

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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SUPREME COURT
SEP 29 2006

20060162

State of North Dakota,)	
)	Supreme Court No. 20060162
Plaintiff-Appellee,)	
)	District Court No. 08-05-K-00132
-vs-)	
)	
Mark Streeper,)	
)	
Defendant-Appellant,)	
.....)	SA No. F 72-05-01

BRIEF OF PLAINTIFF-APPELLEE

Appeal from Jury Trial of February 27 – March 1, 2006
Criminal Judgment
Dated May 9, 2006
Burleigh County District Court
South Central Judicial District
The Honorable Bruce B. Haskell, Presiding

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STATE OF NORTH DAKOTA

TABLE OF CONTENTS

	<u>Page No.</u>
Table of Cases	i
Table of Statutes and Authorities	iii
Statement of the Issues	1
Statement of the Case	2
Argument	3
Conclusion	13

TABLE OF CASES

	<u>Page No.</u>
<u>City of Jamestown v. Neumiller</u> 2000 ND 5; 604 N.W.2d 441	8
<u>Gonzalez v. Tounjian</u> 2003 ND 121; 655 N.W.2d 705	5
<u>McDowell v. Gillie</u> 2001 ND 91; 626 N.W.2d 666	3
<u>Myer v. Rygg</u> 2001 ND 23; 630 N.W.2d 62	5
<u>South v. National Railroad Passenger Corporation (AMTRAK)</u> 209 N.W.2d 819 (N.D. 1980)	3
<u>State v. Burgard</u> 458 N.W.2d 274 (N.D. 1990)	9
<u>State v. Fasching</u> 461 N.W.2d 102 (N.D. 1990)	8,9
<u>State v. Garcia</u> 1997 ND 60; 561 N.W.2d 599	9
<u>State v. Hatch</u> 346 N.W.2d 268 (N.D. 1984)	8
<u>State v. Haugen</u> 448 N.W.2d 191 (N.D. 1989)	9
<u>State v. Klose</u> 2003 ND 39; 657 N.W.2d 276	8
<u>State v. Knowels</u> 2003 ND 180; 671 N.W.2d 816	8
<u>State v. Kringstad</u> 353 N.W.2d 302 (N.D. 1984)	12
<u>State v. Kroeplin</u> 266 N.W.2d 537 (N.D. 1978)	4

TABLE OF CASES, CONT.

	<u>Page No.</u>
<u>State v. Lund</u>	
424 N.W.2d 645 (N.D. 1988)	9
<u>State v. Pollack</u>	
462 N.W.2d 119 (N.D. 1990)	8
<u>State v. Steen</u>	
2000 ND 152; 615 N.W.2d 555	8
<u>State v. Torres</u>	
529 N.W.2d 853 (N.D. 1995)	9

TABLE OF STATUTES AND AUTHORITIES

	<u>Page No.</u>
<u>North Dakota Century Code</u>	
§ 12.1-17-03	4
§ 39-08-06	3
<u>North Dakota Rules of Criminal Procedure</u>	
Rule 29(a)	8
<u>North Dakota Rules of Evidence</u>	
Rule 702	5

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STATEMENT OF THE ISSUES

- I. Whether the trial court erred by allowing the State to argue that failure of Mark Streeper to render aid after injecting A.B. with controlled substances was reckless as to the manslaughter charge.
- II. Whether the trial court properly instructed the jury on the lesser-included offense of reckless endangerment.
- III. Whether expert testimony was necessary to establish the date and time digital photographs were taken by Mark Streeper.
- IV. Whether the trial court erred in receiving the digital photographs into evidence.
- V. Whether there was sufficient evidence to sustain a verdict of guilty as to manslaughter.

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ARGUMENT

I. Whether the trial court erred by allowing the State to argue that failure of Mark Streeper to render aid after injecting A.B. with controlled substances was reckless as to the manslaughter charge.

Streeper argues that the State was precluded from arguing that part of his recklessness was his failure to render aid to A.B. after he knew or should have known that she was in distress. The State's argument was that, upon injecting A.B. with controlled substances, Streeper's failure to render aid to A.B. was a continuation of his reckless behavior. Trial Trans. p. 180, line 21 – p. 181, line 5.

