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IN THE SUPREME COURT

IN THE STATE OF NORTH DAKOTA

State of North Dakota

Appellee,

v.

Terry Kautzman

Appellant.

Appeal from the District Court
South Central Judicial District
Oliver County, North Dakota
The Honorable Thomas J. Schneider

SUPREME COURT NO. 20060329
OLIVER COUNTY NO. 06-K-1006

****

BRIEF OF APPELLEE

****

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I. Should the Supreme Court Uphold the Jury's Conviction of Kautzman for Gross Sexual Imposition?

II. Should the Supreme Court Uphold the Jury's Conviction of Kautzman for Terrorizing?

III. Did the Trial Court Properly Exclude Evidence of the Victim's Sexual History Under N.D.R.Ev. 412?

STATEMENT OF THE CASE

On July 20, 2006 appellant Terry Kautzman was tried before an Oliver County jury on charges of Attempted Murder, Terrorizing and Gross Sexual Imposition. *Pursuant to a pre-trial agreement*, count I dealing with the Gross Sexual Imposition consisted of two questions:

> "We, the jury impaneled and sworn to try the above-entitled action, do find the defendant, Terry Kautzman (Mark an X on appropriate blank),
> _____ Not Guilty __x__ Guilty
> of the crime of **Gross Sexual Imposition.**
>
> "If you find the Defendant, Terry Kautzman, guilty of the crime of Gross Sexual Imposition, do you find that the State proved beyond a reasonable doubt that the Defendant inflicted serious bodily injury on Darbi Boyko? (Mark an X on appropriate blank), _____ Yes or _____No"
> [Appellant's Tr. p 1]

The jury put an X on the blank for "Guilty" of Gross Sexual Imposition, but was deadlocked on the issue of serious bodily injury and thus did not answer the second question.

The jury leader initially announced a verdict of "Not Guilty" on the Terrorizing charge. When other jurors objected, the Court sent the jury back to their deliberation room. They quickly returned and a poll of the jury revealed then that all jurors intended to convict Kautzman of Terrorizing.

Kautzman was acquitted of Attempted Murder. He was pronounced guilty of Gross Sexual Imposition and Terrorizing and sentenced by District Judge Thomas J. Schneider to three years imprisonment.

STATEMENT OF FACTS

On February 9, 2006 Terry Kautzman called 911 and admitted that he had badly hurt his girlfriend Darbi Boyko. At trial Kautzman was asked what he meant when he told 911that he had "hurt somebody bad":

> **A** Well, I didn't know what -- if I had hurt her when I put her up -- slammed her up against the wall or if I choked her *too much.* I didn't know what happened. She wasn't moving." [Tr. p 350] (emphasis added)

One of the ways Kautzman hurt his victim was by choking her "*too much.*" At trial Kautzman admitted that he could not stop choking his victim.

> **Q** And you also said to -- on the 911 call. "when she went to the floor, I just kept choking her. I couldn't quit." What were you so angry about?
>
> **A** I don't think it was angry, it just—like I said, I think the adrenalin was just... [Tr. page 357]

After his arrest, Kautzman confirmed this violence by telling the deputy sheriff that he had been strangulating his victim:

> "Did you still have her by the throat?
>
> "Yes, I did.
>
> "Were you squeezing?"
>
> You answered, "I was squeezing hard." [Tr. p 353.]

At trial Kautzman discussed this statement to the deputy and detailed his strangulation of his victim for the jury:

Q And you were squeezing hard?

A I could have been, yeah. [Tr p 353.]

Shortly after the attack, EMT personnel found the victim lying unconscious in her bed, her belt buckled, but her pants unbuttoned and unzipped [Tr. p 186] and her throat partially blocked by fluids [Tr. p 187]

Kautzman's admission of hard, uncontrolled choking was also supported by photographs of the victim's bruised neck, which were admitted into evidence without objection.

