IN THE SUPREME COURT
STATE OF NORTH DAKOTA
DISTRICT COURT NO. 05-K-130
SUPREME COURT NO. 20060375

State of North Dakota,)
)
Plaintiff/Appellee,)
)
vs.)
)
Jeffrey Schmeets,)
)
Defendant/Appellant.)

APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
WELLS COUNTY, NORTH DAKOTA
THE HONORABLE JAMES M. BEKKEN

BRIEF OF APPELLANT

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ISSUE: I **WHETHER SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO CONVICT JEFFREY SCHMEETS OF TAMPERING WITH A WITNESS.**

STATEMENT OF THE CASE

(1) Nature of the Case

This is an appeal of the Criminal Judgment entered by the Honorable James M. Bekken on November 14th, 2006. (App. pp. 6-8).

(2) Course of Proceedings/Disposition of the Court Below.

On August 30th, 2006, Mr. Schmeets was convicted of Tampering With a Witness. He received fourteen (14) days in jail, supervised probation, and a fine (App. pp. 6-8). On December 14th, 2006, an appeal was filed in this matter (App p. 5).

FACTUAL AND PROCEDURAL BACKGROUND:

(3) On August 30th, 2006, defendant Jeffrey L. Schmeets was convicted of the charge of Tampering with Witness in violation of section 12.1-09-01 (1)(a) NDCC by then, and there being a person that intentionally uses force, threat, deception, or bribery to influence another's testimony in an official proceeding. It was alleged at trial that defendant Jeff Schmeets intentionally bribed his daughter, Kealy Schmeets, in an attempt to influence her testimony in a pending Sheridan County criminal case. By way of a criminal judgment dated November 14th, 2006, Jeffrey Schmeets was sentenced to fourteen days in jail, minus three days for time served, $2,000.00 in fines, $500.00 in fees, and miscellaneous other conditions pursuant to the judgment. (App. pp. 6-8)

(4) At several times throughout the August 30th, 2006, jury trial of Jeffrey Schmeets relating to this Tampering with a Witness charge, his trial counsel made several Rule 29 Motions for Judgment of Acquittal. (Tr. p. 134, lines 1-25, and P 135, lines 1-24.) Then again at the close of all evidence, trial counsel renewed his motion for judgment of acquittal. (Tr. p. 170, lines 6-25, p. 171 lines 1-25, and p. 172 lines 1-20)

LAW AND ARGUMENT

ISSUE: WHETHER SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO CONVICT JEFFREY SCHMEETS OF TAMPERING WITH A WITNESS.

(5) It is defendant Jeffrey Schmeets position that there was a complete insufficiency of evidence at trial for him to be convicted. Section 12.1-09-01 of the NDCC dealing with tampering with witnesses and informants in proceedings in relevant part provides as follows:

1. A Person is guilty of a class C felony if he uses force, threat, deception, or bribery:

a. With intent to influence another's testimony in an official proceeding; or

b. With intent to induce or otherwise cause another:

(1) To withhold any testimony, information, document, or thing from an official proceeding, whether or not the other person would be legally privileged to do so;

(2) To violate section 12.1-09-03;

(3) To elude legal process summoning him to testify in an official proceeding; or

(4) To absent himself from an official proceeding to which he has been summoned.... (NDCC 12.1-09-01)

(6) It is our contention that Schmeet's conduct, even if true, did not rise to the level of culpability required and/or meet the prongs necessary to satisfy this statute to ultimately be convicted of this charge.

At the end of the state's presentation of evidence, Schmeets' trial counsel made a motion for judgment of acquittal. At that time, the following exchange occurred:

THE COURT: I agree. For the record, I am in chambers. The state has rested. Any motions?

MR. HOFFMAN: Yes, Your Honor, I'd make a motion for judgment of acquittal. It's based upon the state's request for jury instruction under witness and the second sentence, "All that is necessary is that the person be one who knows or is supposed to know material facts and is expected to testify to them or be called on to testify."

Keally Schmeets did not have material facts for prosecution of that Sheridan County case. Second of all, there is no evidence that she was expected to testify or be called to testify in that case. (Tr. line 13-24 p. 133)

Then again, at the end of all of the evidence, Schmeets' counsel renewed his motion for judgment of acquittal with the following:

THE COURT: Chambers now and did you want to renew your Rule 29 motion?

