prescribed by state law. An example of "patently offensive" includes a "representation or description of masturbation . . . and lewd exhibition of the genitals." *See Miller v. California*, 413 U.S. 15, 25 (1973). Here, Gunn's statements meet the second prong as they describe and encourage Till to masturbate and expose his genitals to his daughter.

> Third, the statements severely lack any serious literary, artistic, political, or scientific value. Gunn has not indicated they qualify as such and the Court fails to see, by any stretch of the imagination, how the statements have literary, artistic, political, or scientific value. Therefore, Gunn's statements to Till regarding sexual abuse of minor children qualify as obscenity and are not protected speech under the First Amendment.

[¶19] While we agree with the district court that Gunn's statements were obscene, the primary reason Gunn's statements fall outside the protection of the First Amendment is because they were integral to the commission of a crime. Gunn's private one-on-one messages to Till provided detailed instructions on committing sex crimes against children. Gunn's statements were integral to the crime of criminal attempt because under the circumstances known to her, the statements advocated and were likely to produce imminent lawless action. Gunn's statements were criminal and outside the First Amendment because they showed an "inten[t] to aid another to commit a crime." N.D.C.C. § 12.1-06-01(2). We conclude the online conversations between Gunn and Till are not protected by the First Amendment.

IV

[¶20] Gunn argues the district court's jury instructions failed to correctly instruct the jury on the culpability required for criminal attempt.

[¶21] Jury instructions are fully reviewable on appeal. *State v. Wilson*, 2004 ND 51, ¶ 11, 676 N.W.2d 98. We review the instructions as a whole to decide whether they adequately and correctly inform the jury of the applicable law. *State v. Anderson*, 2016 ND 28, ¶ 31, 875 N.W.2d 496. "If, when considered as a whole, a jury instruction correctly advises the jury of the law, it is sufficient even if part of it standing alone may be insufficient." *Id.* (quoting *State v. Barth*, 2001 ND 201, ¶ 12, 637 N.W.2d 369).

[¶22] The district court instructed the jury on the essential elements of attempted gross sexual imposition:

> 1) On or about November 12-13, 2015, in Burleigh County, North Dakota;
>
> 2) the defendant, Amira Gunn;
>
> 3) intending to aid Calvin Till to commit the crime of Gross Sexual Imposition;
>
> 4) engaged in conduct that would make the defendant, Amira Gunn an accomplice to Gross Sexual Imposition were the crime committed by Calvin Till; and
>
> 5) the victim of the sexual act was less than fifteen (15) years of age and Calvin Till was at least twenty-two (22) years of age.

[¶23] Gunn argues the word "knowingly" should have preceded essential element (4). Gunn contends essential element (4) should have read "knowingly engaged in conduct that would make the defendant, Amira

Gunn an accomplice to Gross Sexual Imposition were the crime committed by Calvin Till."

[¶24] Here, essential element (3) uses "intending," indicating a culpability of intentionally. A person engages in conduct "'[i]ntentionally' if, when he engages in the conduct, it is his purpose to do so." N.D.C.C. § 12.1-02-02(1)(a). A person engages in conduct "'[k]nowingly' if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so." N.D.C.C. § 12.1-02-02(1)(b). The district court provided these definitions to the jury in the instructions. The highest level of culpability is intentionally. *State v. Rufus*, 2015 ND 212, ¶ 22, 868 N.W.2d 534.

[¶25] The jury instructions followed the wording of the criminal attempt statute under which Gunn was charged. *See* N.D.C.C. § 12.1-06-01(2) ("[a] person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt if the conduct would establish his complicity under section 12.1-03-01 were the crime committed by the other person"). The instructions also defined "accomplice," which mirrored the text of N.D.C.C. § 12.1-03-01(1)(b). We conclude the district court correctly instructed the jury on the culpability required for criminal attempt and correctly advised the jury of the law. The court's instructions to the jury were not erroneous.

[¶26] We have considered Gunn's remaining arguments and find them to be without merit, unnecessary

to our decision, or not adequately articulated, supported and briefed. The order is affirmed.

[¶27] Lisa Fair McEvers
Daniel J. Crothers
Jerod E. Tufte
Gerald W. VandeWalle, C.J.
Jon J. Jensen

STATE OF NORTH DAKOTA | **IN DISTRICT COURT**

COUNTY OF BURLEIGH | **SOUTH CENTRAL JUDICIAL DISTRICT**

State of North Dakota,
Plaintiff,
v.
Amira Olivia Gunn,
Defendant.

