ORIGINAL

IN THE SUPREME COURT

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STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	Supreme Court No. 2005-0047
	)	
vs.	)	District Court No. 09-03-K-01805
	)	
Luis I. Hernandez,	)	
	)	
Defendant-Appellant.	)	
	)	

FILED
IN THE OFFICE OF THE
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STATE OF NORTH DAKOTA

APPEAL FROM ORDER DENYING MOTION FOR NEW TRIAL, DATED JANUARY 28, 2005, AND CRIMINAL JUDGMENT AND COMMITMENT ENTERED JANUARY 28, 2005, IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA
THE HONORABLE GEORGIA DAWSON

PLAINTIFF-APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES .... ¶ 1

STATEMENT OF ISSUES .... ¶ 2

STATEMENT OF THE CASE .... ¶ 3

STATEMENT OF FACTS .... ¶ 5

SUMMARY OF ARGUMENT .... ¶ 16

ARGUMENT .... ¶ 22

I. There was no fatally prejudicial effect when the Trial Court, in exercising discretion, allowed limited previous history .... ¶ 23

A. The Issue was Not Properly Preserved at the Trial Court Level .... ¶ 25

B. If the Issue is Preserved, the Trial Court Properly Exercised its Discretion .... ¶ 27

II. Admission of the Unredacted Letter was Not Error Because It Concerned the Incident at Trial, Not Previous Crimes .... ¶ 31

III. The Trial Court did not err when allowing testimony of the handwriting expert .... ¶ 36

IV. Destruction of Evidence was a Medical Procedure and was Not in Bad Faith .... ¶ 44

V. Search Warrant was Valid .... ¶ 50

CONCLUSION .... ¶ 56

CERTIFICATE OF SERVICE .... ¶ 58

[¶1] TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

UNITED STATES SUPREME COURT CASES

Arizona v. Youngblood, 488 U.S. 51 (1988) ¶ 45

California v. Trombetta, 467 U.S. 479 (1984) ¶ 45

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ¶ 40, 41

Kuhmo Tire Co. v. Carmichael, 526 U.S. 137 (1999) ¶ 40, 41

Luce v. United States, 469 U.S. 38 (1984) ¶ 28

NORTH DAKOTA CASES

Anderson v. A.P.I. Company, 1997 ND 6, 559 N.W.2d 204 ¶ 39

Howe v. Microsoft, 2003 ND 12, 656 N.W.2d 285 ¶ 38, 40

Kluck v. Kluck, 1997 ND 41, 561 N.W.2d 263 ¶ 38

State v. Anderson, 2003 ND 30, 657 N.W.2d 145 ¶ 26

State v. Bell, 2002 ND 130, 649 N.W.2d 243 ¶ 28

State v. Bollingberg, 2004 ND 30, 674 N.W.2d 281 ¶ 41

State v. Jensen, 2000 ND 28, 606 N.W.2d 507 ¶ 28

State v. Oberlander, 460 N.W.2d 400 (N.D. 1990) ¶ 39

State v. Ramsey, 2005 ND 42, 692 N.W.2d 498 ¶ 48

State v. Randall, 2002 ND 16, 639 N.W.2d 439 ¶ 28, 48

State v. Schmitz, 474 N.W.2d 249 (N.D. 1991) ¶ 54

State v. Steffes, 500 N.W.2d 608 (N.D. 1993) ¶ 45, 47

OTHER FEDERAL CASES

United States v. Cunningham, 145 F.3d 1385 (D.C. Cir. 1998) ¶ 35

United States v. Jolivet, 224 F.3d 902 (8th Cir. 2000) ¶ 41

United States v. Luffred, 911 F.2d 1011 (5th Cir. 1990) .... ¶ 35

United States v. Paul, 175 F.3d 906 (11th Cir. 1999) .... ¶ 41

United States v. Prime, 363 F.3d 1028 (9th Cir.2004); vacated on other grounds by --U.S. ----, 125 S.Ct. 1005, (2005) .... ¶ 41

Walzer v. St. Joseph's State Hospital, 231 F.3d 1108 (8th Cir. 2000) .... ¶ 28

OTHER STATE CASES

State v. Baldwin, 618 A.2d 513 (Conn. 1993) .... ¶ 47

People v. Erwoldt, 867 P.2d 757, 773 (Cal. 1994) .... ¶ 30

People v. Stanley, 433 P.2d 913 (Cal. 1967) .... ¶ 30

NORTH DAKOTA RULES

N.D.R.Ev. 403 .... ¶ 48

N.D.R.Ev. 404(b) .... ¶ 32, 34

N.D.R.Ev. 702 .... ¶ 38

OTHER AUTHORITIES

Jury Instructions, p. 8, l. 7-18 .... ¶ 29

Jury Instructions, p. 16 .... ¶ 43

I McCormick on Evidence §13, at pp. 54-55 (4th ed. 1992) .... ¶ 39

3 Weinstein's Evidence ¶702[04] (1996) .... ¶ 39

[¶2] Statement of the Issues

I. Whether Trial Court erred in its discretion in allowing limited prior sexual history of victim in response to Hernandez questions.