MR. HOFFMAN: Yes, Your Honor.

THE COURT: Thank you. Staying with the same arguments I take it?

MR. HOFFMAN: Yes.

THE COURT: Ms. Trosen, you object?

MS. TROSEN: Yes, I object and I would say that Mr. Lipp said that although he did not have any intent to call her in those, oh sorry. Oh okay.

In those proceedings he said that she was material to the drug paraphernalia that she found and she could have also been a rebuttal witness for the credibility and also the other arguments that I made previously that the state does not have to prove that a proceeding is actually pending and that she has material knowledge to the butane lighter. She has material knowledge to the paraphernalia that she found herself.

THE COURT: Anything isles you want to add for the record? Mr. Hoffman?

MR. HOFFMAN: Well, it's not just that she had material information. It's material facts and expected to testify.

THE COURT: Just hold on. Do you need something?

MISC. JUROR E: I'm trying to find my keys.

THE COURT: Yeah, go ahead and grab them.

MISC. JUROR E: I am so sorry to interrupt.

THE COURT: It's okay, if we had a private room it'd work better. But we don't. No problem.

MISC JUROR E: Sorry.

THE COURT: It's okay. No problem.

MISC. JUROR E: Thank you.

THE COURT: Thank you. Okay for the record we stopped. A juror came in and got something. We're in the courtroom in chambers conference. So. There was no argument heard by the juror. Go ahead. Continue Mr. Hoffman.

MR. HOFFMAN: In response to Ms. Trosen, it's not that Keally Schmeets had material information, it's material facts and is expected to testify. Clearly she was not expected to testify regarding any of the items found by her that led to the search warrant.

Mr. Lipp verified there wasn't even a hearing on the motion to suppress evidence. It was strictly based upon argument and briefing, as you well know, that occurs. He testified that her being a rebuttal witness was remote.

And if you tie that into the burden of proof, then there isn't sufficient evidence in regard to her being a rebuttal witness. That would get us past that.

The issue of whether or not the defense would argue she is not truthful in rebuttal was also tied into this idea that this butane lighter -- **the charge against Mr. Schmeets in this case doesn't have anything to do with her**. Asking his daughter to change her testimony regarding the butane lighter. (My emphasis)

I would ask the court to do justice in this matter and render a judgment of acquittal.

THE COURT: All right. I note both of your arguments and I'm going to deny the motion for judgment of acquittal and reserve my decision as allowed under Rule 29, now with the amendment of March 1st, subject to the court making the further determination if I deem appropriate as a matter of law under the circumstances presented to the court. (Tr. p.170, lines 5-25, p. 171, lines 1-25, and p. 172, lines 1-20.)

(7) The crux of what trial counsel is arguing here is that **"there is no evidence here that this -- that Keally Schmeets was ever going to give testimony. That she had ever given testimony or that she was going to be giving testimony."** (Tr p 135, lines 6-9) (My emphasis)

Just to make it clear once again, Jeff Schmeets was charged with tampering with a witness for a case in Sheridan County, but the alleged tampering happened in Wells County. For purposes of establishing whether Keally Schmeets was to be a witness in the Sheridan County proceedings, trial counsel called the Sheridan County State's Attorney, Walter Lipp, and questioned him about this felony case. (Tr. pp 147-158) Schmeets' trial counsel then clearly established through State's Attorney Lipp that **Keally Schmeets was not at any time listed on the Information or ever intended to be a "witness" against Schmeets in the Sheridan County case**. (My emphasis) In that regard, the following exchange occurred:

MR HOFFMAN: (continuing)

Q. Now, defendant's exhibit one, the information, not only charges the same offenses, but there's another requirement there, correct? It list all the state's witnesses.

A. That's correct.

Q. Is Keally Schmeets listed as a witness on state's – or defendant's exhibit one?

A. No.

Q. How many witnesses do you have listed there?

A. Eight.

Q. All Right. She's not one?

A. That's correct.

Q. In order for you to ultimately decide to use her as a witness, you'd actually have to make a motion to the court to allow you to amend that document to include her as a witness, is that right?

A. That's ordinarily we'd just call the defense lawyer and ask him if it's okay. And if they say okay then, you know, or you can go to the judge.

