STATE OF NORTH DAKOTA
IN THE SUPREME COURT
SUPREME COURT NO. 200600

State of North Dakota,	)	Crim. No. 06-K-1006
	)	
Plaintiff and Appellee,	)	20060329
	)	
vs.	)	FILED
	)	IN THE OFFICE OF THE
	)	CLERK OF SUPREME COURT
Terry Kautzman,	)	
	)	JAN 25 2007
Defendant and Appellant.	)	

STATE OF NORTH DAKOTA

APPEAL FROM JURY TRIAL JULY 17-20, 2006,
JURY VERDICT ON JULY 20, 2006,
AND SENTENCING HEARING HELD OCTOBER 30, 2006,
BEFORE THE HONORABLE THOMAS J. SCHNEIDER
IN OLIVER COUNTY DISTRICT COURT

BRIEF OF APPELLANT

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STATEMENT OF FACTS

Terry Kautzman ("Kautzman") and Darbi Boyko ("Boyko") were engaged in a romantic relationship. (Tr.p.309, ll. 14-25). Even though they spent time together, they each maintained separate residences. (Tr.p.340, ll. 3-8). On February 8, 2006, Kautzman had spent the night at Boyko's residence. (Tr.p.___, ll. ___). Boyko got up the next morning prior to Kautzman and had left the residence. (Tr.p.319, ll. 9-16). Kautzman left and walked back to his brother's residence. (Tr.p.319, ll. 21-25). Later that morning, Boyko and Kautzman's brother, Marty, came back to Boyko's residence, to which Kautzman had returned at 11:00 a.m. (Tr.p.321, ll. 4-7). Kautzman, Marty, and Boyko sat around the residence and had several beers. Marty and Boyko then left to return to a bar. (Tr.p. 321, ll. 14-24). Kautzman did not join them at the bar, but remained behind at Boyko's residence and fell asleep. (Tr.p.322, ll. 5-10). Boyko returned to her residence and woke up Kautzman and proceeded to kiss him. She unbuckled his belt and eventually it evolved into sex. (Tr.p.323, ll. 14-15). Kautzman attempted anal sex, but quit after Boyko expressed that she was hurting. (Tr.p.323, ll. 16-24).

Boyko got up from the bed and went into the bathroom. She threw a towel at Kautzman. (Tr.p.324, ll. 22-25). Kautzman said something to Boyko. Boyko became offended and upset. Kautzman attempted to leave. (Tr.p.326, ll. 12-13). As he was tying his shoes, Kautzman noticed Boyko coming at him with a knife. (Tr.p.326, ll. 19-23). The knife was pointed toward him. Boyko looked like she was evil. (Tr.p.329, ll. 1-11). He feared for his life. (Tr.p.329, ll. 12-14).

Kautzman grabbed Boyko and pushed her back. (Tr.p.329, ll. 12-19). The knife fell to the floor and he pushed her up against the wall. Boyko then dropped to the ground. (Tr.p.329. ll. 16-19). Kautzman did place his hand around her neck. (Tr.p.331, ll. 1-14). He did so to push her away in order to escape. (Tr.p. 331, ll. 18-21). Boyko lost consciousness and slumped to the floor. (Tr.p.331. ll. 22-25). Kautzman grabbed the knife and asked Boyko, "Is this what you wanted?" He tried to revive her. When he was unsuccessful, he picked her up and laid her on the bed. (Tr.p.333, ll. 7-17). He left her and drove to his brother's home for help. He returned to Boyko's residence and called 911.

STATEMENT OF PROCEEDINGS

On February 10, 2006, Terry Kautzman ("Kautzman") was charged with Attempted Murder, Gross Sexual Imposition, and Terrorizing. He entered pleas of Not Guilty to all charges.

A jury trial was held July 17-20, 2006, with the Honorable Thomas J. Schneider, District Judge, presiding. Following testimony, the jury acquitted Kautzman of Attempted Murder, but found him guilty of Terrorizing and guilty of Gross Sexual Imposition. A Motion for Acquittal or Mistrial was made on July 21, 2006. On August 8, 2006, the Court entered its Order, denying the motion.

On October 30, 2006, Kautzman was sentenced on the two counts to three years at the North Dakota Department of Corrections. On November 12, 2006, a Notice of Appeal was filed with the North Dakota Supreme Court.

ISSUES

1. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL OR MISTRIAL?

2. DID THE TRIAL COURT ERR WHEN IT DENIED THE MOTION TO DETERMINE ADMISSIBILITY OF EVIDENCE UNDER SECTION 12.1-20-15, N.D.CENT.CODE?

LAW AND ARGUMENT

1. The trial court erred when it denied the Motion for Judgment of Acquittal or Mistrial.

The State filed its Information on March 3, 2006, charging Kautzman with the offense of Gross Sexual Imposition, as follows:

> Count I. **GROSS SEXUAL IMPOSITION** in violation of N.D.C.C. Section 12.1-20-03(1)(a) by then and there, Engaging in a sexual act with Darbi Boyko, compelling her to submit by force or threat of imminent death or serious bodily injury to be inflicted upon her, and/or said Defendant knew the victim was unconscious and unaware that the sexual act was being committed upon her, and in the course of the offense, the Defendant inflicted serious bodily injury upon the victim.

