20190404

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 6, 2020
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA
IN THE SUPREME COURT
Supreme Court No. 20190404
McLean Co. No. 28-2018-CR-00307

State of North Dakota,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
John Immanuel Hirschkorn,	)
	)
Defendant-Appellant.	)

BRIEF OF APPELLEE

Appeal from Judgment
dated November 18, 2019
& Verdict Entered on June 28, 2019
McLean County District Court
South Central Judicial District
The Honorable David Reich, Presiding

ORAL ARGUMENT IS REQUESTED

Ladd R. Erickson (ID #05220)
McLean County State's Attorney
Attorney for Plaintiff-Appellee
P. O. Box 1108
Washburn, ND 58577
(701) 462-8541
Service: 28SA@nd.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

¶ 1 STATEMENT OF THE ISSUES

¶ 2 Whether the trial court properly admitted evidence at trial?

¶ 3 Whether the trial court properly limited the testimony of an undisclosed expert?

¶ 4 Whether sufficient evidence was presented to sustain the guilty verdicts for Aggravated Assault and Driving Under the Influence?

¶ 5 STATEMENT OF THE CASE

¶ 6 This is an appeal from a jury trial where the defendant was convicted for Aggravated Assault and Driving Under the Influence. The Honorable David Reich presided over the trial, which was held in McLean County on June 27th and June 28th, 2019.

¶ 7 STATEMENT OF THE FACTS

¶ 8 This case is about a routine McLean County bar fight between two drunk people. At least, that's at the start of the fray.

¶ 9 On October 10, 2018, Matthew Mills went to the Rusted Rail Bar in Underwood to buy some beer. (Vol. I Tr. p. 137, lines 14-25; p. 138, lines 1-4) He'd been drinking beforehand. (Vol. I Tr. p. 138, lines 5-10)

¶ 10 At the bar the defendant and Mills began to argue about nonsensical things which then escalated into a brawl. (Vol. I Tr. p. 139, lines 10-25; p. 140, lines 1-7) Video from the bar that captured the events was admitted into evidence and the state walked Mills through that video during his testimony. At first, the video depicted the defendant and Mills arguing and fighting. (Vol. I Tr. p. 143, lines 8-25; p. 144, lines 1-4) Then the video shows Mills sitting at the bar, the dispute over, and not "leaning into" or "threatening" the defendant. (Vol. I Tr. p. 144, lines 19-23) The defendant standing next to the seated Mr. Mills then takes a beer bottle and smashes it over his face – to which Mr. Mills remembered

the "feeling and sound" of the bottle hitting his face. (Vol. I Tr. p. 144, lines 9-10) A photograph of Mr. Mills' face showing a cut from his ear to his lip caused by the beer bottle was admitted into evidence. (Vol. I Tr. p. 141, lines 2-23)

¶ 11 After the defendant broke the beer bottle over Mr. Mills' face he fled the scene but was stopped later by McLean County Deputy Brad Nielsen after he witnessed the defendant's vehicle swerving down the road. (Vol. I Tr. p. 163, lines 3-5) The defendant "stumbled" out of his vehicle, smelled of alcohol, had slurred speech, and had a blood alcohol content of .139. (Vol. I Tr. p. 163, lines 19-25; p. 164, lines 1-25; p. 165, lines 1-9; p. 177, lines 10-11) However, the test result related to his DUI arrest was taken after two hours from the defendants last driving because he had to be medically cleared at the Turtle Lake Hospital before testing. (Vol. I Tr. p. 167, lines 9-11)

¶ 12 LAW AND ARGUMENT

¶ 13 I. Whether the trial court properly admitted evidence at trial?

¶ 14 Since the Aggravated Assault upon Mills was caught on video the jury did not have to suffer through difficult questions during their deliberations. Both men were at fault for engaging in mutual combat in the bar, but only the defendant used a weapon after that to injure Mills – and the jury watched it all on video.

¶ 15 At trial, and now on appeal, the defendant states facts that contradict the bar video and are irrelevant to any questions before the jury. For example, Mills was the aggressor, the threatening one, the one that had to protect himself, etc. But the jury watched the opposite of that depiction on the bar video. Therefore, the defendant sought to exclude the bar video from the jury arguing it lacked foundation and authenticity. He was overruled by the trial court.