Another way Kautzman hurt his victim was by ripping her rectum open with a foreign object. MedCenter One's Sexual Assault Nurse Examiner, Tish Scheuer, testified that upon examination the unconscious victim's rectum was not in its normal, closed position. Instead, it stayed open--wide open--indicating that the sphincter muscle had been recently damaged. Her rectum also had a very large tear at the 5 o'clock position. [Tr. p 263] Throughout Scheuer's testimony, both lawyers assured that these injuries occurred during the attack in question. [Tr. p 275,279,281,282]

Ms. Scheuer, whose testimony was not contradicted by any other expert or medical testimony, indicated that neither the blunt trauma next to the rectum nor

the damage to the rectum itself could have been caused by a penis, but that it had to have been caused by a foreign object. [Tr. p 274 - 275]

Kautzman's defense was to testify that the anal sex was "consensual":

> **A** Well. I had asked her if -- and she said, yeah. And when we started, it just -- she just looked at -- you know, looked like she was hurting and I quit right away. I mean, there was penetration, but it wasn't vigorous. [Tr. p 323]

Sexual Assault Nurse Examiner Scheuer refuted Kautzman's claim that the sex was consensual. In her expert opinion, both the size of the tearing and the gaping expansion of the rectum indicated that a non-consensual sexual attack had occurred. [Tr. p 263.] Ms. Scheur also made clear what every human being involved in this case already knows, i.e. that these injuries were excruciatingly painful. [Tr. p 273]

The record supports Kautzman's initial assessment that he had "hurt somebody bad." It contains no evidence or testimony to indicate that the strangulation and the gaping injuries to the victim's rectum occurred at any other time *except* during the victim's February 9th encounter with Kautzman.

LAW AND ARGUMENT

I. The Jury's Conviction of Kautzman for Gross Sexual Imposition Should be Upheld

Appellant Kautzman provides no authority for his assertion that the jury "did not reach a complete verdict" after finding Kautzman guilty of Gross Sexual Imposition. Kautzman does not now challenge the trial court's jury instruction defining Gross Sexual Imposition, since he never objected to that definition at trial. He provides no authority for the proposition that the Verdict form included a "greater offense." And he provides no guidance as to the standard of review applicable to any of these questions.

A. Standard of Review re: Motions for Acquittal or Mistrial: Abuse of Discretion

The trial court has broad *discretion* in ruling on motions for mistrial or a new trial based on alleged juror misconduct. See State v. Breding, 526 N.W. 2d 465 (ND 1995). When a trial court has discretion to make trial decisions, its rulings will only be reversed if that discretion has been abused. State v. Neufeld, 1998 ND 103. ¶ 17, 578 N.W. 2d 536.

Under Sathren v. Behm Propane, Inc., 444 N.W. 2d 696 (ND 1989) even errors affecting the jury will not be grounds for reversal when there is "no demonstration of prejudice which would warrant a new trial." Id. at 698. Nothing

in this record shows unfair prejudice to Kautzman.

When a party does not properly preserve a matter for appeal, the standard of review is that the challenged action must constitute "obvious error which affects substantial rights of the defendant" State v. Jones, 557 N.W. 2d 375 (ND 1996), *citing* State v. Thiel, 411 N.W. 2d 66, 70 (ND 1987), and N.D.R.Crim.P. 52(b).

B. Kautzman *Agreed* to the Verdict Form He Now Contests

The issues surrounding the framing of the Verdict form—specifically including whether Kautzman was entitled to a lesser-included-offense instruction—were *waived* by the agreement of this appellant, as can be seen in the first pages of the transcript:

> Mr. Mahoney: I guess on the jury form, I mean, the verdict form of in the event they found him guilty of this offense, then they'd have to determine whether or not serious bodily injury was inflicted while it was committed.
>
> The Court: Do you agree with that, Mr. Morrow?
>
> Mr. Morrow: **Yeah, I would agree with that. I think there might have to be a separate interrogatory for them to answer.**
>
> The Court: Okay. Well, we'll have to figure that one out later then as far as the jury question to answer at the end, gross sexual imposition.

