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980131

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| State of North Dakota,<br><br>Plaintiff-Appellee,<br><br>-vs-<br><br>Lynn C. Goulet,<br><br>Defendant-Appellant. | ) | Supreme Court No.<br>980131 |



# BRIEF OF PLAINTIFF-APPELLEE

Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Gail Hagerty, Presiding

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TABLE OF CONTENTS

## TABLE OF CASES

## TABLE OF STATUTES AND AUTHORITIES

## I. ISSUES PRESENTED FOR REVIEW

I. THE DEFENDANT'S APPLICATION FOR FUNDS TO DEPOSE A WITNESS WAS NOT MADE PURSUANT TO RULE 17(b) OF THE NORTH DAKOTA RULES OF CRIMINAL PROCEDURE AND THE TRIAL COURT WAS REQUIRED TO DISCLOSE THE EX PARTE COMMUNICATION TO THE STATE PURSUANT TO CANON 3(B)(7)(a) OF THE NORTH DAKOTA CODE OF JUDICIAL CONDUCT.

II. THE STATE DID NOT VIOLATE DISCOVERY RULES BY NOT DISCLOSING A REBUTTAL WITNESS AND BY NOT PROVIDING A COPY OF A DOCUMENT USED TO IMPEACH A DEFENSE WITNESS.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT SURREBUTTAL.

## II. STATEMENT OF THE CASE

On October 3, 1997, the defendant, Lynn Goulet (hereinafter "Goulet") was charged with one count of Assault, a class A misdemeanor. (Record at 1). This charge arose out of events occurring on September 25, 1997, in Bismarck, Burleigh County, North Dakota.

The Defendant was arraigned and plead not guilty to the charge on October 3, 1997. A pretrial conference was held on November 7, 1997, pursuant to the trial court's Amended Order Setting Pretrial Conference. (R. at 10). No motions were made prior to or at the pretrial conference by the State or the Defendant.

Notice of Trial dated November 18, 1997 set the case for jury trial for January 14, 1998 before the Honorable Gail Hagerty, District Judge. (R. at 11). On January 8, 1998, the Defendant submitted an Application for Continuance of Trial. (R. at 33). The State filed its response resisting this request on January 9, 1998. (R. at 32). The trial court granted the request for continuance on January 12, 1998. (R. at 39, 40).

The Defendant, upon being granted a continuance, filed a flurry of motions. On January 12, 1998, the Defendant filed a Motion for Leave of Court to Pay Expenses for Deposing Witness, or to Pay Expenses to Bring Witness to Trial and a supporting brief. (R. at

37, 38). The trial court denied the Defendant's request in its first Order granting the trial continuance. (R. at 39). The Defendant then filed an Ex Parte Application for Funds to Depose Witness Jason Baca. (R. 42). The Defendant's ex parte motion was made pursuant to Rule 15 (a)(3) of the North Dakota Rules of Criminal Procedure. Id. The trial court denied the Defendant's application and did not seal the request. (R. at 43). The Defendant then filed a Motion for Leave of Court and supporting brief reiterating everything is his ex parte application and requesting that the trial court: (1) allow his attorney and an attorney for the State to take Baca's deposition in Texas; (2) or permission for a phone deposition of Baca; (3) or expenses be provided for Baca to come to trial in North Dakota. (R. at 44-46). The State responded to this motion and objected to the Defendant's request to depose Jason Baca without first attempting to secure his appearance at trial. The State requested the trial court to authorize expenses so that Baca could be brought back for trial. (R. 47). The Defendant then filed an Addendum to Motion for Leave of Court, and Response to State's Response to Motion for Leave of Court and Affidavit of Jason Baca. (R. at 50,51). The Defendant also filed an Expedited Motion to Summon Jason Baca as a Necessary Witness and Pay Indigent Expenses and supporting

brief, and proposed order on February 17, 1998. (R. at 53-54B).

A jury trial was held before the Honorable Gail Hagerty on April 24, 1998. The jury returned a verdict of guilty on April 24, 1998. (R. 73). The Defendant was sentenced on April 24, 1998. This appeal followed.