Q. All right. Did you ever talk to Keally Schmeets during the pendency of that case?

A. I can't remember for sure. She may have called me on the phone or it may have been her mom. But if I did talk to her it was over the phone. But I wouldn't – I will – my answer would be probably not.

Q. <u>Well, you didn't list her as a witness so that indicates you had no intent to calling her as a witness in that case, is that right?</u>

A. <u>That's correct.</u> (My emphasis)

Q. And you never sat down with her to prepare her for being a witness in that case, did you?

A. That's correct.

Q. Now, you know that she gave, as an informant, gave information to the police that resulted in a search warrant in that case, correct?

A. That's correct.

Q. Now, if she had ever called you -- did she ever call –well, if she had ever called you to say that that information was not correct, would that have made any difference to you?

A. She never called me…

MS. TROSEN: Objection.

THE COURT: Hold on just a minute.

MS. TROSEN: Objection. Leading and also he said he doesn't recall if he talked to her and hypothetical.

THE COURT: I'll sustain the objection at this point. You can ask another question.

MR. HOFFMAN: (continuing)

Q. She gave the information as an informant to the police. Correct?

A. Correct.

Q. And that resulted in a search warrant, correct?

A. That's correct.

Q. And that execution of that search warrant resulted in those charges contained in both defendant's exhibit one and state's exhibit on, correct?

A. Correct.

Q. Now, you've told us that you don't need her as a witness to prosecute those charges, right?

A. That's correct. (Tr. p 152-154) (My emphasis)

(8) A situation analogous to this situation was addressed by the Supreme Court:

"On appeal Jungling raised the following two issues: (1) whether or not the trial court erred when it permitted Samuelson to testify as a rebuttal witness (My emphasis) when his name was not listed on the information; and (2) whether or not the trial court erred when it refused to reopen the case to permit the defendant to introduce the photographs and the testimony of the person who took them.

The rule governing which witnesses must be listed on a criminal information is Rule 7(g), North Dakota Rules of Criminal Procedure. It provides:

'When an indictment or Information is filed, the names of all the witnesses on whose evidence the indictment or information was based shall be endorsed thereon before it is presented, and the prosecuting attorney shall endorse on the indictment or information, at such time as the court by rule or otherwise may prescribe, the names of such other witnesses as he purposes [proposes] to call. A failure so to endorse the said names shall not affect the validity or sufficiency of the indictment or information, but the court in which the indictment or information was filed, upon applicator of the defendant, shall direct the names of such witnesses to be endorsed. No continuance shall be allowed because of the failure to endorse any of the said names unless such aplition [application] was made at the earliest opportunity and then only if a continuance is necessary in the interests of justice.'

This Rule, except for 'prosecuting attorney,' is the text of former NDCC § 29-11-57 and, therefore, case law thereunder is applicable.

In State v. Manning, 134 N.W.2d 91,95 (N.D.1965), we said:

"...all that the law now requires is that the names of witnesses on whose evidence the information is based be endorsed on such information at the time it is filed. Such information may be based on the evidence of only one witness, and thus his name alone would have to be endorsed at the time of filing. If the defendant desires to have the names of other witnesses which the State may call, endorsed on

the information, he may ... make application to the court and the court 'shall direct the names of such witnesses to be endorsed.'"

See also State v. Kilmer, 31 N.D. 442, 447,153 N.W. 1089, 1091 (1915) (State may call witness not endorsed on information where defendant had notice of State's intent to call witness and where State had no knowledge witness' testimony would be material); (My emphasis) *684 State v. Pierce, 22 N.D. 358, 133 N.W. 991 (1911) (State may call witness not endorsed on information where State had no knowledge witness' testimony would be material and defendant not prejudiced)."

The record does not reflect that the defendant sought an order requiring the State to disclose either additional witnesses or rebuttal witnesses that it intended to call. Further, the defendant made no objection to Samuelson's testimony at trial. (My emphasis) When an unlisted rebuttal witness is called to testify "...It [is] incumbent upon the appellant to raise a timely objection and thereby allow the trial court to specifically rule on the issue." Lucas v. State, 376 So.2d 1149, 1151 (Fla.1979). As a general rule, this Court will not review an assignment of error predicated upon wrongful admission of evidence unless a timely objection was made. State v. Bragg, 221 N.W.2d 793, 799 (N.D.1974).