Mr. Morrow: **I suppose they have to determine whether or not he's guilty or not guilty of the gross sexual imposition; and then if you find him guilty of this offense, do you find that serious bodily injury was inflicted upon the victim.**

[Tr. p 3 – 4]

In State v. Morstad, 493 N.W. 2d 645 (ND 1992) the court confronted a defendant in a gross sexual imposition case who claimed the verdict convicting him was contrary to the weight of the evidence. However, the defendant never made that contention at the trial court level. The court therefore rejected his plea on appeal, noting at page 646 that "*Our insistence on a party's presenting an issue to the trial court before presenting it on appeal is not mere whim or caprice: it is to prevent that party from inviting error upon a trial court, and then seeking to prevail upon appellate review of the invited error.*"

That is precisely what is going on with this appeal. Kautzman advised the Court to first have the jury answer the question about Gross Sexual Imposition; and then, if necessary, have the jury answer the penalty enhancement question. The Court did as Kautzman suggested. And now Kautzman says the Court was wrong for doing what he asked. He now claims that he was entitled to an acquittal on the "greater offense" as a pre-condition of his conviction for Gross Sexual Imposition, i.e. that he should have his cake at trial and then eat it on appeal.

Morstad held that a party must timely and squarely present his issues to the

trial court, to allow that court appropriate time for consideration, including research, study and whatever contemplation the trial court deems necessary. Id. at 646. Having received the benefit of that research and the collected contemplation of the parties, but not liking the results, Kautzman now changes course on appeal. This is clearly improper under many well-settled precedents of this Court. See also Carlson v. Farmers Insurance Group of Companies, 492 N.W. 2d 579 (ND 1992).

Furthermore, in State v. Keller, 2005 ND 86, ¶ 14, 695 N.W. 2d 703 an attempted murder case, the Court made clear that a party like Kautzman has waived his right to an instruction on a lesser-included-offense by failing to request one. "Generally, absent a request for an instruction on a lesser included offense, a trial court need not give such an instruction." Id. at ¶ 31, 711, *citing* State v. Motsko, 261 N.W. 2d 860, 867 (ND 1977).

The State requests the Court affirm the trial court's denial of the motion for an acquittal or mistrial based on the plain fact that Kautzman *agreed* to the precise approach to the verdict form language which he now claims as error.

C. Assuming Arguendo That the Court Finds No Waiver Below, Kautzman Was Still Not Entitled to a Lesser-Included-Offense Instruction.

N.D.C.C. § 12.1-20-03 provides for a variety of different penalties for the crime of Gross Sexual Imposition, depending upon the circumstances. The entire statute reads as follows:

12.1-20-03. Gross sexual imposition—Penalty.

1. A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if:

a. That person compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

b. That person or someone with that person's knowledge has substantially impaired the victim's power to appraise or control the victim's conduct by administering or employing without the victim's knowledge intoxicants, a controlled substance as defined in chapter 19-03.1, or other means with intent to prevent resistance;

c. That person knows that the victim is unaware that a sexual act is being committed upon him or her;

d. The victim is less than fifteen years old; or

e. That person knows or has reasonable cause to believe that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct.

2. A person who engages in sexual contact with another, or who causes another to engage in sexual contact, is guilty of an offense if:

a. The victim is less than fifteen years old; or

b. That person compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being.

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, or 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.

b. An offense under this section is a class C felony if the actor's conduct violates subdivision d of subsection 1 or subdivision a of subsection 2, and the actor was at least four but not more than five years older than the victim at the time of the offense.

c. **Otherwise the offense is a class A felony.**

4. If, as a result of injuries sustained during the course of an offense under this section, the victim dies, the offense is a class AA felony, for which the maximum penalty of life imprisonment without parole must be imposed. [Emphasis Added]

To fairly deal with these penalty options (as noted above) both parties agreed before trial that the jury should first determine whether Kautzman was guilty of the crime of Gross Sexual Imposition; if so, then the jury would need to answer the special interrogatory on enhancing the penalty to a Class AA status.

This is a statutory provision for enhancing penalties—it is NOT a statute that allows for lesser-included-offenses.