## III. Statement of Facts

On September 25,1997, Jamie Schell, was working at Borrowed Bucks (hereinafter "Bucks") and was assigned to parking lot security for the evening. (Tr. 28). Around 11:30 p.m., Jamie observed a commotion in the doorway of Bucks and proceeded towards the doorway to see what was going on. However, Jamie did not make it to the front door. (R. 29). While making his way towards the doorway, Jamie was struck in the jaw and in the ribs by the Defendant. (R. 30). Jamie suffered a fractured jaw and chipped tooth as a result of the Defendant's assault upon him. (Tr. 30-31, 36). Beth Rooker witnessed the Defendant assault Jamie. (R. 47). Beth Rooker testified that Jamie was blind sided and hit in the face by the Defendant as Jamie was walking towards the front door of Bucks and that Jamie was not involved in any fighting. (R. 47-48).

When questioned by a police detective, the Defendant denied hitting anyone while at Bucks on

the evening of September 25, 1997. (R. 38-39). However, the Defendant admitted to Duane Johnson during a conversation about Duane Johnson's friend getting his jaw broken while working at Bucks, that he had been at Bucks on September 25, 1997 and hit somebody three times. (Tr. 42-43).

The Defense witnesses, Edward Waslaski, Tony Kambeitz, and Jason Baca testified that the victim, Jamie Schell had been attacking Jason Baca when the Defendant assaulted Jamie. (R. 54-55, 62, 71). However, none of these defense witnesses ever reported this alleged attack to the police. (R. 58, 63-63, 76). On rebuttal, the State's witness, Beth Rooker testified that she knew who Jason Baca was and that on the evening of September 25, 1997, when Jamie Schell was assaulted by the Defendant, that Baca was nowhere in the vicinity of Jamie Schell or the Defendant. (R. 81-82).

## III. ARGUMENT

A. THE DEFENDANT'S APPLICATION FOR FUNDS TO DEPOSE A WITNESS WAS NOT MADE PURSUANT TO RULE 17(b) OF THE NORTH DAKOTA RULES OF CRIMINAL PROCEDURE AND THE TRIAL COURT WAS REQUIRED TO DISCLOSE THE EX PARTE COMMUNICATION TO THE STATE PURSUANT TO CANON 3(B)(7)(a) OF THE NORTH DAKOTA CODE OF JUDICIAL CONDUCT.

Goulet argues that the trial court violated his constitutional rights to due process and equal protection by disclosing to the State the defense's Ex Parte Application for Funds to Depose Witness, thereby disclosing the defense's theory of the case. The Defendant predicates this argument on Rule 17(b) of the North Dakota Rules of Criminal Procedure, which permits an indigent defendant to secure subpoenas for witnesses on an ex parte basis, and cites to various cases indicating the involvement of the prosecution in this ex parte process may result in violation of the aforementioned constitutional rights. This argument is flawed in a number of respects in relation to this case: (1) Goulet's ex parte application was **not** made pursuant to Rule 17(b) of the North Dakota Rules of Criminal Procedure, but was a specific request for funds to take a deposition pursuant to Rule 15 of the North Dakota Rules of Criminal Procedure; (2) Goulet had already disclosed his "theory of the case" to the prosecution prior to making the ex parte motion; (3) Had Goulet's request been granted, the State would have been privy to the information Goulet wished to keep from the State in any event.

The primary focus of Goulet's brief is the ex parte application process of Rule 17(b)of the North

Dakota Rules of Criminal Procedure. Rule 17 provides, in part, as follows:

> "The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense...."