II. Whether it was error to allow the jury to see an unredacted version of a translated letter alleged to be written by Hernandez and describing events of the charged incident.

III. Whether admission of expert testimony of handwriting analysis violates the test in North Dakota .

IV. Whether destruction of evidence done by medical professionals without bad faith violates Hernandez's constitutional rights.

V. Whether a court order requiring a hospital to comply with a search warrant replaces the original warrant.

[¶3] Statement of the Case

[¶4]This is an appeal from an East Central Judicial District Court Order denying a Motion for a New Trial, Judgment and Conviction of Appellant Luis I. Hernandez (hereinafter "Hernandez") for Gross Sexual Imposition, in violation of N.D.C.C. § 12.1-20-03. The State has reviewed Hernandez's statement of the case at page 1 of the Appellant's Brief ("Ap. Br."), and has no objections or additions to include regarding the statement of the case provided. The State respectfully urges this Court to affirm the District Court's judgment.

[¶5]**Statement of the Facts**

[¶6] Hernandez was convicted of gross sexual imposition with the daughter of his former girlfriend, Jennifer Haroldson. Hernandez and Haroldson had an "on-again-off-again" relationship since 1994. (T. p. 106, l. 24-25; p. 107, l. 1-8). Haroldson had a child from a previous relationship, that being the victim, and also a child with Hernandez. (T. p. 32, l. 20-25; p. 33, l. 20-21). Hernandez also had a relationship with Evon Ortiz during the same time.

[¶7] The incident in this case took place on May 22, 2003 at the Motel 6 in Fargo, North Dakota. (T. p. 41, l. 9-20). The State's witnesses testified that Hernandez picked up the victim at her school in a red vehicle. (T. p. 37, l. 20-25; p. 38, l. 1-11). Hernandez took the victim to a friend's apartment and then to the Motel 6. (T. p. 39, l. 16-19). Hernandez and the victim went into the motel room, where the victim disrobed. (T. p. 44, l. 15-18). Hernandez sexually assaulted her on the bed. (T. p. 45, l. 12-19). The victim pushed Hernandez off and ran to the bathroom. (T. p. 47, l. 19-25). Hernandez pulled her back onto the bed and assaulted her again. (T. p. 48, l. 7-25). Hernandez struck the victim while he was pulling her out of the bathroom. (T. p. 49, l. 12-18). The victim was able to push him off again and ran back to the bathroom. (T. p. 51, l. 18-19). Hernandez then drove the victim to Hornbacher's to pick up some groceries for Jennifer Harloldson. (T. p. 55, l. 10-18). Hernandez dropped the victim off at Haroldson's home, where the victim told her mother that she had been raped. (T. p. 57, l. 25; p. 58, l. 1-6).

[¶8] Jennifer Haroldson and Hernandez took the victim to Meritcare Clinic, where a doctor and a Sexual Assault Nurse Examiner ("SANE") performed a sexual assault kit. (T. p. 126, l. 19-20). The doctor and SANE followed the procedures and submitted the

evidence to the North Dakota Crime Lab for processing. (T. p. 281. l. 8-10; p. 310, l. 3-12). The doctor and SANE also performed a swab of the pubic area, which is different than the combing required by the sexual assault kit. (T. p. 285, l. 23-25; p. 286, l. 1; p. 312, l. 4-7). This test was done for Meritcare's own internal procedures. (T. p. 315, l. 12-23). A lab technician tested the swab and found non-motile sperm. (T. p. 321, l. 8-17). The swab was destroyed because the test of motility had already been accomplished. (T. p. 321, l. 18-20). The doctor also tested for sexually transmitted diseases, including gonorrhea. (T. p. 286, l. 13-17). The test came back positive for gonorrhea. (T. p. 286, l. 18-22).

[¶9] As part of Meritcare's medical care, and prior to taking samples as part of the sexual assault examination, the victim spoke with the doctor in regards to what happened. (T. p. 276. l. 4-6). The victim made statements about previous sexual contact. (T. p. 304, l. 7-8). The victim, at a later date, met with a doctor who specializes in sexual abuse of minors. The victim related to this doctor previous sexual relations between the victim and Hernandez. (T. p. 343, l. 5-13).