A bystander has no duty to render aid to another; however, a person who has caused the injury is bound to render aid to that injured person. See N.D.C.C. § 39-08-06 (stating a driver of a vehicle involved in an accident resulting in injury or death to another shall render aid to any person injured in that accident.); See also McDowell v. Gillie, 2001 ND 91, 626 N.W.2d 666 (stating there is a duty to render aid if there is "...some relationship between the parties that creates a special responsibility to render assistance not owed to the general public.") Furthermore, this Court has held that "...a person who knows or has reason to know that his conduct, whether tortious or innocent, has caused harm to another has an affirmative duty to render assistance to prevent further harm..." South v. National Railroad Passenger Corporation (AMTRAK), 209 N.W.2d 819, 837 (N.D.1980). As such, Streeper did have a duty to render aid to A.B. once it was known or should have been known to him that she experiencing distress from the injection he had administered.

1 **II. Whether the trial court properly instructed the jury on the lesser-included**
2 **offense of reckless endangerment.**

3 The trial court instructed the jury on two lesser included offenses for
4 manslaughter, namely negligent homicide and reckless endangerment. Trial Trans. p.
5 369, line 24 – p. 371, line 10. Regarding the instruction on reckless endangerment, the
6 trial court stated it was only going to instruct the jury as to creating a substantial risk of
7 serious bodily injury or death to another but would not include the element of extreme
8 indifference. Trial Trans. p. 370, lines 9-15. The essential elements for a felony charge
9 of reckless endangerment specifically include the element of “manifesting an extreme
10 indifference to the value of human life.” N.D.C.C. § 12.1-17-03; See State v. Kroeplin,
11 266 N.W.2d 537 (N.D.1978). Without that element, the instructions given to the jury
12 included only the class A misdemeanor reckless endangerment. As the trial court did, in
13 fact, instruct the jury on misdemeanor reckless endangerment, Streeper’s argument is
14 moot.
15 moot.

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18 **III. Whether expert testimony was necessary to establish the date and time**
19 **digital photographs were taken by Mark Streeper.**

20 Streeper claims the trial court erred when it allowed Detective Gaddis to testify as
21 an expert witness regarding the time and date settings on the digital camera. During
22 Detective Gaddis’ testimony, Streeper objected to the digital photographs, claiming that
23 Detective Gaddis was not qualified as an expert to testify regarding the time the
24 photographs were taken. Trial Trans. p. 208, lines 2-7. The trial court specifically stated,
25 when overruling his objection, that expert testimony was not necessary and that the jury
26 could take Detective Gaddis’ training and experience into consideration when
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1 determining the reliability of his testimony regarding the photographs. Trial Trans. p.
2 208, lines 8-13.

3 Rule 702 of the North Dakota Rules of Evidence states, “[i]f scientific, technical,
4 or other specialized knowledge will assist the trier of fact to understand the evidence or
5 to determine a fact in issue, a witness qualified as an expert by knowledge, skill,
6 experience, training, or education, may testify thereto in the form of an opinion or
7 otherwise.” In this case, Detective Gaddis testified that on November 29, 2004 at 9:42
8 p.m., he looked at the date and time set on the digital camera. On that date and time, the
9 camera settings showed the date as November 5, 2002 and the time as 9:14 p.m. Trial
10 Trans. p. 205, lines 6-10. There was no indication that it took specialized training to look
11 at the camera settings. Trial Trans. p. 205, lines 1-3. It did not take specialized training
12 to figure out that any date and time stamp on the pictures was off by 2 years, 24 days, and
13 28 minutes and that to get the correct time, all one would need to do is add that time to
14 the date and time on the photographs.