Case No. 08-2015-CR-03443

ORDER DENYING MOTION IN LIMINE TO EXCLUDE STATEMENTS

INTRODUCTION

[¶1] This matter comes before the Court on a *Motion in Limine* filed by the Defendant, Amira Olivia Gunn ("Gunn") to exclude statements. The State charged Gunn with Attempted Gross Sexual Imposition. This case is set for trial on November 3, 2016 at the Burleigh County Courthouse before the Honorable John W. Grinsteiner.

BACKGROUND

[¶2] Gunn asserts in her *Motion* that her speech with Calvin Till ("Till") is constitutionally protected and should be excluded as such. The State contends the referenced speech occurred with Till through a social media site called *MeetMe.com*.

[¶3] The State asserts in its *Response* that, upon learning Till had a six-year-old daughter, Gunn

instructed and encouraged Till to groom the daughter for sexual activity. Specifically, the State asserts Gunn's statements include: "[L]et her walk in on you jacking off"; "lay her on her back and relax her . . . kiss her if she likes that it rub her gently with your fingers first . . . see how she likes it and very gently finger her . . . get her wet . . . pussy juice in the best lube"; and "once she wet enough, try two figures [sp] and then try the head of your dick."

[¶4] The State also asserts Gunn wrote to Till regarding a strategy to kidnap two neighbor children (ages six and eight) for the purposes of sex. In that statement, Gunn allegedly wrote, "You'd have to be masked and not speak, maybe blind fold them, and clean up the cum."

LAW AND DECISION

[¶5] Generally, a defendant must raise an argument for constitutionally protected activity through a motion in limine. *State v. Curtis*, 2008 ND 93, ¶ 7, 748 N.W.2d 709, 713. "Evidence found to be constitutionally protected by the court is inadmissible and should be held from the jury." *Id*. "Whether speech is constitutionally protected is a question of law." *Id*. at ¶ 7, 712-13.

[¶6] The First Amendment freedom of speech has its limits. *Achcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002). On one hand, "It does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real

children." *Id*. at 245-46. On the other hand, "The Government may not suppress lawful speech as the means to suppress unlawful speech." *Id*. at 255.

[¶7] "In evaluating the free speech rights of adults, we have made it perfectly clear that sexual expression which is indecent but not obscene is protected by the First Amendment." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) (internal quotations omitted).

[¶8] However, speech that exceeds indecency and constitutes obscenity is not protected. *See*, *Roth v. U.S.*, 354 U.S. 476, 485 (1957). The test for obscenity is:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Reno, at 872.

[¶9] In the present case, the Court finds Gunn's statements constitute obscene speech that is not protected by the First Amendment. Under the obscenity test stated in *Roth*, the lewd statements pertaining to sexual grooming of Till's daughter, as well as a plan for

sexual abuse of the neighbor children, clearly meet the elements of obscene speech.

[¶10] First, the average person would find the statements to appeal to the prurient interests of Gunn. It is apparent the statements are of a nature having a tendency to excite lustful thoughts in Gunn.

[¶11] Second, the statements depict and describe sexual conduct in a patently offensive way as prescribed by state law. An example of "patently offensive" includes a "representation or description of masturbation . . . and lewd exhibition of the genitals." *See*, *Miller v. California*, 413 U.S. 15, 25 (1973). Here, Gunn's statements meet the second prong as they describe and encourage Till to masturbate and expose his genitals to his daughter.

[¶12] Third, the statements severely lack any serious literary, artistic, political, or scientific value. Gunn has not indicated they qualify as such and the Court fails to see, by any stretch of the imagination, how the statements have literary, artistic, political, or scientific value. Therefore, Gunn's statements to Till regarding sexual abuse of minor children qualify as obscenity and are not protected speech under the First Amendment.

CONCLUSION

[¶13] For the aforementioned reasons, the Defendant's *Motion in Limine* is DENIED.

IT IS SO ORDERED.

Dated this 28th day of October, 2016.

BY THE COURT:

/s/ John Grinsteiner
John W. Grinsteiner,
District Judge
South Central
Judicial District

cc: Michael R. Hoffman
Wade Davison

STATE OF NORTH DAKOTA **IN DISTRICT COURT**

COUNTY OF BURLEIGH **SOUTH CENTRAL JUDICIAL DISTRICT**

State of North Dakota,
Plaintiff,
v.
Amira Olivia Gunn,
Defendant.