[¶10] Police searched the motel room where the assault took place and found wet bath towels, a bedspread, pillowcases, and some hair samples. (T. p. 366. l. 16-18). DNA testing was done on the bedspread and pillowcases. (T. p. 538, l. 15-19). On the bedspread, pubic hair was found that was compared to Hernandez's blood. (T. p. 544, l. 2-5). There was over a 1 in a trillion chance that the pubic hair did not come from Hernandez. (T. p. 542-543). Another set of pubic hair found on the bedspread has a strong possibility of matching the victim's pubic hair. (T. p. 546-547). Hair found on the

floor of the motel room had over 1 in a quadrillion chance that it didn't come from the victim. (T. p. 548-551).

[¶11] Hernandez was apprehended in October of 2003. At that time there was a search warrant to retrieve bodily fluids. Due to privacy concerns from Meritcare, police obtained a Court order to compel Meritcare to abide by the search warrant. (T. p. 417, l. 22-25; p. 418, l. 1-4; Ap. p. 24). Sgt. Ross Renner of the Fargo Police Department mistakenly thought that the officers were getting a new warrant and wrote void on the front of the original warrant. (Ap. p. 26-27). The order was granted and police collected the samples. (Ap. p. 25).

[¶12] Before trial Jennifer Haroldson found a letter written to her in Spanish from Hernandez. (T. p. 112-113). The letter was compared to writings taken from Hernandez's file in the jail. A retired Bureau of Criminal Investigation agent who specialized in handwriting compared the documents and determined that Hernandez wrote the letter. The letter references events that occurred the day of the incident. (Ap. p. 33-35).

[¶13] Hernandez brought witnesses that testified he was taken to the motel by a friend so that he could visit his kids. (T. p. 708-710). They testified that the children went swimming while Jennifer tried to have sex with Hernandez. (T. p. 708-709). Hernandez's witnesses claimed that the kids returned from swimming, showered, and everyone left. (T. p. 710). There was testimony that Jennifer Haroldson dropped Hernandez off at a friend's apartment. (T. p. 710).

[¶14] Hernandez had been involved in an auto accident that resulted in him wearing a halo device. (T. p. 697-698). There is some dispute as to how much this accident affected his physical abilities. Hernandez claims that he could not feed himself, dress himself,

drive a car, or grasp a glass of water. (T. p. 598-599; 601; 644; 670-675; 700-703; 710). A corrections officer noticed that Hernandez could carry a tray and feed himself since October 2003. (T. p. 752, l. 2-17). The victim stated that she was forced on the bed by Hernandez and that he slapped her. (T. p. 48, l. 7-25; p. 49, l. 12-18).

[¶15] Hernandez was found guilty of gross sexual imposition and sentenced to serve 12 years in prison.

[¶16]Summary of Argument

[¶17] This Court should affirm the judgment and commitment of the Trial Court. The Trial Court properly exercised its discretion in admitting limited prior history. Hernandez didn't object when the issue of gonorrhea was raised, thus this Court cannot hear the issue on appeal. If this Court addresses this issue, the Trial Court was still within its discretion. Hernandez opened the door in referencing that gonorrhea takes five days to incubate. The Trial Court properly allowed the State to elicit testimony about limited prior sexual history because Hernandez had referenced it in the question of gonorrhea.

[¶18] Hernandez argues that an English translation of a Spanish letter written by him should have been redacted before going to the jury. Hernandez and the State agreed to redact certain portions of the evidence. This letter was not among those agreed to. Further, the specific quotes mentioned by Hernandez refer to the incident in question, not prior sexual contacts. Because of these references, no redaction was needed.

[¶19] Hernandez objects to the admission of handwriting expert testimony. His first objection is that handwriting science should not be admitted to court. Handwriting analysis has been used by this Court and other courts in the country. An expert in this field needs to be qualified and must be able to assist the jury. The expert used in this case had previous handwriting analysis experience and training and was able to assist the jury in determining if Hernandez wrote the letters. While Hernandez raises some question as to whether he actually wrote the letter, the expert used was able to determine that in his opinion the letter was written by Hernandez.

[¶20] The destruction of sperm by Meritcare personnel does not violate Hernandez's constitutional rights. This was a test performed after the sexual assault kit according the

Meritcare's internal procedures. It was neither plainly exculpatory nor plainly inculpatory. The technician did a test on the sperm to determine if it was motile and then destroyed the sample because Meritcare does not preserve sperm samples. The technician did not destroy the sample in order to harm Hernandez, therefore there is no bad faith involved.

[¶21] The search warrant was properly obtained and the court order directing Meritcare to comply with the search warrant did not alter the warrant itself. Meritcare would not abide by the search warrant without a court order, due to internal policies. The court order requiring Meritcare to comply with the warrant was not itself a new warrant but simply an order enforcing the original warrant. The fact that "void" was written across the original warrant does not make it invalid, it was simply a miscommunication between officers. For all of these reasons, this Court should uphold the verdict below.