In State vs Piper, 261 N.W. 2d 650 (ND 1977) the court set forth the standard for instructing on a lesser included offense. "*The test is not merely whether or not the offense is a lesser included offense of the basic offense charged, but rather is whether or not there is evidence which will create a reasonable doubt as to whether the greater offense can support a conviction of the lesser included offense.*" [Emphasis Added]

Piper was a case of mistaken identity, where the defendant in an Attempted Sexual Imposition charge claimed the victim had mistaken him for her boyfriend. This Court found in the footnote on page 654 that "if the defendant's testimony were accepted and believed, there would be no attempted sexual imposition. Neither would there be a sexual assault, because defendant testified that the complainant made advances to him, mistaking him for her boyfriend, 'Wayne'. Defendant's testimony, if believed, supports an acquittal of both attempted sexual imposition and sexual assault." Id. at 654.

Terry Kautzman similarly alleges that the jury should have been instructed on the "lesser included charge" of class A Gross Sexual Imposition. This is not so! This is not supported by Kautzman's own version of the case, which is that his victim consented to having sex with him. Like the testimony of the Piper defendant, Kautzman's testimony, if believed, supports an acquittal of BOTH Gross Sexual Imposition with a class A penalty and Gross Sexual Imposition with a class AA penalty. Kautzman's testimony, if believed, does NOT support an acquittal on class AA gross sexual imposition and a conviction on class A gross sexual imposition. Under the Court's Piper analysis, Kautzman was therefore not entitled to a lesser included offense instruction.

This same analysis was reinforced more recently in the case of State v. Keller, 2005 ND 86, ¶ 31, 695 N.W. 2d 703 an attempted murder case in which the court stated: "For a lesser included offense instruction, there must be evidence on which a jury could rationally find beyond a reasonable doubt that the defendant is not guilty of the greater offense and to find beyond a reasonable doubt that the defendant is guilty of the lesser." Id. at ¶ 31, 711.

Again, Kautzman offered no such evidence in this case. His testimony and his evidence was that his victim consented, i.e. *that no Gross Sexual Imposition of any kind was committed.* Under Keller, therefore, Kautzman was not entitled to any lesser-included-offense instruction.

The fact is that North Dakota's Gross Sexual Imposition statute does not,

properly speaking, include lesser included offenses. What it does do is layout various aggravating factors that enhance the penalties for the one single crime the Legislature identified as Gross Sexual Imposition, i.e. imposing sexual contact by compelling another to engage in a sexual act. This is how the parties understood and applied the statute prior to the start of this trial.

The Court's controlling precedents leave Kautzman with no valid legal basis for requesting a mistrial, and support this Court affirming Kautzman's jury conviction for Gross Sexual Imposition.

II. The Jury's Conviction of Kautzman for Terrorizing Should be Upheld

Kautzman asked to be acquitted on the Terrorizing charge because the trial court allowed the jury to go back into the jury room in order to correct a mistake the jury leader made in first announcing the jury's verdict on the Terrorizing charge.

A. Standard of Review: Abuse of Discretion

NDCC §29-21-02 allows the court, *in the exercise of its sound discretion*, to control the order of trial. "When the state of the pleadings requires it, or in any other case, for good reasons and in the sound discretion of the court, the order of trial and argument prescribed in NDCC §29-21-01 may be departed from." [emphasis added] When a trial court has discretion to make trial decisions, its

rulings will only be reversed if that discretion has been abused. State v. Neufeld, 1998 ND 103, ¶ 17, 578 N.W. 2d 536.

This Court has necessarily found that many other aspects of a trial fall within the court's discretion, including the reciting of a not guilty plea after a witness had testified State v. Skjonsby, 319 NW. 2d 764 (ND 1982); the reopening of a party's case, State v. Mayer, 356 N.W. 2d 149 (ND 1984) and the presentation of additional evidence by the State after the defense has rested, State v. Puhr, 316 N.W. 2d 75 (ND 1982). These matters are far more significant than the trifling and eminently sensible direction the Court gave the jury in this case to go back to the deliberation room and clear up its miscommunication so that it could announce a proper and unanimous verdict on the Terrorizing charge.

B. The Trial Court Properly Followed N.D.R.Crim.P. Rule 31

Pursuant to Rule 31(a), N.D.R.Crim.P. the jury must return its verdict to a judge in open court. The verdict must be unanimous. Subsection (D) of Rule 31 provides:

> **Jury poll:** "After a verdict is returned, but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury."