Case No. 08-2015-CR-03443

ORDER DENYING MOTION TO RECONSIDER

[¶1] Nothing in the defendant's motion to reconsider changes this Court's ruling. Gunn's statements describe and encourage Till to commit sexual conduct specifically defined and prohibited by the State's GSI statute in 12.1-20-03.

CONCLUSION

[¶2] For the aforementioned reasons, the Defendant's *Motion to Reconsider* is DENIED.

IT IS SO ORDERED.

Dated this 2nd day of November, 2016.

BY THE COURT:

/s/ John Grinsteiner
John W. Grinsteiner,
District Judge
South Central
Judicial District

cc: Michael R. Hoffman
Wade Davison

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota, Plaintiff, -vs- **Amira Olivia Gunn,** Defendant.	**ORDER DEFERRING IMPOSITION OF SENTENCE** SA # F1755-15-12 Cr. No. 08-2015-CR-03443

[¶1] On this 27th day of February, 2017, came Marina Spahr, Assistant States Attorney of Burleigh County and State of North Dakota, and the Defendant having appeared in person and with Michael R. Hoffman, legal counsel, and the Defendant having been convicted by a jury of the crime of **Attempted Gross Sexual Imposition, a Class A Felony**; as charged in the Sixth Amended Information, and the Defendant having been asked by the Court whether she had any statement to make in her own behalf or wished to present any information or mitigation of punishment on which would require the Court to withhold pronouncement of judgment and sentence and no sufficient cause to the contrary having been shown,

[¶2] IT IS HEREBY THE SENTENCE AND JUDGMENT OF THE COURT:

(a) Imposition of sentence upon the charge is deferred and suspended for a period of five (5) years from the above date, and the Defendant is hereby

placed on probation in accordance with the provisions of Chapter 12.1-32, N.D.C.C.

(b) The Defendant is placed under the control and management of the North Dakota Board of Pardons and the supervision of the parole officers.

(c) Imposition of sentence will be suspended upon the Defendant's compliance with each of the conditions set forth in the probation conditions.

(d) Defendant shall register as a Sex Offender as stated in condition #29.

(e) Defendant shall provide DNA as stated in condition #24.

(f) Defendant shall submit to fingerprinting as stated in condition #21.

(g) Defendant shall engage in counseling services to address mental health symptomatology and follow-up with psychotropic medication management services as recommended in the Pre-Sentence Investigation

[¶3] At the expiration of or within the probation period, the Court, in its discretion, may permit the Defendant to withdraw his plea or verdict of GUILTY. The verdict or plea of GUILTY may then be set aside and the action dismissed. The discretion of the Court will be based upon the record of the Defendant during the period of probation and predicated upon the Defendant's compliance with each of the above terms and conditions.

[¶4] The Defendant is admonished that a violation of any of the terms or conditions of this Order will result in her immediate arrest, revocation of this Order will be entered, and the Defendant will be brought before this Court, as soon as practicable, for sentencing on the plea or verdict of GUILTY to this charge.

[¶5] THAT YOU STAND COMMITTED UNTIL THIS JUDGMENT, Sections a, b, c, d, e, f, and g and the Appendix A ARE COMPLIED WITH.

Dated this ____ day of March, 2017.

Signed: 4/5/2017
11:12:33 AM

BY THE COURT:

/s/ John Grinsteiner
John W. Grinsteiner,
District Judge
Burleigh County District Court
Bismark, North Dakota

Signed: 4/5/2017
2:28:34 PM

ATTEST:

/s/ Michele Bring
Michele Bring
Clerk of said District Court

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota, Plaintiff, -vs- **Amira Olivia Gunn,** Defendant.	**SIXTH AMENDED INFORMATION** SA # F1755-15-12 Cr. No. 08-2015-CR-03443

[¶1] Richard J. Riha, State's Attorney for Burleigh County, charges that on or about the 12th day of November, 2015 through the 13th day of November, 2015, in Burleigh County, the defendant, Amira Olivia Gunn, did commit the crime of Attempted Gross Sexual Imposition, committed as follows:

[¶2] The defendant willfully engaged in conduct intending to aid another to commit the crime of Gross Sexual Imposition; specifically, the defendant intentionally aided Calvin Till to engage in a sexual act with another, or caused another to engage in a sexual act and the victim was less than fifteen (15) years of age and **Calvin Till** was at least twenty-two (22) years of age.