[¶22]Argument

[¶23]I. There was no fatally prejudicial effect when the Trial Court, in exercising discretion, allowed limited previous history

[¶24] The Trial Court did not abuse its discretion when it expanded the scope of the evidence to include limited previous history of the victim. While the Trial Court granted a motion in limine to exclude this evidence, circumstances unfolding during trial forced the Trial Court to revisit the issue. The Trial Court was forced to expand the scope because of questioning directed from Hernandez about the length of time it takes for gonorrhea to incubate. The testimony that was elicited was corroborated by the physical evidence. Because Hernandez failed to preserve this issue for appeal and, even if he did, the Trial Court did not abuse its discretion, the evidence was properly admitted.

[¶25]A. The Issue was Not Properly Preserved at the Trial Court Level

[¶26] An issue must be properly preserved at the Trial Court level before it can be considered on appeal. State v. Anderson, 2003 ND 30, ¶ 6, 657 N.W.2d 145. A timely objection at the time the error occurred would properly preserve the issue. Id. Because a motion in limine is heard outside the context of a trial, a renewed objection at trial if the evidence is introduced focuses the Trial Court on the contextual issues of relevancy and prejudice. Id at ¶ 7. A failure to object at trial acts as a waiver of the claim of error. Id. (citations omitted). The violation argued by Hernandez was the State's questions during direct examination of the doctor about gonorrhea. At no time during that testimony did Hernandez object. (T. p. 286. l. 13-22). Hernandez further opened the door when asking in cross examination the amount of time necessary for gonorrhea to incubate. (T. p. 288. l. 14-18). The only point at which this issue was raised was after Hernandez's cross of Dr. Jacob when the State requested that the jury be excused for a moment. (T. p. 296. l.

23-25; p. 297, l. 1-23). There was no mention of a mistrial at that point. Because Hernandez failed to preserve this issue by objecting at the time it was introduced, this Court should not hear this point.

[¶27]B. If the Issue is Preserved, the Trial Court Properly Exercised its Discretion

[¶28] If the Court were to find the issue properly preserved. the Trial Court did not abuse its discretion in admitting evidence. Because of the position of the Trial Court in regards to evidence, the Trial Court has broad discretion in evidentiary matters and will only be overturned by an abuse of that discretion. State v. Bell. 2002 ND 130. ¶ 6, 649 N.W.2d 243 (citing State v. Jensen, 2000 ND 28, ¶ 10, 606 N.W.2d 507). "A trial court abuses its discretion when it acts in an arbitrary. unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law." Id (citing State v. Randall. 2002 ND 16, ¶ 5, 639 N.W.2d 439). Evidentiary rulings made before trial based on a motion in limine are preliminary and may be changed during trial by the Trial Court. Walzer v. St. Joseph's State Hospital, 231 F.3d 1108 (8th Cir. 2000) (citing Luce v. United States, 469 U.S. 38, 41 (1984)).

[¶29] The Trial Court modified its ruling from the motion in limine. Hernandez opened the door to limited prior acts when he asked Dr. Jacob about how long it took for gonorrhea to incubate. This was not the first time that Hernandez had attempted to walk through the door. (T. p. 81. l. 4-15; p. 175. l. 8-16). The Trial Court had even admonished Hernandez for attempting to open the door. (T. p. 175. l. 11-16). The Trial Court, realizing the door to be open, allowed the State limited ability to question Drs. Jacob and Norberg about prior sexual history. (T. p. 333, l. 14-25; p.334, l. 1-23; p. 336. l. 4-12).

This testimony was limited to references to previous occasions occurring over a number of years. Hernandez is attempting to use evidence which he initiated to claim an unfair trial. The Trial Court in this instance recognized Hernandez had partially opened the door. In viewing the evidence and prejudicial effects at the time of trial, the Trial Court used its discretion to allow limited testimony. The Trial Court, besides placing limits on testimony, gave the jury instructions in regards to the medical history testimony. (Jury Instructions, p. 8, l. 7-18). Due to Hernandez eliciting testimony about gonorrhea taking five days to incubate, the Trial Court properly admitted limited prior history.

[¶30] Hernandez' reliance on California cases is misplaced in this case. Hernandez relies on People v. Stanley, 433 P.2d 913 (Cal. 1967), to argue that the testimony elicited from the victim is not admissible. The proposition in Stanley is that generally the uncorroborated testimony of the complaining witness in regards to uncharged acts should not be admissible. Id at 916. But the California Supreme Court also stated that rigid rules should not dictate this admissibility. Id. The Court looked to a balancing test between the probative value and the harm it could cause. Id. The California Supreme Court expanded on this notion in People v. Erwoldt, 867 P.2d 757, 773 (Cal. 1994), which held that there will be circumstances "in which the uncorroborated testimony of the complaining witness concerning the defendant's uncharged misconduct will be admissible." Id. In this case, the testimony from the doctors about what the victim told them was corroborated by the finding of gonorrhea. Even if this Court were to find that the testimony was uncorroborated, it goes to explaining why gonorrhea was present. Hernandez wanted the jury to know that gonorrhea took five days to incubate to show that the victim may have had sex with someone else. Thus the reason that the uncorroborated evidence was

admitted was to show that a previous sexual act had occurred between Hernandez and the victim in order to provide an explanation of the finding of gonorrhea.