At Kautzman's trial, it was apparent from the reaction of the jurors to the reading of the Verdict that the jury leader misspoke regarding the terrorizing charge. The court inquired and, consistent with Rule 31, directed the jury to deliberate further to reach unanimity on this count. The jury quickly returned with a corrected verdict form expressing a unanimous finding of guilty to the terrorizing count. A poll of the jury conducted thereafter confirmed the unanimity of the jury on this and the other counts, and the jury was discharged.

C. The Mistaken Reading of the Verdict Did NOT Make it "Final"

Rule 32 of the North Dakota Rules of Criminal Procedure requires the judge's signature and entry of the judgment by the clerk in order to make it final. To construe rule 31 and rule 32 in the manner now advocated by Kautzman would not allow a judge to send the jury back for further deliberations in order to rectify a mistake made in filling out the verdict form.

As the trial court noted in its Order denying Kautzman's Motion for a Mistrial, this reading of the rule would create ludicrous results.

D. Many Provisions of the Century Code Also Support the Court's Handling of the Mistaken Reading of the Verdict

The North Dakota Century Code, at §29-22-26 makes clear that a verdict is not accepted, merely because it is returned by the jury: "If the jurors return a verdict

of guilty against the accused, the court, before it is accepted, shall ascertain whether it conforms to the law of the case."

Similarly, NDCC §29-22-27 specifically authorizes the court to have the jury reconsider its verdict.

> "When there is a verdict of conviction, in which it appears to the court that the jurors have mistaken the law, the court may explain the reason for that opinion and may direct the jurors to reconsider their verdict."

NDCC §29-22-28 provides that a verdict which is unclear cannot be recorded until the intention of the jurors is understood. "If the jurors render a verdict, which is neither a general nor a special verdict, the court, with proper instructions as to the law, may direct them to reconsider it, and it cannot be recorded until it is rendered in such form that it can be clearly understood there from whether the intent of the jurors is to render a general verdict or to find the facts specially and leave the judgment to the court."

If there was any mistake made by either the jury or the court in this matter, it clearly and obviously was harmless error. This Court has found other errors in jury communication, far more serious than the one in this case, to be harmless beyond a reasonable doubt. One example is the judge communicating with the jury in the absence of the defendant. State v. Ash, 526 N.W. 2d 473 (ND 1995); State v. Hatch, 346 N.W. 2d 268 (ND 1984). Another is the inadvertent reading of the information by the judge, rather than by the clerk or State's Attorney. This did

not prevent defendant from having a fair trial. State v. Ellvanger, 453 N.W. 2d 810 (ND 1990).

This Court should therefore affirm the trial court's denial of Kautzman's motion for a mistrial on the Terrorism charge.

III. The Trial Court Properly Excluded Evidence of the Victim's Sexual History under N.D.R.Ev. 412.

Prior to trial Kautzman made a timely motion to admit testimony of his victim's sexual history. His offer of proof and supporting affidavit proposed to venture into the intimate relations the victim supposedly once had with her estranged husband at an unspecified time in the past, and some alleged actions of the victim days and even months *after* the Kautzman attack. [App. p 9-12]

A. Standard of Review for the Scope of Cross Examination: Abuse of Discretion

Kautzman's Motion was primarily grounded in a rule of evidence, and almost all of his citations and authority refer to evidentiary (not Constitutional) authorities.

Although cross-examination is the primary mode of safeguarding the Sixth Amendment right of confrontation, the scope of cross-examination is a matter within the trial court's discretion. State v. Padgett, 410 N.W. 2d 143 (ND 1987): "The trial court has broad discretion in evidentiary matters, and, absent an abuse of

discretion, we will not reverse its decision." State v. Jensen, 2000 ND 28, ¶ 10, 606 N.W. 2d 507, 511, *citing* State v. Leinen, 1999 ND 138, ¶ 7, 598 N.W. 2d 102.

On the other hand, Appellant Kautzman does make one passing reference to his Sixth Amendment rights. The standard of review for a violation of constitutional rights is a *de novo* review. State v. Sevigny, 2006 ND 211, ¶ 28, 722 N.W. 2d 515 *citing* State v. Messner, 1998 ND 151, ¶ 8, 583 N.W. 2d 109. An act of the Legislature is presumed to be correct, valid, and constitutional, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity. State v. Burr, 1999 ND 143, ¶ 11, 598 N.W. 2d 147.