Rule 17(b), N.D.R.Crim. P.. The remaining argument pertaining to a violation of constitutional rights is wholly dependant upon there being a violation of the application process contained in Rule 17(b). Goulet does not argue a constitutional violation in any other manner or for any other reason. Goulet, however, either ignores the fact that his Ex Parte Application for Funds to Depose Witness was **not** based upon Rule 17(b), or he has not read his application. The application specifically refers to Rules 15 and 16(b)(2) of the North Dakota Rules of Criminal Procedure. Rule 15, N.D.R.Crim.P. pertains to depositions. Rule 16(b)(2), N.D.R.Crim.P. pertains to information subject to disclosure by a defendant during discovery. Neither of these rules provide for ex parte communications with the trial court in any fashion. In fact, when a party is

requesting to take a deposition to perpetuate testimony, which Goulet was asking for in his application, Rule 15 specifically requires that the requesting party make a motion to the trial court for permission to do so. See Rule 15(a)(3), N.D.R.Crim.P.. Any such motion must, of course be served upon the opposing party. See Rule 3.2, N.D.R.O.C..

Clearly Goulet's application was not based upon Rule 17(b) or the North Dakota Rules of Criminal Procedure. Not only did it not refer to that rule, it did not request what Rule 17(b)(2) is designed for. (R. 42). As noted above, Rule 17(b)(2) discusses securing funds to subpoena a witness that is necessary for an adequate defense. It does not discuss taking that witness' deposition. Goulet's application specifically asked for funds to take a deposition. (R. 42). The heading of the application states as much. (R. 42). The application states on page 1: "The Defendant thanks this Court for the continuance in attempt to *secure testimony under oath for trial.*" Id. (emphasis added). Further, at pages 3-4, the application states: "The Defendant prays this court will find that such a need for a transcript under oath is a justifiable expense in the interests of justice." Id. Without question, this was an application to

take a deposition to perpetuate testimony under Rule 15 of the North Dakota Rules of Criminal Procedure. That rule does not permit an ex parte application.

Since Goulet did not base his application in the trial court on Rule 17(b) of the North Dakota Rules of Criminal Procedure, his entire argument in Issue I is without merit as are the arguments contained in the amicus brief on this issue. There is no violation of Goulet's constitutional rights where his motion was based upon two other rules which do not permit ex parte applications to the court.

In Goulet's brief to this Court, he argues that the trial court should have known his motion was based upon Rule 17(b). Goulet seems to believe that trial judges are omniscient and should somehow be able to recognize that a motion or application which specifically refers to one rule is really being made under another rule. Goulet states in his brief: "Rather than considering why the application was done ex parte and realizing that there was attorney/client privileged information within the document, the Court was quick to reveal the document to the state. *Had the Court known of N.D.R.Crim.P. 17(b), there would have been an understanding as to why such an application was done ex parte, and the Court would have recognized defense counsel's*

*request to seal the application."* See Appellant's Brief, pp.24-25 (emphasis added). The trial judge is not the one making the motion! If a party believes there is an appropriate reason for sealing the application, it is that party's burden to tell the trial court why. It is not the trial court's responsibility to figure out what was *actually intended* in a particular pleading. Further, when the trial judge receives contact from a party on an ex parte basis, including a motion or application which on its face has no authority for being made ex parte, the trial judge has an ethical obligation to make that contact know to the opposing party. See Canon 3(B)(7)(a) of the North Dakota Code of Judicial Conduct.

Even if this Court were to consider Goulet's constitutional arguments despite Goulet's lack of citation to Rule 17(b) of the North Dakota Rules of Criminal Procedure, this Court should not find any constitutional violation. Goulet has failed to show how the trial court revealed the defense's theory in any way that Goulet had not already revealed or intended to reveal to the State prior to trial. Prior to making his ex parte application, Goulet had filed with the Court and served upon the State an Application for Continuance of Trial under N.D.C.C. 29-19 and a Motion for Leave of Court to Pay

Expenses for Deposing Witness, or to pay Expenses to Bring Witness to Trial. (R. 33-38). These documents specifically identified Jason Baca as a potential defense witness, and further indicated that the defense's theory was that Goulet was attempting to defend Baca from harm when the charged assault occurred. See e.g. Affidavit in Support of Application for Continuance of Trial Under N.D.C.C. 29-19, Record at 33 ("Jason Baca's testimony is critical as he is the one which the defendant was protecting during the alleged activities."). The documents also indicated Baca was on probation, a fact which was well known to the State. From these documents, it was apparent that Goulet's theory was defense of others, the "other" being Jason Baca. With this information, the State was able to have Baca's probation officer, Cathy Schweitzer, ready for rebuttal testimony if needed. The State certainly could have listened to Baca's testimony about his allegedly deformed hands and simply inquired of Ms. Schweitzer as to any information about that deformity. The end result would have been the same as occurred at trial.