The State charged Kautzman with the offense as a Class A felony, under Section 12.1-20-03. N.D.Cent.Code. Section 12.1-20-03(3)(a) provides, in part, as follows:

> 3. a. An offense under this section is a class AA felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, if the actor's conduct violates subdivision a of subsection 1, or if the actor's conduct violates subdivision d of subsection 1 and the actor was more than five years older than the victim at the time of the

offense.

The addition of the language raises the classification of the offense for a Class A to a Class AA felony.

Prior to trial, the Court, after concurrence by the State and Kautzman, fashioned a special interrogatory for the jury as to the infliction of serious bodily injury on Darbi Boyko during the commission of the offense of Gross Sexual Imposition. The addition of this language adds an element to the crime that must be proven by the State beyond a reasonable doubt.

Section 12.1-01-03(1), N.D.Cent.Code states:

12.1-01-03. Proof and presumptions.

1. No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. An accused is presumed innocent until proven guilty. The fact that the accused has been arrested, confined, or charged with the offense gives rise to no inference of guilt at the accused's trial. "Element of an offense: means:

    a. The forbidden conduct;

    b. The attendant circumstances specified in the definition and grading of the offense;

    c. The required culpability;

    d. Any required result: and

    e. The nonexistence of a defense as to which there is evidence in the

case sufficient to give rise to a reasonable doubt on the issue.

The element of "infliction of serious bodily injury" was an element that was not only a grading of the offense, but a required result of the forbidden conduct, i.e., that serious bodily injury was inflicted during the course of the gross sexual imposition.

Following testimony, the jury deliberated for many hours. They did find Kautzman guilty of gross sexual imposition by use of force, but were unable to reach a decision on whether serious bodily injury was inflicted. The jury returned their verdict and indicated a deadlock on the special interrogatory. Therefore, the jury did not return a complete verdict on the charge. This situation is analogous to many other criminal charges, such as under Chapter 12.1-17, N.D.Cent.Code. The grading of offenses under the assault chapter requires a finding on a range of "required results", i.e., differing kinds of injury, from injury to serious bodily injury. If the State charges an individual with aggravated assault, but the jury deadlocks and is unable to decide whether the State proved the existence of "serious bodily injury", an incomplete verdict is reached and a mistrial should be ordered. The case with Kautzman is no different. The jury failed to reach a verdict (or decision) on one of the elements of the charged offense.

Rule 29(c), of the North Dakota Rules of Criminal Procedure, authorizes the court to set aside the verdict and enter an acquittal if the jury has returned a guilty verdict. The Court can also enter a judgment of acquittal if the jury has failed to return a verdict.

Rules 31(e)(4), North Dakota Rules of Criminal Procedure also permits the Court to declare a mistrial, "if the jury cannot agree on a verdict on one or more counts."

Count I required the jury to determine two matters:

(1) Whether the Defendant committed the crime of Gross Sexual Imposition; and

(2) Whether, in the course of commission of the offense, inflicted serious bodily injury on the victim.

The jury answered Question 1 in the affirmative, but were deadlocked and failed to answer or reach a verdict on Question 2. Therefore, they did not reach a complete verdict.

Rule 31(e) North Dakota Rules of Criminal Procedure provides for the use of special verdicts. Primarily these verdicts are used for the determination of the existence of affirmative defenses. However, the principle of the use of special interrogatories, such as used in this case for the charge of Gross Sexual Imposition, is instructive and analogous. Whenever a special verdict form is used, the jury "if it so finds, shall declare that fact in its verdict." See Rule 31(c)(2) and (4). In other words, the verdict must state a finding on the existence of special circumstances before the verdict is considered final. Subsection (3) of Rule 31(e) requires the jury to make a finding on the special issue "before returning a verdict of guilty." A finding is necessary on the special issue even if the verdict on the underlying charge is guilty.

The failure of the jury to render a decision on the special interrogatory renders the verdict incomplete and should not have been accepted.

Rule 31(c), NDRCrim.P., provides that " a defendant may be found guilty of an offense necessarily included in the offense charged."

The North Dakota Supreme Court, in ***State v. Keller,*** 2005 ND 86, 695 N.W.2d

703, addressed the issue of lesser included offenses. A lesser included offense is a "crime that is composed of same, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime." See ***Keller,*** supra at 707, quoting **Black's Law Dictionary,** 1111 (8th Ed. 2004)(emphasis in original).

Keller appears to require that either party, or the Court *sua sponte,* to request a lesser included jury instruction sometime during the trial and before submissions of the case to the jury for deliberation. See ***State v. Wiedrich,*** 460 N.W.2d 680 (N.D. 1990). Neither party requested a lesser included jury instruction on Section 12.1-20-03(1), N.D.Cent.Code. The Court did not so instruct. ***Keller*** also concluded that the term "lesser included offenses" under Section 12.1-01-04(15), N.D.Cent.Code must no longer be used to determine entitlement to a "lesser included offense" instruction.