15 Even if this Court would determine that an expert was needed to provide that
16 testimony, Detective Gaddis testified that he attended a 40-hour basic data recovery class
17 which dealt with forensic examination of computer storage devices. Trial Trans. p. 203,
18 lines 10-12. A witness must show some degree of expertise in the field in which he will
19 testify. Gonzalez v. Tounjian, 2003 ND 121, ¶ 24, 665 N.W.2d 705. The expert does not
20 have to be a specialist or have a particular expertise or special certification so long as his
21 “knowledge, training, education, and experience” will assist the fact finder. Myer v.
22 Rygg, 2001 ND 23, ¶¶ 14-15, 630 N.W.2d 62. Detective Gaddis’ training was sufficient
23 to qualify him to look at the camera settings to read the date and time on the camera.
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1 Furthermore, the State also called Special Agent Tim Erickson who testified to
2 his training and experience in conducting forensic computer examinations. Trial Trans.
3 p. 212, line 2 – p. 213, line 4. Streeper did not object to Special Agent Erickson's
4 qualifications when he testified about the workings of the digital camera and flash media
5 card used to store the digital photographs. Trial Trans. p. 213, line 13 – p. 216, line 18.
6 The State attempted to have Special Agent Erickson testify regarding the camera's date
7 and time settings and how that compared to the current date and time. Trial Trans. p.
8 216, lines 19-20. The trial court would not allow the testimony as it would have been
9 identical to that which Detective Gaddis had already testified. Trial Trans. p. 216, line 21
10 - p. 217, line 2. There is no question that Special Agent Erickson, whose qualifications
11 were not challenged, would have given identical testimony as that offered by Detective
12 Gaddis.
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16 **IV. Whether the trial court erred in receiving the digital photographs into**
17 **evidence.**

18 Streeper claims that the trial court impermissibly received the digital photographs
19 into evidence to impeach his testimony prior to him testifying. He further alleges that he
20 was forced to testify to explain away the improperly received photographs.

21 The digital photographs were not offered to impeach Streeper's testimony, as he
22 had not offered any testimony at that time. Rather, they were used to discredit Streeper's
23 statements to law enforcement. There is no rule that prohibits the use of relevant, non-
24 prejudicial evidence to discredit or corroborate statements made to the police by either
25 witnesses or suspects. Other evidence was offered in this trial for the same purpose.
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1 Streeper told officers that he had left work at 8 p.m., picked up A.B. at her home,
2 and went to his residence, arriving there at 9 p.m. Trial Trans. p. 41, lines 5-9; p. 189,
3 lines 10-12. Streeper's manager testified that Streeper actually left work at 6:42 p.m. on
4 that date. Trial Trans. p. 113, lines 9-11; p. 115, lines 13-25. Detective Stugelmeyer
5 later testified that surveillance tapes from M&H Gas in Mandan showed Streeper
6 purchasing alcohol there at 7:07 p.m. on that date. Trial Trans. p. 194, line 4 - p. 195,
7 line 16. Photographs from the surveillance tapes were entered into evidence with no
8 objections from Streeper. Trial Trans. p. 195, line 25 - p. 196, line 7.

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11 Streeper told law enforcement officers that he was on his computer and then fell
12 asleep in his chair after A.B. had fallen asleep on his bed. Trial Trans. p. 190, lines 5-9.
13 He indicated that he had fallen asleep at 4 a.m. Trial Trans p. 28, lines 15-17. Detective
14 Gaddis testified that the digital photographs were taken from 4:19 a.m. to 4:23 a.m. Trial
15 Trans. p. 208, line 24 - p. 209, line 17.

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17 Furthermore, the State offered the photographs to advance its theory that Streeper
18 recklessly caused A.B.'s death, not only by injecting her with controlled substances, but
19 also by failing to render aid when it was or should have been apparent that she was in
20 distress. Trial Trans. p. 180, line 9 - p. 181, line 5. These pictures are virtually identical
21 to the ones taken by law enforcement after they responded to the Streeper residence,
22 which indicate that A.B. was at or near death at the time the pictures were taken. Trial
23 Trans. p. 162, line 25 - p. 164, line 12; Trial Trans. p. 208, line 17 - p. 209, line 17; Trial
24 Trans. p. 228, line 7 - p. 229, line 11. Because the pictures were relevant and not
25 prejudicial, they were properly admitted by the trial court.
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1 **V. Whether there was sufficient evidence to sustain a verdict of guilty as to**
2 **manslaughter.**

3 Rule 29(a), North Dakota Rules of Criminal Procedure, provides that the court, on
4 its own motion, or the defendant's motion, following the close of evidence on either side,
5 shall enter a judgment of acquittal if the evidence is insufficient to sustain a conviction.
6 In the case before this Court, Streeper made such a motion, asserting that there was no
7 legal obligation for Streeper to render aid to A.B. and that the State failed to show that
8 Streeper recklessly caused A.B.'s death because there was no evidence as to what
9 substance was in the syringe Streeper used to inject A.B. Trial Trans. p. 366, line 24 – p.
10 367, lines 1-6, and p. 367, lines 19 – p. 368 lines 1-7. Thus, Streeper contended the State
11 had not presented a prima facie case that Streeper had recklessly caused A.B.'s death.
12 Trial Trans. p. 368, lines 7-9. The trial court denied Streeper's Rule 29 motion. Trial
13 Trans. p.368, lines 15-17.
14 Trans. p.368, lines 15-17.