In addition, Goulet always intended to disclose the "defense of others" theory, including Baca's alleged deformity, to the State. Goulet was seeking to depose Baca through its application.

While Goulet may refer to his application as nothing more than a request for funds, that reference is illogical. Goulet could not have simply kept the funds for his own purposes. He was required to use them for the purpose for which they were requested, i.e., a deposition of Jason Baca. As Goulet recognizes in his brief to this Court, "[w]henever a party seeks to conduct a deposition, either for discovery purposes or to perpetuate testimony, notice is given to the other party, and a convenient time an location is then set up for both parties." See Appellant's Brief at page 24. Accordingly, the State would have been present at the deposition and the facts which Goulet sought to keep secret in his application would have been disclosed to the State. The trial court's disclosure of Goulet's application to the State provided the State with no additional information than it already had and that Goulet intended on disclosing in any event. Therefore, there was no prejudice to Goulet and no violation of his constitutional rights.

B. THE STATE DID NOT VIOLATE DISCOVERY RULES BY NOT DISCLOSING A REBUTTAL WITNESS AND BY NOT PROVIDING A COPY OF A DOCUMENT USED TO IMPEACH A DEFENSE WITNESS.

Goulet argues that the trial court erred by allowing Cathy Schweitzer to testify as a rebuttal

witness. This argument is premised upon an alleged violation of Rule 16 of the North Dakota Rules of Criminal Procedure, and Goulet's misperception that the trial court unfairly disclosed his theory of the case to the State. Again, Goulet either chooses to ignore Rule 16 of the North Dakota Rules of Criminal Procedure, or he simply did not read the Rule.

Goulet claims Rule 16, N.D.R.Crim.P. requires that "upon written request of the defendant, the prosecution shall furnish to the defendant a written list of the names of all prosecution witnesses." See Appellant's Brief, p.29. While this statement reflects what Rule 16 provides **in part**, it does not accurately state the substance of Rule 16. What Rule 16 actually states is as follows:

> "Upon written request of the defendant, the prosecution shall furnish to the defendant a written list of the names and addresses of all prosecution witnesses, and any statements made by them, **whom the prosecuting attorney intends to call in the presentation of the case in chief**, together with any records of prior felony convictions of any of those witnesses which are within the knowledge of the prosecuting attorney. If a written request for discovery of the names, addresses, and statements of witnesses has been made by a

defendant, the prosecuting attorney must be allowed to perpetuate the testimony of those witnesses in accordance with the provisions of Rule 15."

Rule 16(f)(1), N.D.R.Crim.P.(emphasis added). Goulet fails or refuses to cite the Court to the entire context of Rule 16(f)(1) of the North Dakota Rules of Criminal Procedure. The reason why is clear. Goulet's argument has no merit if the entire Rule is cited. Cathy Schweitzer's testimony had nothing to do with the State's case in chief. Goulet was charged with Assault for willfully causing substantial bodily injury to another person. That is what the State was required to prove in its case in chief. Schweitzer was not at the scene of the crime, and she did not and could not testify as to events which transpired there. Schweitzer's testimony was offered to rebut Jason Baca's claim of physical deformity necessitating Goulet's aid. (Tr. 80). Schweitzer was not a witness the State left waiting in the wings to prove how or why Goulet assaulted the victim. A rebuttal witness is not one whose evidence was or will be relied upon in chief to establish the indictment or information. State v. Jungling, 340 N.W.2d 681, 684 (N.D. 1983). The rebuttal witness is to rebut evidence presented by

the defendant. Id. Clearly, Schweitzer fits this description.