[¶31]II. Admission of the Unredacted Letter was Not Error Because It Concerned the Incident at Trial, Not Previous Crimes.

[¶32] The English letter that was translated from Spanish and entered into evidence was not improperly admitted to the jury because the letter mentioned aspects of the current case and not previous charges against Hernandez. Because the agreement during the trial was to redact information in letters that would violate N.D.R.Ev. 404(b). this letter did not fall under that agreement and was properly admitted to the jury for its consideration.

[¶33] The Spanish letter was admitted into evidence. (T. p. 115, l. 20-21). It was found in the screen door of the residence in which Jennifer Haroldson (mother of L.H.) lives with L.H. (T. p. 112, l. 21-24). The handwriting expert testified that the writing in the letter was similar to the writing of known samples of Hernandez. A Spanish interpreter was able to translate the letter. (T. p. 565, l. 15-19). The translation of the Spanish letter into English was admitted into evidence. (T. p. 571, l. 15-18).

[¶34] The translated letter and the original Spanish letter were allowed into evidence without redaction. The only redaction that was needed was in letters that mentioned Hernandez being previously accused of sexual assault. These were found in a few of the letters that were admitted to the jury. The State and Hernandez agreed to redact portions of these letters so that there would not be a violation of N.D.R.Ev. 404(b). (T. p. 767-772; p. 814, l. 11-13). This agreement never covered the translated letter. The letter itself spoke of Hernandez's feelings after the assault and specifically about certain aspects of the crime of which he was accused. The portions that were highlighted by Hernandez in his brief dealt with the crime. There was testimony that Hernandez was driving a red

vehicle right before he assaulted L.H. and that he drove her back to her home. (T. p. 37, l. 23-25; p. 38, l. 1-6; p. 69, l. 9-12). This is directly admitted in the letter. The letter also asks that L.H. state it was sex and not rape so that Hernandez would get out of jail. This again relates to the current crime and not previous crimes.

[¶35] Hernandez's reliance on Luffer and Cunningham is misplaced. 911 F.2d 1011, 1014 (5th Cir. 1990); 145 F.3d 1385, 1393, 1396 (D.C. Cir. 1998). Both deal with situations where evidence that should have been redacted had inadvertently been given to the jury. In this case, though, there was no error in admitting the letter unredacted. The original letter matched writing of Hernandez. It was found in the screen door of the mother of L.H. It regards matters which Hernandez would have knowledge of that occurred on the day of the crime. Redaction of the letter was unnecessary because of the relevance it has to the crime charged.

[¶36]III. The Trial Court did not err when allowing testimony of handwriting expert.

[¶37] The testimony of the handwriting expert in this case was admissible under North Dakota law and the trial court was correct in admitting it. Even though there may be some question as to whether Hernandez wrote a part of one of the samples examined, Hernandez still wrote on all samples examined by the expert. It is for the jury to decide whether they believe the expert or not. Because there was no mistake in law or abuse of discretion, this Court should allow the testimony of the handwriting expert to stand.

[¶38] Expert testimony in trials is governed by N.D.R.Ev. 702, which allows an expert to testify if their specialized knowledge will assist the trier of fact in understanding evidence or determining a fact in issue. Id.; Kluck v. Kluck, 1997 ND 41, ¶ 7, 561

N.W.2d 263. Broad discretion is given to the trial judge in determining whether an expert is qualified and whether the testimony would assist the trier of fact. Id. This Court should not overturn the decision of the Trial Court in this matter unless there is an abuse of discretion. Id. A Trial Court abuses its discretion only when it acts in an unreasonable, arbitrary, or unconscionable manner, when its decision is not the product of a rational mental process leading to a reasoned decision, or when it misinterprets or misapplies the law. Howe v. Microsoft, 2003 ND 12, ¶ 6, 656 N.W.2d 285.

[¶39] Use of expert testimony is generously allowed if it is shown that the expert has some expertise in the field on which the expert will testify. Anderson v. A.P.I. Company, 1997 ND 6, ¶ 9, 559 N.W.2d 204. An expert's formal title or licensing is not determinative in this case, rather it is the expert's actual knowledge of the field. Id. This can be shown through the expert's "knowledge, skill, experience, training, or education." Id. (citing State v. Oberlander, 460 N.W.2d 400, 402 (N.D. 1990); 3 Weinstein's Evidence ¶702[04] (1996)). This skill can be found in the expert's reading up on the field or purely practical application. Anderson, 1997 ND 6, ¶ 9, 559 N.W.2d 204 (citing I McCormick on Evidence §13, at pp. 54-55 (4th ed. 1992)).