15 In an appeal challenging the sufficiency of the evidence, the defendant must show
16 that the evidence, when viewed in the light most favorable to the verdict, reveals no
17 reasonable inference of guilt. State v. Knowels, 2003 ND 180, 671 N.W.2d 816; State v.
18 Klose, 2003 ND 39, 657 N.W.2d 276; State v. Steen, 2000 ND 152, 615 N.W.2d 555,
19 561. (citing, City of Jamestown v. Neumiller, 2000 ND ¶ 5, 604 N.W.2d 441); State v.
20 Pollack, 462 N.W.2d 119, 121 (N.D.1990); State v. Hatch, 346 N.W.2d 268, 277
21 (N.D.1984); and State v. Fasching, 461 N.W.2d 102, 102-103 (N.D.1990). In reviewing
22 the sufficiency of the evidence, this court has previously declined to resolve conflicts in
23 the evidence or weigh the credibility of witnesses. State v. Klose, 2003 ND 39, 657
24 N.W.2d 276; State v. Pollack, 462 N.W.2d 119, 121 (N.D.1990); and State v. Fasching,

1 461 N.W.2d 102, 103 (N.D.1990). Only if the record presents no substantial evidence to
2 support the verdict will a jury's determination be reversed . State v. Lund, 424 N.W.2d
3 645 (N.D.1988).

4 Corroborating evidence need not be incriminating in and of itself. State v. Garcia,
5 1997 ND 60, ¶ 38, 561 N.W.2d 599; State v. Torres, 529 N.W.2d 853, 855 (N.D.1995).
6 Nor must the corroborating evidence directly link the accused to the crime. State v.
7 Burgard, 458 N.W.2d 274, 277 (N.D.1990); State v. Haugen, 448 N.W.2d 191, 195
8 (N.D.1989). Applying these standards, there is sufficient corroborating evidence to
9 prove the elements of each of the offenses and to warrant the convictions.
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11 There was testimony as to the types of controlled substances that were either
12 found at the Streeper residence or present at the Streeper residence during the weekend
13 that A.B. died. Detective Stugelmeyer testified that Alprazolam pills, Diazepam pills,
14 and Methadone pills were found in Streeper's bedroom. Trial Trans. p. 171, line 12 – p.
15 172, line 21; p. 173, lines 18 – p. 174, line 11; p. 175, line 14 – p. 176, line 1; p. 177,
16 lines 12-24.
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18 The testimony of three witnesses confirmed that Streeper had provided A.B. with
19 either injections or pills on at least three occasions: 1) K.U. testified that she observed
20 Streeper standing in front of A.B., had A.B. hold her right arm, and Streeper injected the
21 contents of a syringe into her vein. Trial Trans. p. 64, lines 13-20; p. 78, lines 9-13.
22 K.U. also testified that she had observed Streeper give A.B. a pill. Trial Trans. p.70,
23 lines 21-24; p.78, lines 2-3. 2) Huft testified that she had also observed Streeper kneeling
24 in front of A.B. and injecting her with the contents of a syringe. Trial Trans. p. 91, lines
25 18-24; p. 93, lines 10-18. 3) Stenehjerm acknowledged that he told detectives he had
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1 observed Streeper kneeling down in front of A.B. and injecting her with drugs in her
2 right arm. Trial Trans. p. 146, lines 16-22.