(9) The question of whether or not a rebuttal witness must be endorsed upon an information poses a potentially distinct issue. Basically, a rebuttal witness generally is not one whose evidence was or will be relied upon in chief to establish the indictment or information. The rebuttal witness, as the name implies, is to rebut evidence presented by the defendant. Accordingly, we decline to comment further upon this issue." (State v. Jungling, 340 N.W.2d, 681, 683, 684).

(10) We submit that Keally Schmeets was not, and was not ever expected to be, a "witness" against Jeff Schmeets in the Sheridan County Case. Keally Schmeets was **not** listed on the criminal information, and more than likely the trial court should have disallowed any "witness' testimony from her, even on rebuttal, based upon the aforementioned cases, and Walter Lipp's unequivocal testimony.

Again, it is our contention that there was a complete insufficiency of evidence to support a conviction in this case and that the evidence did not rise to the level or type required for a violation of this statute.

(11) In a case similar to this one, attorney Henry Howe was charged with Tampering with a Witness. In that case, State v. Howe, 247, N.W. 2d 647 Henry Howe, allegedly tampered with a witness involved in one of his cases. The trial court in that case granted Howe's motion to dismiss indicating that there was no intent to tamper with a witness's testimony. (Howe at ¶ 23) This case further went on to analyze what legally constitutes this offense:

"The substance of the charge itself is using threat with intent to influence another's testimony or cause another to withhold testimony in an official proceeding. The gist of the offense is the willful and corrupt attempt to interfere with and obstruct the administration of justice. 67 C.J.S. Obstructing Justice s 8. The mere attempt is what the law makes punishable. The attempt need not be successful, and in fact need not even be the method that would be the most promising; success only aggravates the offense. Knight v. United States, 310 F.2d 305 (5th Cir. 1962); People v. Coleman, 350 Mich. 268, 86 N. W.2d 281 (1957). The offense is not limited to successful attempts because the damage has been done as soon as the endeavor is made. If it is successful, the function of the court has been defeated by private aggression. If not successful, the orderly processes of society have been challenged and an effort made to substitute fear of violence or disgrace for the fairness of due process. People v. Coleman, supra, at 288.

"Further, it is not necessary that the person tampered with be under subpoena as a witness. All that is necessary is that the person be one who knows or is supposed to know material facts and ***is expected to testify to them or to be called on to testify.*** See United States v. Griffin, 463 F.2d 177 (10th Cir. 1972), United States v. Solow, 138 F.Supp. 812 (D.C.N.Y.1956). (My emphasis) The defendant need not have absolute knowledge that the person is expected to testify; information or a reasonably founded belief will suffice. This knowledge or belief can be inferred from the circumstances and is a question for the jury. Odom v. United States, 116 F.2d 996 (5th Cir. 1941)."

(12) "When deciding the sufficiency of the evidence, this Court views the evidence and all reasonable inferences 'in the light most favorable to the prosecution and then determine[s} whether a rational factfinder could have found guilt beyond a

reasonable doubt. Only if the evidence is insufficient to sustain a conviction will this court allow for the entry of a judgment of acquittal.' State v. Lambert, 539 N.W.2d 288, 289 (N.D. 1995) (citation omitted)."

(13) Along this same line of reasoning and cases the North Dakota Supreme Court has found that: "When this Court 'concludes that evidence is legally insufficient to support a guilty verdict, it concludes that the prosecution has failed to produce sufficient evidence to prove its case. The Double Jeopardy Clause of the fifth Amendment to the United States Constitution bars retrial in such a case.' State v. Yineman, 2002 ND 145, ¶ 8, 651 N.W.2d 648."

(14) Lastly, "It is a well-settled rule of statutory construction that criminal statues are strictly construed in favor of the Defendant and against the government." State v. Plentychief, 454 N.W.2d 373, 375 (N.D.1990). The state must prove each element of the offense beyond a reasonable doubt. *Id.* At 376."

CONCLUSION

(15) It is our position that this case should have never gone to the jury. The trial court abused it's discretion in not granting the judgment of acquittal, as it is clear from the testimony of State's Attorney Walter Lipp that Keally Schmeets was never intended to be a witness in this case and, in fact, was never even listed on the Criminal Information notifying Jeffrey Schmeets of this alleged witness against him. This conviction must be reversed, and the trial court ordered to dismiss this action against Mr. Schmeets.

Dated this ____ day of _____, 2007.

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