[¶40] Hernandez attempts to use Daubert and Kuhmo Tire as the appropriate test in determining the admissibility of expert testimony. 509 U.S. 579 (1993); 526 U.S. 137 (1999). This Court has expressly chosen not to adopt the test from Daubert and Kuhmo Tire. Howe v. Microsoft, 2003 ND 12, n.1 656 N.W.2d 285. The trial court still must determine that the expert has some qualifications in the field. Also, the role of the expert in testifying is important to remember. The expert is there to assist the trier of fact in looking at the evidence. The trier of fact must weigh the credibility and qualifications of

the expert in determining whether to listen to the expert. Counsel opposing the expert can address these issues through cross examination, pointing out to the trier of fact discrepancies that would undermine the expert. The trier of fact is allowed to completely disregard the expert witness. Thus, this Court should maintain the current expert evidence standard in North Dakota.

[¶41] Hernandez relies on a Law Review article calling into question the science of handwriting examination. (Ap. Br. p. 36-88). It should first be noted that the article in question is from 1989 and that one of the authors of the article, at least as of 1999, has not done any follow up research on this topic since its release. United States v. Paul, 175 F.3d 906, 912 (11th Cir. 1999). The entire article is based on studies that were most recently done in 1987. Studies have been performed since the release of the article that support the use of handwriting experts. Several U.S. Federal Circuit Courts have allowed the use of handwriting experts in court cases, including the 8th Circuit. United States v. Jolivet, 224 F.3d 902, 906 (8th Cir. 2000). North Dakota has also allowed the use of handwriting experts to testify in helping the trier of fact. State v. Bollingberg, 2004 ND 30, 674 N.W.2d 281. Handwriting analysis has even passed the Daubert, Kuohmo Tire test for expert analysis. United States v. Prime, 363 F.3d 1028, 1033 (9th Cir.2004); vacated on other grounds by --- U.S. ----, 125 S.Ct. 1005, (2005).

[¶42] David Lybeck was the expert called in this situation. He had worked for the North Dakota Bureau of Criminal Investigations for 30 years as a criminal investigator. (T. 446-447, l. 3-9, 25-8). He had received training from the FBI in 1981 for comparing questioned writing with known writing. (T. p. 446, 15-17). This training was over a period of 3 months. (T. 448-449, l. 25-1). After that time, he assisted law enforcement

agencies in over 200 cases, many of which included multiple documents to examine. (T. p. 447, 449, l. 15-17, l. 18-19). He averaged at least 20 handwriting cases a year. (T. p. 450, l. 11-13). Lybeck is sufficiently knowledgeable about the standards used by the FBI in handwriting cases. (T. p. 452, l. 20-25). He is proficient in his knowledge of handwriting styles. (T. p. 454, l. 22-25; p. 455, l. 1-6, 22-25; p. 456, l. 1-15). He testified in detail about the procedure he used in analyzing the handwriting in this case. (T. p. 457, l. 1-11). All of this taken together indicates that Lybeck was experienced and knowledgeable in the highly specialized area of handwriting analysis. The Trial Court in this case felt that the expert was qualified. (T. p. 454, l. 2-5). Because of his previous work and qualifications, Lybeck qualifies as an expert in North Dakota.

[¶43] Hernandez also questions Lybeck's credibility alleging someone else may have written the samples Lybeck used as "known" writings. Hernandez argues that Kelly Barfield, an inmate with Hernandez, wrote most of the "known" samples while he was in jail with Hernandez. The State had Lybeck compare known writing done by Barfield with writing from Hernandez's file. (T. p. 793, l. 9-25; p. 794, l. 1-18). Lybeck's expert opinion was that Barfield had not written the known sample or the previously admitted known samples. (T. p. 795, l. 20-22). In fact, the known Hernandez sample compared against Barfield's writing included the misspelling of the word "investigator." (T. p. 801, l. 20-23). This same misspelling occurs in the "known" samples of Hernandez that were previously used. (T. p. 486, l. 13-24). This further proves that Hernandez would have written the "known" samples. Hernandez also questions the use of the inmate request form, State's Exhibit 26. There was testimony that multiple people had written on it. (T. p. 429, l. 2-5). Lybeck used State's Exhibit 26 simply in comparing signatures. (T. p. 491,

l. 1-9). Lybeck did not focus on State's Exhibit 26 for comparison of writing in the questioned document. (T. 506. l. 13-20). Lybeck used the other known writing samples to compare to the Spanish letter. These known samples were different than the ones that Barfield had written in his file. This would show that Hernandez wrote the "known" samples and the Spanish letter. If Hernandez felt that the expert got it wrong, he was free to cross examine the expert to show that the expert lacks credibility. Hernandez attempted to do exactly that with his thorough cross examination of Lybeck. (T. p. 499-503). The jurors were instructed that they could completely disregard the expert if they didn't find it helpful or if they found the expert insufficient. (Jury Instructions, p. 16). Even with the faults Hernandez laid out, the jury still found him guilty. Lybeck was an expert in a highly specialized field which would assist the trier of fact. His testimony was not improperly introduced.