3 There was further testimony regarding what substance was in that syringe. K.U.
4 testified that she observed Streeper crushing up pills on a spoon, put water and cotton on
5 the spoon, and fill the syringe with that mixture. Trial Trans. p. 63, lines 2-9, p. 76, lines
6 21-23. This was the same syringe that he used to inject A.B. Trial Trans. p. 64, lines 13-
7 20; p. 78, lines 9-13. Streeper testified that when K.U. was in the bathroom with him, he
8 had crushed up four Oxycontin pills on the spoon. Trial Trans. p. 454, line 19 – p. 456,
9 line 8. K.U. also observed him hiding the spoon in an air vent in the bathroom ceiling.
10 Trial Trans. p. 63, lines 12-16, p. 76, line 24 – p. 77, line 1.

13 Detective Gary Malo testified that he had seized some drug paraphernalia
14 consisting of a spoon, cotton ball, and syringes from the exhaust fan vent of the bathroom
15 at the Streeper residence as described by K.U. Trial Trans. p. 280, lines 8-18; p. 283,
16 lines 16-18; p. 285, lines 7-8; p. 286, lines 12-13; p. 287, lines 15-16; p. 288, lines 18-19.
17 He further testified that these items were taken to the State lab for analysis and the
18 spoons contained Oxycodone. Trial Trans. p. 289, lines 21-25; p. 290, lines 16-23.

20 Testimony indicated that it was likely the drugs entered A.B.'s body by injection.
21 Dr. Harvey Hanel, a pharmacist, testified that the dose of Oxycodone in A.B.'s body was
22 consistent with injection as opposed to oral ingestion. Trial Trans. p. 304, lines 12-17.
23 Dr. George Mizell, State Forensic Examiner, testified that, although there was not a way
24 to determine if the drugs found in A.B.'s body were introduced by injection or orally, he
25 indicated that the levels were higher than what is typically seen through oral ingestion.
26 Trial Trans. p. 250, lines 18-22. Hope Olson, the DNA analyst, testified that she had
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1 tested syringes for DNA profiling. Trial Trans. p. 338, line 23 – p. 340, line 13. She
2 testified that of the DNA samples she obtained, she was not able to exclude Streeper's or
3 A.B.'s DNA from being present on one of the syringes. Trial Trans. p. 346, lines 21-25.
4 She testified that the population frequency for A.B.'s profile would be one in 2,455,000,
5 meaning that out of 2,455,000 people, she would not be able to exclude one person. Trial
6 Trans. p. 352, lines 2-6.

7
8 There was evidence that Streeper knew the signs of distress in a person from a
9 drug overdose and should have known that A.B. was in distress within a short time after
10 her injection. Stenehjem testified that he had almost died from a drug overdose and
11 Streeper had helped him by sucking vomit out of his mouth to save his life. Trial Trans.
12 p. 152, lines 14-23. Detective Stugelmeyer testified that Streeper told him that Streeper
13 thought A.B. had died from a drug overdose. Trial Trans. p. 190, lines 11-14. Dr. Mizell
14 testified that he could not tell a specific time when the drugs entered A.B.'s body, but the
15 levels and metabolites in her system indicated that it was a recent ingestion. Trial Trans.
16 p. 251, lines 2-7. Dr. Hanel testified that with the level of Oxycodone in A.B.'s body,
17 respiration could stop anywhere from minutes to one half hour. Trial Trans. p. 304, lines
18 8-11.

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21 The cause of A.B.'s death was not contested. Dr. Mizell testified that the cause of
22 her death was mixed drug intoxication with the drugs Oxycodone, Methadone, and
23 Alprazolam listed as the intoxicants. Trial Trans. p. 243, lines 6-11. Dr. Mizell testified
24 that elevated levels of Oxycodone, Methadone, and Alprazolam were present in A.B.'s
25 body. Trial Trans. p. 240, lines 11-18. Dr. Hanel testified that the level of Oxycodone
26 found in A.B.'s body was a lethal dose. Trial Trans. p. 303, lines 9-21.
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1 The evidence against Streeper was clearly overwhelming. Streeper has failed to
2 show, based on the evidence, that "no rational fact finder could have found the defendant
3 guilty beyond a reasonable doubt." State v. Kringstad, 353 N.W.2d 302, 306 (N.D.1984).
4 Therefore, Streeper's argument on this issue must fail and this Court should deny his
5 appeal and affirm the conviction.
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Streeper has failed to present any evidence of error. The State requests that the convictions, in all matters, be affirmed.

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