The cases cited by Goulet in his brief to this Court all deal with a prosecution witness used to prove the essential elements of the offense being held back until after the defense case. Goulet uses "sound bites" from those cases to make his argument. Unfortunately for him, the actual holdings of those cases do not support a finding that Schweitzer's identity as a witness had to be disclosed by the State. Goulet also cites to cases from jurisdictions with different discovery rules.

For example, Goulet cites to Izazaga v. Superior Court of Tulare County, 815 P.2d 304,316-17 (Cal. 1991). Goulet argues that this case supports his position that the prosecution must disclose "all" witnesses, including rebuttal witnesses the prosecution intends to call at trial. However, in that jurisdiction, the discovery rule requires the prosecution to disclose all witnesses it "intends to call at trial." Id. That is not the same discovery rule as North Dakota's Rule 16, which requires disclosure only of those witnesses the state intends to call in the presentation of its case in chief. The same can be said for People v. Curtis, 491 N.E.2d 134 (Ill. 1986).

Goulet asserts that the State should have been required to disclose Schweitzer's identity as a witness because of the trial court's disclosure of the defense's theory of the case. Goulet fails to indicate that *his own* motions to the trial court, prior to the ex parte application, identified not only Baca's identity, but the defense's theory of defense of others. See Application for Continuance of Trial Under N.D.C.C. 29-19 and Motion for Leave of Court to Pay Expenses for Deposing Witness, or to Pay Expenses to Bring Witness to Trial. (R. 33-38). The State could have anticipated using Schweitzer as a rebuttal witness from those documents alone.

Goulet also asserts that he was prejudiced by the State's failure to disclose Schweitzer as a witness because he was somehow unable to question the jurors during voir dire about Baca's status as a probationer. The lack of questioning about probation was not the result of any failure to disclose. That was a deliberate choice of Goulet's counsel. Undeniably, counsel for Goulet knew of Baca's probation status. His motions to the trial court indicated that he was aware Baca was on probation. (R. 33-38, 42). Goulet's counsel could have reasonably anticipated that some testimony related to Baca's status as a probationer would come out at trial. Goulet's counsel was not prevented

from asking about that status, he simply chose not to inquire about it.

Finally, Goulet argues that the State violated discovery rules by failing to disclose the questionnaire completed by Baca.

In order to prove a Brady violation, a defendant must prove three things: (1) The prosecution suppressed the evidence; (2) The evidence was favorable to the accused; and (3) The evidence was material to the issue of guilt. Griffin v. Delo, 33 F.3d 895 (8th Cir. 1993). Goulet cannot demonstrate any of these.

The threshold requirement of any Brady violation is that the State suppressed the evidence. Goulet would have this mean that the State must provide him with a copy of the document. This Court has clearly stated that the prosecution need not provide copies of documents to a defendant. See State v. Flynn, 479 N.W.2d 477 (N.D. 1992). In fact, this Court has stated that the prosecution does not violate Rule 16 of the North Dakota Rules of Criminal Procedure where it does not provide copies of documents used in its case in chief when the State's discovery response indicates its file is open to the defendant for inspection and copying. Id.at 478-79.

In this case, the State's response to Goulet's discovery request specifically stated that "[t]he State has maintained an open file in this matter and will continue to do so." (R. 7). The response further provided that it was the responsibility of the defendant to monitor the file for any new evidence or information not required to be affirmatively disclosed, and that all evidence collected could be inspected and copied by the defendant. (R. 7). Through this response, the State allowed Goulet to view any and all evidence in the case. Therefore, the State did not "suppress" any evidence and Goulet cannot meet the initial burden for proving a Brady violation.