[¶44]IV. Destruction of Evidence was a Medical Procedure and was Not in Bad Faith

[¶45] Hernandez claims the destruction of evidence by Meritcare, taken outside the scope of a sexual assault kit, denied him the ability to test it. However, Hernandez has failed to prove bad faith on the part of the State. The method of evidence found in this case fits the same method used in State v. Steffes. 500 N.W.2d 608 (N.D. 1993). That case was based on the reasoning found in Arizona v. Youngblood, 488 U.S. 51 (1988), a United States Supreme Court case that narrowed California v. Trombetta, 467 U.S. 479 (1984). In Steffes, this Court found that evidence that was not plainly exculpatory at the time of destruction does not prejudice the defendant if it is destroyed. Id at 613. The Court in Youngblood specifically rejected the fundamental fairness argument proposed by Hernandez in this case because it placed an unnecessary burden on the State to

preserve evidence that may or may not be exculpatory. Youngblood. 488 U.S. at 58. In this case, a Meritcare technician destroyed samples that were not plainly exculpatory because the collection of the samples was performed according to Meritcare's internal procedures.

[¶46] A sexual assault kit was performed on the victim by Dr. Jacob and Stacey Weible, the Sexual Assault Nurse Examiner ("SANE"), at Meritcare the same day as the assault. They performed all the steps necessary for the sexual assault kit. (T. p. 284, l. 22-25; p. 285, l. 1-25: p. 286, l. 1-12). Debris collected for the sexual assault kit is gathered with a piece of paper. (T. p. 316, l. 8-12). After they had completed the sexual assault kit by sealing it and giving it to law enforcement, Dr. Jacob noted dried secretions lighted by the Woods lamp. (T. p. 284, l. 22-25; p. 285, l. 1). Dr. Jacob did a swab of the material as per Meritcare's internal procedures in sex assault cases. (T. p. 285, l. 16-18, 23-25; p. 315, l. 19-22). This is done after the sex assault kit and is something more than the sexual assault kit itself. (T. p. 285. l. 19-24). The swab was taken to the lab to test for sperm. (T. p. 286, l. 11-12; p. 312, l. 14-20). The Meritcare technician tested the swab and found non-motile sperm. (T. p. 319, l. 16-18). After the test, the technician disposed of the sample. (T. p. 321, l. 20).

[¶47] In further review of any prejudice against Hernandez, this Court can look at the level of care used by the Meritcare technician. If the technician acted on good faith, then there is no violation of Hernandez's constitutional rights. In order for the destruction of evidence in this case to violate Hernandez's constitutional rights, the Meritcare technician must have destroyed evidence in bad faith. Bad faith is defined as:

> the state deliberately destroyed the evidence with the intent to deprive the defense of information; that is, that the evidence was destroyed by, or at the direction of, a state agent who intended to thwart the defense.

Steffes, 500 N.W.2d at 613 (citing State v. Baldwin, 618 A.2d 513 (Conn. 1993)). In this case, the Meritcare technician did not destroy evidence to thwart the defense; she was simply following her standard procedures. She had no way of knowing that the sample would be used in a criminal sexual assault trial. There is clearly no bad faith in this case. Meritcare has procedures set up for collection and testing for this type of evidence. These procedures were used in this case.

[¶48] The evidence of non-motile sperm found by Meritcare staff is relevant to the crime that was committed. Hernandez argues that under N.D.R.Ev. 403 evidence that is relevant may still be excluded if the probative nature does not outweigh its prejudicial nature. "In determining whether to exclude evidence under Rule 403, courts should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." State v. Ramsey, 2005 ND 42, ¶ 27, 692 N.W.2d 498 (citing State v. Randall, 2002 ND 16, ¶ 15, 639 N.W.2d 439). N.D.R.Ev. 403 applies only to limit unfairly prejudicial evidence. Id. "A trial court should exercise its power to exclude evidence under Rule 403 sparingly, recognizing that 'any prejudice due to the probative force of evidence is not unfair prejudice.'" Id (citing State v. Klein, 1999 ND 76, ¶ 5, 593 N.W.2d 325 (citation omitted)).

[¶49] In this case, the probative nature of the evidence is that sperm was found in the victim's pubic area coincident with her claim of having been sexually abused. It is probative of her having sexual contact with someone near that time. There was no DNA analysis done on the sperm because it was collected through Meritcare internal

procedures and then destroyed. Thus, there was no way to link it to Hernandez and that was made clear to the jury. While there may be some prejudicial aspects to this evidence, that is true about most evidence presented by the State in a criminal case. The value of showing that someone had recent sexual contact with the 13-year old victim was greater than any prejudice against Hernandez. Because the sampling of the non-motile sperm was beyond the scope of the sexual assault kit, not plainly exculpatory, and there was no bad faith on the part of the Meritcare staff, the destruction of the non-motile sperm sample did not violate Hernandez's constitutional rights.