The jury instruction on a "lesser included offense" must require an acquittal of the offense charged before consideration of lessser-included offenses. ***Keller, supra,*** at 711; ***State v. Daulton,*** 518 N.W.2d 719, 722-23 (N.D. 1994). The jury never acquitted Kautzman on the greater offense under Section 12.1-20-03(a), N.D.Cent.Code. Therefore, they could not have, by default, found him guilty of gross sexual imposition under Section 12.1-20-03, N.D.Cent.Code.

The decision of the Court to deny the Motion for Judgment of Acquittal or Mistrial was clearly erroneous. It must be reversed and remanded to the District Court for an Order either entering a judgment of acquittal or granting a mistrial.

The second issued raised in the Motion for Judgment of Acquittal or Mistrial was Kautzman's request for a judgment of acquittal on the Terrorizing charge.

Katuzman also requested that the Court enter a judgment of acquittal on the Terrorizing charge. Generally, in a criminal case, a verdict is considered accepted by the Court when it is received and announced in open court. ***State v. Knight,*** 421 N.W.2d 847 (Wis. 1988); 23A C.J.S. Sec. 1389(1961); ***Boykins v. United States,*** 702A.2d 1242 (D.C. App. 1997); 5 LaFave, et al Criminal Procedure, § 24.10(d)(2nd. Ed. 1984).

The verdict on the Terrorizing charge was received by the Court and announced in open court as a "Not Guilty" verdict. Due to protests by some of the panel members, the Court sent the jury back for further deliberations and they returned a verdict of guilty. It was error for the Court to do so, and the not guilty verdict must stand because it was effectively received by the Court. ***State v. Knight,*** supra, at 80.

The Court failed to poll the jurors individually until after the jurors were ordered to deliberate further. Because there was no poll that revealed a lack of unanimity, it was error to order them to deliberate and then change their verdict.

The verdicts of "not guilty" should have been accepted.

The Court failed to poll the jurors individually until after the jurors were ordered to deliberate further. Even though several jurors made a spontaneous response to the Court's reading of the verdict of "not guilty", it was impossible to tell whether all jurors agreed with the verdict, as read or not. (Tr.p. 394, ll. 8-24). Because there was no poll conducted that revealed a lack of unanimity, it was reversible error to order the jury to deliberate and then change their verdict.

2. The trial court committed reversible edrror when it denied the Motion to Determine Admissibility of Evidence.

On June 15, 2006, Kautzman filed a Motion to Determine Admissibility of Evidence under Section 12.1-20-15, N.D.Cent.Code.

N.D.Cent.Code Section 12.1-20-15, was superseded by N.D.R.Ev. 412, effective March 1, 1998. Rule 412 provides that the following evidence is not admissible in any criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c) of the rule:

"(1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and

(2) evidence offered to prove any alleged victim's sexual predisposition."

Subdivision (b) of Rule 412 provides for the following exceptions:

"(1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct, offered by the accused to prove consent or by the prosecution; and

(3) evidence the exclusion of which would violate the constitutional rights of the defendant."

Kautzman contends that the evidence regarding past sexual activity between Darbi Boyko and her husband of a similar kind, i.e., anal sex, as charged in this case was relevant

evidence under Rule 412(1). The State alleged that the illegal sexual conduct by Kautzman involved the use of anal sex. Kautzman sought to introduce evidence that Boyko had engaged in similar anal sex with her husband and had enjoyed such sexual conduct. The Court ruled that it was not relevant and was prohibitive under Rule 412.

A similar request was made in ***Sandoval v. Acevedo,*** 996 F.2d 145 (7th Cir. 1993). The Defendant Acevedo sought to introduce testimony by another man that the victim had consented to anal sex at other earlier times to the time that resulted in the charge. The evidence was deemed inadmissible in violation of Illinois rape shield law, similar to Rule 412.

A rape shield statute cannot constitutionally be employed to deny the defendant an opportunity to introduce vital evidence and impeaching evidence can be vital. ***Sandoval,*** supra at 149. The Seventh Circuit did not rule on the issue of a violation of Sixth Amendment privilege of confrontation, as it found that the curative instruction given by the Court rendered any error harmless. The evidence sought to be introduced, i.e. Boyko had consented to anal sex with Kautzman because she had done so before with her husband was vital. Its exclusion deprived Kautzman of his constitutional right of confrontation.

CONCLUSION

The trial court committed reversible error when it declined the Motion for Judgment of Acquittal or Mistrial.

The trial court committed reversible error when it denied the Motion to Determine Admissibility of Evidence.

Dated this 25th day of January, 2007.

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CERTIFICATE OF SERVICE BY MAIL

On the 25th day of January, 2007, a copy of the Brief of Appellant and Appendix to Brief of Appellant was mailed to:

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