Even if that initial burden had been met by the Defendant, the final two elements are missing. Certainly, the document complained of was not "favorable" to Goulet. Goulet does not even address that element. In addition, the document was not material to the issue of guilt. Goulet was charged with Assault for willfully causing substantial bodily injury to another person. The contested document did not demonstrate in any manner whether Goulet did or did not assault the victim. The State did not even move to admit the document into evidence. The Document was merely used to refresh the recollection of Jason Baca to ensure that he

testified truthfully as to his statements to Cathy Schweitzer. (Tr. 74-75). The purpose of the cross-examination and the document used in cross-examination was to demonstrate that Baca's claim of disability was exaggerated.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT SURREBUTTAL.

Goulet argues that the trial court erred by refusing to allow Goulet to present surrebuttal evidence following the State's introduction of evidence on rebuttal. Again, Goulet misinterprets statutory law and lacks a basis for his argument.

Goulet first claims that it is mandatory that the trial court allow surrebuttal by a defendant. Goulet states "[w]hile this statute [29-21-01] appears unclear because of the term 'may', given subsection 3, it appears that the right of surrebuttal is mandatory under this statute." See Appellant's Brief, p. 37. This statement is just plain wrong. The word "may" as it appears in Section 29-21-01 of the North Dakota Century Code pertains to the parties, indicating that they have a choice whether or not they choose to present such evidence. However, the North Dakota Supreme Court has long held that the trial court has broad discretion in the order of proof at trial. See State v. Werner, 16 N.D. 83, 112 N.W.60 (1907);

State v. Carlson, 1997 N.D. 7, 559 N.W.2d 802. The law is more than clear in North Dakota that the order of proof is within the discretion of the trial court. In other words, while parties may choose to present rebuttal or surrebuttal testimony, the trial court does not have to allow the same. Even the cases cited by Goulet do not support his position. For example, State v. Mitchell, 491 N.W.2d 438, 447 (S.D. 1992), states that there is *no right* to surrebuttal. (emphasis added). See also United States v. Wilford, 710 F.2d 439, 451 (8th Cir. 1983)(decision whether to allow a party to present evidence in surrebuttal is committed to sound discretion of trial court).

Furthermore, the cases cited by Goulet indicate surrebuttal should be allowed *only* where the prosecution introduces new evidence in its rebuttal. See State v. Mitchell, 491 N.W.2d 438, 447 (S.D. 1992). That did not occur in this case. Cathy Schweitzer testified in rebuttal as to her version of the conversation she had with Jason Baca. (Tr. 79-80). Baca had testified as to that matter in the defense's case. Certainly, that was not "new" evidence. Elizabeth Rooker was recalled to rebut Baca's testimony about Baca's whereabouts when Goulet committed the crime. (Tr. 81-82). Again, this was not new evidence. It was evidence

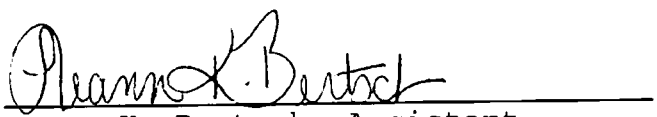
rebutting what Baca had stated. Baca testified to each of these matters. Therefore, any recall of Baca would have simply been repetitive testimony. Baca had already addressed these issues. The trial court did not abuse its discretion in denying such surrebuttal evidence.

Finally, Goulet failed to make an offer of proof as to the surrebuttal evidence he intended to offer. The failure to make such an offer of proof prevents this Court from evaluating the evidence in an effort to determine whether the trial court abused its discretion. See Wagner v. Peterson, 430 N.W.2d 331, 333 (N.D. 1988); State v. Martinsons, 462 N.W.2d 458, 460 (N.D. 1990). This Court has no way to evaluate what evidence Goulet intended to present in surrebuttal. He made no indication what that testimony would be. Again, the State in its rebuttal had presented matters only to which Jason Baca had previously testified. The only person with information about those matters was Baca, and he had already testified about them. Recalling Baca in surrebuttal would have been cumulative and repetitive, and refusal to allow such testimony was not an abuse of discretion.

## IV. CONCLUSION

Based upon the foregoing, the State of North Dakota respectfully requests that this Court AFFIRM the judgment of conviction.

Respectfully submitted this 8th day of October, 1998.



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