N.D.C.C. 12.1-06-01(2),
12.1-20-03(1)(d),
12.1-20-03(3)(a), MANDATORY REGISTRATION AS A SEXUAL OFFENDER
12.1-32-15,
12.1-06-01(3),
12.1-32-01(2) **CLASS A FELONY**

[¶3] This against the peace and dignity of the State of North Dakota.

Dated this 26th day of October, 2016.

/s/ Richard J. Riha
Richard J. Riha, BAR ID: 03861
Burleigh County States Attorney

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF BURLEIGH)

AFFIDAVIT

I, Detective Brandon Rask of the Bismarck Police Department, being first duly sworn depose and state the following:

1. That I am a trained and licensed peace officer with 13 years of experience with jurisdiction to enforce state law in Burleigh County, North Dakota.

2. That on 11/13/2015, in Burleigh County, North Dakota at 2529 Berkshire Drive in Bismarck.

3. The suspect was identified as Amira Gunn and is 19 years of age.

4. The following gives rise to probable cause to charge the suspect with: **12.1-06-01 F(A) Criminal Attempt (GSI)**

5. ***Circumstances and/or other facts:***

   On December 8th, 2015, Calvin George Willard Till, age 29, was arrested for Patronizing a Minor for Commercial Sexual Activity. This act was committed via text message chatting through a social networking website known as MeetMe.com. In reviewing additional chats unrelated to the one prompting the charge, I located a text conversation between Calvin Till and a local female named Amira Gunn. During this conversation on

November 12th, 2015, Till informed Gunn that he has a young daughter that does not typically live with him but would be visiting him that day. The daughter's age is never mentioned by Till in the chat; however, when later asked by investigators, Gunn indicated that she believed Till's daughter to be 6 years of age at the time of the chat. After learning that Till had a daughter, Gunn began directing Till on what he should do to groom his daughter for the purposes of sex. Gunn advised Till to, ***"Sleep next to her at night"*** and ***"be close with her and just test out her reaction to things."*** Furthermore, she instructed him to, ***"ask her if she wants to make daddy happy"*** and ***"Let her walk in on you jacking off."***

The following day on November 13th, 2015, Gunn began instructing Till to perform specific sexual acts on his daughter. Specifically, Gunn told him to, ***"Lay her on her back and relax her. Kiss her if she likes that and rub her gently with your fingers first.***

See how she likes it and very gently finger her. Get her wet. Pussy juice is the best lube." Secondly, Gunn instructed Till that, ***"Once she wet enough try two fingers and then try the head of your dick."*** As the chat continued, Till indicated to Gunn that he was performing the acts that Gunn asked of him. Gunn would then continue directing Till to perform additional acts on the daughter for, what appeared to be, both Till's and Gunn's sexual gratification. Although investigators

have no evidence that Till was sexually abusing his daughter in real time during this text conversation, Gunn's text messages show that she believed the real time abuse to be factual and that it was occurring during their text interaction. Rather than contact authorities to report an instance of child sexual abuse in progress, Gunn continued to encourage, direct, instruct, and advise Till on how to continue committing the obscene sexual performances on his daughter for Gunn's and Till's personal satisfaction. When Till indicates that he is finished with his daughter, Gunn instructs him to, ***"delete our messages just in case so no one knows we talked about it."***

Later in the conversation, Till indicates that he has some child neighbors that consist of an 8 year old boy and a 6 year old girl. Till then makes the comment to Gunn, ***"if i could get them i would."*** This prompts an additional conversation in which Till and Gunn speak about how to accomplish this. Gunn began to give advice to Till on how to kidnap them for the purposes of sex. Gunn wrote, ***"You'd have to be masked and not speak, maybe blind fold them, and clean up the cum."*** She then added, ***"Just need rope and tape and blindfolds."*** Lastly, Gunn expressed careful thought in cleaning up the evidence when she wrote, ***"All evidence has to be gone . . . Their blood wouldn't be a problem . . . Plastic over where you put them and once you drop them then it's not your problem."*** IP logs from *MeetMe.com* show that Gunn was

communicating from her residence at 2529 Berkshire Drive in Bismarck.

Dated this 17th of December, 2015.

/s/ [Illegible]
Peace Officer/Affiant

Subscribed and Sworn before me on the 17 day of December, 2015.

CHRISTIE KAYLOR
Notary Public
State of North Dakota
My Commission Expires
July 17, 2019

/s/ Christie Kaylor
Notary Public

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota	)	Case No. 08-2015-CR-03443
v.	)	
Amira Olivia Gunn,	)	
Defendant.	)	

MOTION IN LIMINE

[¶1] Amira Olivia Gunn, defendant, files this motion in limine to exclude evidence.