¶ 16 Landon Lauf owns the Rusted Rail bar and is the keeper of the bar's video security system. (Vol. I Tr. p. 114, lines 21-25; p. 115, lines 1-11) Mr. Lauf made copies of his bar video for law enforcement, identified those videos at trial, and attested that they were a fair and accurate depiction of what occurred in his bar on October 10, 2018, because the videos were not changed, altered, or manipulated. (Vol. I Tr. p. 115, lines 12-25; p. 116, lines 1-6)

¶ 17 In chambers on the morning of trial the defendant tried to keep the jury from seeing the bar videos by claiming there was a gap in them. That discussion is on pages 6-8 of the transcript. After hearing the defendant's arguments, the trial court stated the videos would probably be admitted. (Vol. I Tr. p. 8, lines 18-19)

¶ 18 After the State laid the foundation and authenticated the bar videos through Mr. Lauf, the trial court admitted them over the defendant's objection that there were more videos from the bar that hadn't been given to law enforcement. (Vol. I Tr. p. 116, lines 7-14) Obviously when a video system records 24/7 there is more video footage. The State only received and played the footage relevant to the charge. The defendant further argues there was thirty-four (34) seconds missing from a video. Whether or not that is true or just a time counter difference between camera angles is as irrelevant to this appeal, as it was to any question before the jury. The defendant received the videos in discovery, and the jury saw any footage related to the crime charged.

¶ 19 II. Whether the trial court properly limited the testimony of an undisclosed expert?

¶ 20 The defendant's irrelevancy continues into his second issue. The State didn't contest whether or not the defendant had some bruises or injuries during the mutual combat phase of the altercation. He could have since the two were seen on video punching and

shoving each other. Even if the defendant was injured, however, that has nothing to do with smashing a beer bottle over Mr. Mills' face after the mutual combat was over and Mills was simply seated at the bar minding his own business.

¶ 21 As a matter of law, the defendant had no self-defense claim:

> 12.1-05-03. Self-defense. A person is justified in using force upon another person to defend himself against danger of imminent unlawful bodily injury, sexual assault, or detention by such other person, except that:
>
> 1. A person is not justified in using force for the purpose of resisting arrest, execution of process, or other performance of duty by a public servant under color of law, but excessive force may be resisted.
>
> 2. A person is not justified in using force if: a. He intentionally provokes unlawful action by another person to cause bodily injury or death to such other person; or b. **He has entered into a mutual combat with another person or is the initial aggressor unless he is resisting force which is clearly excessive in the circumstances. A person's use of defensive force after he withdraws from an encounter and indicates to the other person that he has done so is justified if the latter nevertheless continues or menaces unlawful action.** N.D.C.C. § 12.1-05-03 *(Emphasis added.)*

¶ 22 Even if the Court views the trial record as the defendant's testimony having at least some grains of truth and not just a series of exaggerated– breaking a beer bottle over Mr. Mills' face was "clearly excessive in the circumstances."

¶ 23 At trial the defendant brought in a for-hire medical expert to give his opinion that the defendant obtained some head injuries during the mutual combat phase of the altercation. (Vol. II Tr. p. 332-357) The State objected to this witness as irrelevant, and not being a fact witness. (Vol. II Tr. p. 258, lines 9-21) The defendant wanted this non-treating or examining physician to testify that the evidence of the defendant "staggering" when he exited his vehicle could have been caused by a head injury, and his actions in smashing the beer bottle over Mr. Mills' face were "reasonable" self-defense based on his injuries sustained during the bar fight. (Vol. II Tr. p. 258-262)

¶ 24 Essentially, the defendant wanted his expert to testify that he had a mental defect because he had been injured in the fight, but he had failed to disclose that defense to the State before trial as required by Rule 12.2 N.D.R.Crim.P. (Vol. II Tr. p. 275, lines 7-13) Ultimately, the trial court allowed the expert witness to testify, but limited his testimony to what he based his opinions on from his conversations with the defendant. (Vol. II Tr. p. 280, line 25; p. 281, lines 1-2)

¶ 25 The short version of the expert's testimony was that human brains can sustain injuries from being punched and that can cause dizziness, staggering, memory loss, etc. (Vol. II Tr. p. 332-344) Because the defense's expert was irrelevant to any issue before the jury the State began its cross-examination by highlighting that fact:

> State: Thank you, Doctor. The injuries to Mr. Hirschkorn aren't contested in this case, so I am not really clear what the –
>
> Dr. Swenson: He is not – I have not assessed him of neuropsychological, I have just –
>
> State: And we are not contesting that he was injured, so I don't know what your purpose.... (Vol. II Tr. p. 344, lines 23-25; p. 345, lines 1-4)

¶ 26 At the end of the State's cross-examination, Dr. Swenson admitted even he didn't know what the purpose of his testimony was. (Vol. II Tr. 356, lines 1-2)

¶ 27 Under Rule 702 N.D.R.Evid. an expert's purpose is to "help the trier of fact to understand the evidence or to determine a fact in issue." In this case there were no issues before the jury this expert's testimony could help them with. Further, Rule 703 N.D.R.Evid. also protects the integrity of trials by not allowing an expert to testify as a ruse to get self-serving hearsay statements before the jury without the State being able to confront the

declarant – which was the real intent of the defendant calling Dr. Swenson before the trial court limited his testimony to just his personal contact with the defendant:

> RULE 703. BASES OF AN EXPERT'S OPINION TESTIMONY
>
> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. **But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.** *(Emphasis added.)* Rule 703 N.D.R.Evid.