It appears that the great weight of caselaw analyzes Sixth Amendment challenges to Rape Shield laws under the abuse of discretion standard. See, e.g., United States v. Azure, 845 F. 2d 1503, 1506 (8th Cir 1988) ["under these circumstances, we cannot say the district court abused its discretion in excluding evidence of Wendy's alleged prior sexual activities."]; U.S. v. Holy Bear, 624 F. 2d 853, 856 (8th Cir. 1980) [The standard of review for the application of the rape shield provisions is a manifest abuse of discretion standard]; See Also State v. Stuit, 885 P.2d 1290, 1295 (Mont, 1984); State v. Perez, 995 P 2d 372, 376 (KS 1999).

B. Kautzman Waived All Constitutional Arguments by Not Raising Them With the Trial Court or With the North Dakota Attorney General

The undersigned did not try this case. But the first time we see any mention of the Sixth Amendment or the U.S. Constitution in the transcript or the record is on Kautzman's appeal to this Court. All the authority cited above in section IB of this Brief therefore recommends a ruling from this Court that Kautzman cannot now come in at this late stage and make Constitutional arguments for the first time at the appellate level—including State v. Morstad, 493 N.W. 2d 645 (ND 1992); Carlson v. Farmers Insurance Group of Companies, 492 N.W. 2d 579 (ND 1992); State v. Keller, 2005 ND 86, ¶ 14, 695 N.W. 2d 703; and State v. Motsko, 261 N.W. 2d 860, 867 (ND 1977).

The cursory nature of Kautzman's reference to the Sixth Amendment suggests he was not particularly serious about making a Constitutional claim in this case. But if he was serious about raising a constitutional challenge to N.D.R.Ev. 412, then he was required to give the Attorney General of North Dakota notice of his intention to challenge its constitutionality. See NDCC §32-23-11:

> "In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party, and is entitled to be heard, **and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must be served with a copy of the proceeding and is entitled to be heard."**

It appears from a review of the record that no such notice was given to the Attorney General in this case.

The State has a legitimate interest in protecting its rules of evidence and

procedure; so if Kautzman did fail to notify the Attorney General, it would be a serious obstacle for his attack on the Constitutionality of Rule 412.

Kautzman has apparently failed to raise any constitutional argument at the trial court level. (The State says this is "apparently" so because the undersigned was not at the trial and does not have access to the pre-trial hearings.) Since there is nothing in this record to show any constitutional objections at trial, Kautzman's constitutional claim on appeal must fail. In U.S. v. Shaw, 824 F. 2d 601 (8th Cir. 1987) a defendant charged with seven counts of carnal knowledge complained on appeal about the trial court's Rule 412 exclusion of evidence concerning the victim's sexual history. The Eighth Circuit summarily dismissed any constitutional aspect to the claim because it was not properly preserved for appeal. "By failing to raise a [constitutional] argument in the district court through either a written motion or orally at trial, Shaw waived his right to obtain full review of this argument on appeal." Id. at 607, *citing* Powell v. Burns, 763 F. 2d 337, 338-339 (8th Cir. 1985).

It also appears that Kautzman may have failed to notify the victim of his intention to offer evidence of her sexual history, as required by N.D.R.Ev. 412 (c)(1)(B). This is still further grounds for finding that Kautzman has waived his ability to complain about the exclusion of the victim's sexual history.

The State requests the Court affirm the trial court's exclusion of the proffered testimony concerning the victim's sexual history based on Kautzman's

failure to preserve *any* Constitutional issue at the trial court level. The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories. Gonzalez v. Tounjian, 2003 ND 121, ¶ 31, 665 N.W. 2d 705.