[¶2] The conduct of defendant alleged in this case is her speech to and with Calvin Till.

[¶3] Defendant's speech is protected by the First Amendment of the United States Constitution, and cannot be made criminal, because it is not speech which tended to incite an immediate breach of the peace. *City of Bismarck v. Schoppert*, 469 N.W.2d 808, 811-812 (ND. 1991).

[¶4] Nor did defendant's speech in this case constitute a "true threat" communicated to a particular person. See *State v. Brossart*, 2015 ND 1, ¶ 12, 858 N.W.2d 275.

[¶5] Wherefore, defendant requests the Court to enter an order excluding all evidence of defendant's speech which is protected by the First Amendment.

Dated: October 14, 2016.

MICHAEL R. HOFFMAN
North Dakota Bar ID 04366
Attorney for Defendant
P. O. Box 1056
Bismarck, ND 58502-1056
701-355-0900

/s/ Michael R. Hoffman
Michael R. Hoffman
hoffmanmike@yahoo.com;
pkthurn@yahoo.com

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota, Plaintiff, -vs- Amira Gunn, Defendants.	**STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE STATEMENTS** SA# F1755-15-12 Cr. No. 08-2015-CR-3443

[¶1] Comes now the State of North Dakota, and hereby submits this response to Defendant's Motion in Limine in the above entitled case. The State opposes the Defendant's request to exclude all evidence of Defendant's speech and requests that the Court DENY the motion.

Background

[¶2] The Defendant was charged by criminal complaint of one count of Attempted Gross Sexual Imposition, a Class A Felony. A jury trial is scheduled for two days beginning November 3, 2016, The State has alleged that the Defendant, Amira Gunn, committed the offense through communications she had with Calvin Till that took place on November 12 and 13, 2015 through a social media site called MeetMe.com. The Defendant now brings a motion in limine to exclude all evidence of Defendant's speech.

Law and Argument

[¶3] The evidence that the Defendant seeks to exclude is not protected speech under the First Amendment. The absolute meaning of the First Amendment has been adjusted since its inception to "'[permit] restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'" *U.S. v. Stevens*, 559 U.S. 460, 468 (2010), (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-383, 112 S.Ct. 2538), *inter alia*, the categories of unprotected speech under the First Amendment include obscenity and "speech integral to criminal conduct." *Roth v. U.S.*, 354 U.S. 476, 485, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

Obscenity

[¶4] It has long been established that "obscenity is not within the area of constitutionally protected speech or press." *Roth.*, 354 U.S. 476, 485. Obscenity traditionally falls into an unprotected category of speech under the First Amendment because it brings "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality. . . ." *Chapinsky v. new Hampshire*, 315 U.S. 568, 571-572 (1942). Traditionally and legally speaking, obscenity has been defined as "material appealing to prurient interest." *Roth* at 487. Beyond that, "obscene" is defined as: "relating to sex in an indecent or offensive," and "very

offensive in usually a shocking way." Merriam-Webster, http://www.merriam-webster.com/dictionary/obscene.

[¶5] Upon learning that Till had a young daughter, the Defendant proceeded to instruct and encourage Till on how to desensitize her to sexual contact and how to groom her for sexual activity. Gunn gave Till specific instructions on how to introduce his then six-year-old daughter to topics of sex, and how to desensitize her to nudity and sexual contact. Crim. Doc. ID # 1, p 1-2. Specifically, Gunn told Till things like: "let her walk in on you jacking off"; "lay her on her back and relax her kiss her if she likes that it rub her gently with your fingers first . . . see how she likes it and very gently finger her . . . get her wet . . . pussy juice in the best lube"; and "once she wet enough, try two figures [sp] and then try the head of your dick." *Id.* Taken in context in relation to a six-year-old girl, the Defendant's speech is clearly obscene and no doubt falls into the category of unprotected speech. *Roth.* Beyond that, Gunn also writes to Till about a strategy to kidnap two child neighbors, a six-year-old girl and an eight-year-old boy, for the purposes of sex, and writes things like, "You'd have to be masked and not speak, maybe blind fold them, and clean up the cum." This speech would also be classified as obscene by the definition and test above, and would thus fall into a category of unprotected speech. *Id.*

Speech Integral to Criminal Conduct

[¶6] Along with obscenity, the Defendant's words also fall into the unprotected speech category of "speech integral to criminal conduct." *Giboney*, 336 U.S. 490, 498. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." *Id.* At 502 (citing Fox v. Washington, 236 U.S. 273, 277 (1915), *Chaplinsky*, 315 U.S. 568). "Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible to ever enforce laws. . . ." *Id.* The Defendant writes words instructing and encouraging someone to, *inter alia*, commit Gross Sexual Imposition. By her words alone, the Defendant's speech is integral to criminal conduct. As such, they are unprotected under the First Amendment.