[¶50]**V. Search Warrant was Valid**

[¶51] The search warrant issued to retrieve Hernandez's blood, as well as the Court's order directing Meritcare to comply with the search warrant, were legal because they were properly supported by probable cause. The initial search warrant was signed on October 9, 2003, by the Hon. Georgia Dawson. Due to Meritcare's internal policies, they would not collect the samples required by the search warrant against the wishes of Hernandez. In respect of Meritcare's internal policy, the State requested a Court order directing Meritcare to comply. Because Judge Dawson was unavailable, the order was signed by the Hon. Michael McGuire. All of this occurred on the same day. The subsequent order directed at Meritcare does not change the search warrant but was necessary to fulfill the Meritcare's requirements, and in fact refers to the attached search warrant.

[¶52] The warrant requirement under N.D.R.Crim. 41 is specific: "A warrant must be directed to a peace officer." In this case, the original search warrant was directed at a

peace officer. While the order was also directed at peace officers, it was also directed at Meritcare Hospital. A search warrant can only be directed at a peace officer.

[¶53] Even if this Court were to deem the order a supplement to the original search warrant, then the search is still valid. The original search warrant was supported by an affidavit of probable cause. (Ap. p. 22, 23, 30-31). Hernandez does not argue that the probable cause was insufficient. The search warrant was attached to the Motion for the Order. (Ap. p. 24). It is unclear from the record whether the affidavit was also attached. In any case, the order simply directed Meritcare to comply with the attached search warrant. (Ap. p. 25). There was no change to the search warrant itself. The order was needed to allow Meritcare to fulfill its own internal needs. Meritcare policy does not dictate new constitutional law. Probable cause had already been established through the affidavit attached to the original search warrant. This would also apply to the Order.

[¶54] Hernandez uses State v. Schmitz to infer that a search warrant must specify with particularity the person who must perform the search. 474 N.W.2d 249, 253 (N.D. 1991). As stated above, North Dakota law states a warrant must be directed to a peace officer. Schmitz dealt with the particularity in what the police may seize. Id at 251. In that case, the police just put down "stolen items" to describe what was to be seized. Id. This Court found that description too general and required more particularity. Id at 252. The entire Schimitz discussion revolved around where and what was to be seized, it in no way inferred that the person that was to seize the items must be identified with particularity. Id. Neither the North Dakota statutes, rules, nor case law require this standard. If this Court were to require this standard, it would bog down the police because only those on the warrants would be able to search and seize. From a practical perspective, officers

need the assistance of trained medical staff when taking certain biological samples from suspects and victims. Because particularity is not required in regards to who precisely executes the search warrant, the search warrant and order in this case are valid.

[¶55] In regards to the "void" written across the search warrant, this term was simply a miscommunication between Sgt. Renner and Detective LeDoux. When Meritcare indicated they needed something more than the search warrant, Renner believed that a new search warrant was to be issued, instead of the order that was requested and obtained. (Ap. p. 26). Sgt. Renner's simply writing "void" across the search warrant does not invalidate an otherwise valid search warrant. Neither does Detective LeDoux's initials. The Motion for the Order had a copy of the search warrant attached to it, which Judge McGuire used in issuing the order. No other search warrant was issued in this case. The nurse that drew the body samples noted that the search warrant in question was the search warrant presented her. The search warrant remained valid, despite the handwriting on it.

[¶56] Conclusion

[¶57]This Court should affirm the verdict and judgment of the Trial Court. While issues did arise at trial, the Trial Court was able to use its discretion to afford a fair trial. There was some limited testimony that was admitted because of the question by Hernandez. A letter was properly given to the jury because it referred to events alleged in the Information and not prior acts. The admission of expert testimony in handwriting analysis was proper because the expert was qualified according to North Dakota standards and his opinion would assist the jury in evaluating evidence. The destruction of evidence did not impair Hernandez's constitutional rights because it was collected

according to Meritcare standards and there was no bad faith on behalf of the technician handling the sperm. Finally, the search warrant was proper even with the court order because the order was only needed to direct Meritcare to comply. It was not a new search warrant. In looking at all the issues, the Trial Court was able to provide a fair trial to Hernandez. The Trial Court used its discretion to deal with issues that came up at trial. For all these reasons, the State respectfully requests this Court affirm the judgment and conviction and deny Hernandez any relief

Respectfully submitted this 4th day of August. 2005.

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[¶58]**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on this 4th day of August, 2005, upon:

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