¶ 28 Therefore, the trial court was correct in limiting Dr. Swenson's testimony to his background and personal interactions with the defendant since he had no real purpose for any testifying at all.

¶ 29 III. Whether sufficient evidence was presented to sustain the guilty verdicts for Aggravated Assault and Driving Under the Influence?

¶ 30 At this point the Court is versed in the evidence the jury had before it to find the defendant guilty of both Aggravated Assault and Driving Under the Influence. Therefore, the State won't repeat the same list of facts and arguments here.

¶ 31 Instead, the State would ask the Court to first consider the defense's theory behind calling Dr. Swenson as a witness. That theory was apparently to establish that the defendant could have sustained a head injury that caused him to lose his memory and misperceive a threat to him so it was then reasonable to smash a beer bottle over Mr. Mills' face in self-defense; and then to swagger and appear intoxicated upon being stopped by an officer.

¶ 32 With that theory in mind, please now read the statement of facts and the arguments the defendant makes in support of his insufficient evidence claims. Those parts of the defendant's brief almost exclusively cite to the defendant's version of the events. His testimony was a remarkable feat for a memory impaired person who sustained a head injury, and many months later at trial could somehow recall all sorts of evil by Mr. Mills and all sorts of saintly behavior by himself.

¶ 33 From his brief that list includes: Mills suddenly became angry and attacked verbally and physically; Mills started it by putting his hands up; Mills punched the defendant continuously; Mills spit on him; Mills slammed his head on the door frame; the defendant tried to end the fight multiple times, but Mills continued to attack; the defendant tried to shake Mills' hand but Mills jumped him from behind; the defendant tried to get away from Mills and just sit down; the defendant tried to leave but Mills shoved him into a door; Mills told him he had a gun and threatened to kill him; to protect himself he instinctively grabbed a beer bottle and hit Mills over the face with it; even though Mills was the aggressor the State charged him; the officer never checked his mouth before he blew into the machine; he was not wielding the beer bottle as a weapon, just grabbed it so he could leave the bar; he had just had a couple beers and a shot over eight hours; his "traumatic brain injury" caused dizziness and staggering.

¶ 34 The jury heard even more of this type of stuff than the supposed brain injured defendant provided the Court in his brief: Mills told him "I'm going to fucking kill you;" (Vol. II Tr. p. 286, lines 22-23) He "called my mom a fucking whore." (Vol. II Tr. p. 293, lines 16-17) And so on and so forth throughout his testimony. He was the sober victim having to fend off a drunken manic that the cops sided with was the crux of his defense.

¶ 35 CONCLUSION

¶ 36 The defendant's contrived narratives didn't work with the jury because video captured the incident. He stood over a seated man and smashed a beer bottle on his face and then drove away from the scene in a state of drunkenness. The State respectfully requests the Court affirm his convictions.

¶ 37 ORAL ARGUMENT REQUESTED

¶ 38 Appellee respectfully requests oral argument. Oral argument may be helpful to the Court as it would allow further clarification of the factual and legal issues, as well as provide the ability for the parties to answer any questions that the Court may have in regards to the case.

¶ 39 Respectfully submitted this 6th day of May, 2020.

/s/ Ladd R. Erickson
Ladd R. Erickson
McLean County State's Attorney
P. O. Box 1108
Washburn, ND 58577
Tele: (701) 462-8832
Service: 28SA@nd.gov

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20190404
McLean County No. 28-2018-CR-00307

State of North Dakota,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
John Immanuel Hirschkorn,	)
	)
Defendant-Appellant.	)

CERTIFICATE OF COMPLIANCE

¶ 1 I hereby certify that Plaintiff/Appellee's Brief is in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure in that it contains thirteen (13) pages.

¶ 2 Respectfully submitted this 6th day of May, 2020.

/s/ Ladd R. Erickson

Ladd R. Erickson (ID #05220)
McLean Country State's Attorney
P. O. Box 1108
Washburn, ND 58577
Telephone: (701) 462-8541
Service: 28SA@nd.gov

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20190404
McLean County No. 28-2018-CR-00307

State of North Dakota,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
John Immanuel Hirschkorn,	)
	)
Defendant-Appellant.	)

CERTIFICATE OF SERVICE

¶ 1 I hereby certify that on the 6th day of May, 2020, I served a true and correct copies of the **BRIEF OF APPELLEE** and **CERTIFICATE OF COMPLIANCE** upon the following named party by email as follows:

Jennifer Gooss
Attorney for Appellant
beulaw3@westriv.com

¶ 2 Respectfully submitted this 6th day of May, 2020.

/s/ Ladd R. Erickson
Ladd R. Erickson (ID #05220)
McLean Country State's Attorney
P. O. Box 1108
Washburn, ND 58577
Telephone: (701) 462-8541
Service: 28SA@nd.gov