Regarding a True Threat & Incitement to Breach of Peace

[¶7] The Defendant claims that her speech is protected because it is not 1) a "true threat" or 2) speech tended to incite an immediate breach of the peace. *State v. Brossart*, 2015 ND 1, ¶ 12, N.W.2d 275, *City of Bismarck v. Schoppert*, 469 N.W.2d 808, 811-12 (N.D. 1991). The State does not necessarily dispute that Defendant's words are not a true threat, but regardless, "whether a communication constitutes a threat is a question for the jury." Brossart at ¶ 12 (citing State v.

Haugen, 392 N.W.2d 799 (1986)). Thus, to the question of whether or not speech is a true threat, the speech should not be excluded from being presented at trial because that is a question for the jury.

[¶8] The Defendant's claim that her speech was not speech which tended to incite an immediate breach of the peace is inapplicable to the facts at hand.

Conclusion

[¶9] The Defendant's motion fails to address 1) obscenity or 2) "speech integral to criminal conduct" as unprotected categories of speech under the First Amendment in which the Defendant's speech falls. Further, the Defendant merely generally points to two other categories of unprotected speech that are not applicable to the case at hand.

[¶10] For the reasons stated above, the State requests the Defendant's Motion be DENIED.

Dated this 27 day of October, 2016.

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STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota v. Amira Olivia Gunn, Defendant.	Case No. 08-2015-CR-03443

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION IN LIMINE TO EXCLUDE STATEMENTS

[¶1] Amira Olivia Gunn, defendant, files this brief in support of her objection to the Court's Order Denying Motion in Limine to Exclude Statements, and her motion for the Court to reconsider the order.

[¶2] The facts of this case are that there was, in fact no child less than fifteen (15) years of age, even though the State has alleged it to be so in its charging document.

[¶3] The charging document also alleges defendant aided Calvin Till to engage in a sexual act with another, or caused another to engage in a sexual act, when the facts of this case are that Calvin Till did not in fact engage in a sexual act with another person.

[¶4] The "conduct" defendant is accused of committing consists of only words, speech, communicated to Calvin Till.

[¶5] The court analyzed defendant's speech under the three-part test set forth in *Roth v. U.S.*, 354 U.S. 476, 485 (1957), and more recently discussed in *Miller v. California*, 413 U.S. 15 (1973).

[¶6] Defendant contends the Court misapprehended and misapplied that three-part test. A reading of *Miller v. California*, shows the speech, "subject to regulation under the States' police power", 413 U.S. at 22, is to be regulated by statutes carefully limited to "works which depict or describe sexual conduct specifically defined by the applicable state law." 413 U.S. at 23-24. Therefore, the applicable state law must be the regulating law. "Under the holdings announced today, no one will be subject to prosecution for . . . obscene materials unless these materials depict or describe patently offensive . . . sexual conduct specifically defined *by the regulating law*, as written and construed." 413 U.S. at 27. (Emphasis added). This is required for fair notice that such speech may bring prosecution. 413 U.S. at 27.

[¶7] Here, neither N.D.C.C. Chapter 12.1-27.1, Obscenity Control, nor N.D.C.C. Chapter 12.1-27.2, Sexual Performances by Children, North Dakota's obscenity statutes, regulate or prohibit defendant's speech in this case. Defendant cannot be prosecuted for her speech in this case. Defendant has not been given

notice that she would be prosecuted for her speech in this case.

[¶8] This case would be different if there was in fact an actual child. States have greater power to regulate conduct which embodies "both speech and nonspeech elements". *Millet v. California*, 413 U.S. 15, fn. 8 (1973). If there was an actual child, there would be nonspeech elements involved here which the police power of the State of North Dakota could potentially regulate by the criminal statutes charged herein.

[¶9] Wherefore, defendant requests the Court to reconsider its order and grant defendant's motion in limine.

Dated: October 31, 2016.

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