C. Kautzman Suffered No Unfair Prejudice by the Court's Exclusion of the Victim's Sexual History

The United States Supreme Court has supported a Rape Shield law in the face of a Sixth Amendment Confrontation Clause claim similar the one now urged by appellant Kautzman, noting that the Sixth Amendment bestows NO absolute rights: "[T]he right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Michigan v. Lucas, 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed. 2d 205 (1991)

One reason Kautzman suffered no unfair prejudice by the denial of his Motion is that his admitted purpose for offering the victim's *post-attack* sexual history was to impeach her character. And impeaching the victim's character is NOT a recognized exception to Rule 412's general prohibition on evidence of sexual history, United States v. Withorn, 204 F. 3d 790, 795 (8th Cir. 2000).

In United States v. Azure, 845 F. 2d 1503 (8th Cir 1988) defendant was convicted of having carnal knowledge of a female under age 16. He wanted to

introduce evidence of his victim's past sexual relations with a boy. Like appellant Kautzman, the defendant in Azure wanted to introduce the prior sexual conduct for general "impeachment purposes," including her previous denials of sexual behavior, and to show the victim's capability to fabricate a story. The Eighth Circuit noted that "these are not recognized exceptions under rule 412. As we have previously stated, the effect of Rule 412 is 'to preclude the routine use of evidence of specific instances of a rape victim's prior sexual behavior'." Id. at 1506.

Similarly in U.S. v. Shaw, 824 F. 2d 601 (8th Cir. 1987) the Court held that "The effect of [rule 412] is to preclude the routine use of evidence of specific instances of a rape victim's prior sexual behavior. *Such evidence will be admitted only in clearly and narrowly defined circumstances...* . In determining the admissibility of such evidence, the court will consider all the facts and circumstances surrounding the evidence, such as the amount of time that lapsed between the alleged prior act and the rape charged in the prosecution. The greater the lapse of time, of course, the less likely it is that such evidence will be admitted." Id. at 607. [emphasis added]

Shaw thus raises the other obvious problem in Kautzman's Rule 412 proffer—the excluded testimony either concerned supposed sexual preferences of the victim during a completely unspecified time WELL PRIOR to the Kautzman attack, or it pertained to events AFTER his February 9th attack on this victim. All

of the excluded testimony was immaterial to the exclusions set forth in Rule 412.

The defendant's conduct in this case was, by his own admission, extremely violent. He admitted to slamming his victim into the wall. He admitted to choking her. He admitted that he couldn't stop choking her. He admitted to having penetrated her anally. He admitted she passed out. [Tr. p 331] He admitted that he "hurt her bad." And the only sexual abuse expert to testify in this case established that the wounds and the rectum tear and the bruises were the results of violence and could not have resulted from consensual sex. Kautzman's violence left no room for his victim to "consent." Kautzman cannot both *admit* to this parade of violence AND claim that his victim consented.

All the parts of this violent saga came into evidence without objection by the defense.

Therefore the only possible purpose for seeking to introduce testimony about the victim's sexual practices (before and after the attack) would have been to besmirch the victim, to distract the jury with bawdy tangents having no connection to the attack on February 9th, 2006. This is the exact problem which Rape Shield laws are designed to prevent. In actions involving sex crimes, the complainant is not the person being tried. The proceedings should not put the complaining witness on trial to shift the attention away from the accused. State v. Buckley, 325 N.W. 2d 169 (ND 1982).

Addressing that problem is Constitutionally proper. Determining that the

unfair prejudice of these bawdy tangents outweighs their probative value is proper under conventional evidentiary rules and under the U.S. Constitution.

The trial court did not deprive appellant Kautzman of his Constitutional right of confrontation, or cause him to suffer any other unfair harm. The trial court weighed the slight probative value of the proffered evidence against its substantial prejudice, and made the proper evidentiary ruling under Rule 412.

IV. Requested Decision: Affirm the Trial Court

The State of North Dakota respectfully requests that the Supreme Court affirm the trial court in all respects.

Dated this 26th day of February, 2007.

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CERTIFICATE OF SERVICE

On the 26th day of February, 2007, a copy of the foregoing Brief of Appellee was hand delivered to:

Kent M. Morrow
Attorney at Law
411 North 4th Street
Bismarck, ND 58501

and seven (7) copies were hand delivered and filed with the Clerk of the North Dakota Supreme Court.

Michael G. Liffrig