

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

NOV 25 2008

The State of North Dakota,)	STATE OF NORTH DAKOTA
)	Supreme Court No. 20080220
Plaintiff and Appellee,)	
)	District Court No. 18-08-K-167
vs.)	
)	
Timothy Carlton Saulter,)	
)	
Defendant and Appellant.)	

ON APPEAL FROM CRIMINAL JUDGMENT
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE SONJA CLAPP, PRESIDING.

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

- I. Whether the district court abused its discretion when it admitted Detective Vigness' lay opinion testimony.**
- II. Whether there was sufficient evidence to convict the Defendant of Aggravated Assault.**

STATEMENT OF THE CASE

[¶1] Timothy Carlton Saulter, (hereinafter “the Defendant”), appeals from a judgment of criminal conviction in the District Court of Grand Forks County. Mr. Saulter was charged with Aggravated Assault on January 17, 2008, in violation of N.D.C.C. § 12.1-17-02(1) arising from the Defendant willfully causing serious bodily injury to another human being. Appellant’s App. at 1. A bench trial was held and the Defendant was convicted on July 16, 2008. Appellant’s App. at 8-10. Notice of Appeal was entered on September 2, 2008. Appellant’s App. at 16.

STATEMENT OF THE FACTS

[¶2] On the night of January 15, 2008, the victim, Jade Tandeski (hereinafter “Ms. Tandeski” and “the victim”), was at home, in her bedroom, with her then-boyfriend, the Defendant. Trial Tr., p. 14, July 16, 2008. Ms. Tandeski received a phone call from a friend at approximately 11:00 p.m. Id. After Ms. Tandeski ended this telephone call, the Defendant picked up her cellular telephone and pressed the redial button. Id. at 15. The brother of Ms. Tandeski’s friend answered on the other end of the line. Id. The Defendant became upset and began calling Ms. Tandeski names. Id. The altercation then escalated into a physical fight. Id. The Defendant grabbed Ms. Tandeski by the throat with one hand and threw her into a wall. Id. at 15-16, 23. She managed to escape briefly and went down the hallway away from her bedroom. Id. The Defendant caught up with her and grabbed her by the throat with two hands. Id. He lifted Ms. Tandeski up off the ground by her throat and pushed her into a closet. Id. at 16, 23-24. As a result of being lifted by the throat, it was difficult for Ms. Tandeski to breathe and she had a sore throat. Id. at 17. She testified at trial that it was difficult for her to get air and her throat was very tight. Id. After the altercation, the Defendant left the apartment. Id. at 19. Ms. Tandeski testified to these events at trial. Id. at 11-45.

[¶3] The victim’s friend, Amanda Sawyer, testified that she heard the altercation between the Defendant and Ms. Tandeski over the telephone. Id. at 53-54. Ms. Sawyer received a call from Ms. Tandeski’s telephone on the evening of January 15. Id. at 53. When she picked up, no one answered on the other line, but she did hear noises. Id. She heard Ms. Tandeski and the Defendant yelling, sounds like glass breaking, and skin hitting skin. Id. After the telephone call ended, Ms. Sawyer went to Ms. Tandeski’s

apartment. Id. at 54. Ms. Sawyer observed that Ms. Tandeski's tank top was ripped and there were scrapes on her body. Id. She also observed redness on Ms. Tandeski's neck. Id. at 55. Ms. Sawyer took Ms. Tandeski and her son, M.T., to stay at Ms. Sawyer's apartment that evening because she feared for their safety. Id. at 56-57.

[¶4] Officers Jason Dvorak and Dustin Beseke of the Grand Forks Police Department testified at trial. Id. at 61-88. The officers conducted an interview with Ms. Tandeski the day after the altercation. Id. at 62-63, 82-83. Ms. Tandeski reported that she had been assaulted and strangled by the Defendant. Id. at 64. Officers Dvorak and Beseke both observed marks on her body and her neck. Id. at 65, 83. Off. Dvorak observed red marks on Ms. Tankeski's neck that looked like handprints or finger marks. Id. at 65. Off. Beseke testified that he observed bruises on Ms. Tandeski's neck. Id. at 84. Both officers testified that they submitted an Affidavit of Probable Cause to charge the Defendant with Aggravated Assault. Id. at 73-74, 87. Off. Dvorak testified that he based this decision on the victim's swollen neck, the red marks on her throat, and her change in voice. Id. at 73-74. Off. Beseke testified that he based this decision on the victim's report that she had been lifted by her throat, causing asphyxiation. Id. at 87. On cross-examination, the Defendant's attorney showed Off. Dvorak Defendant's Exhibit 2, which was a photograph of the victim's neck. Id. at 78-79. Off. Dvorak testified that her neck did not look swollen in the photograph. Id. at 79.

[¶5] Detective James Vigness testified at trial, as well. Id. at 89-109. Det. Vigness has training in investigating domestic violence and strangulation crimes, including attending a conference in San Diego. Id. at 91. During Det. Vigness'

testimony. the following exchange took place between the Assistant States Attorney, Meredith Larson, the Defendant's attorney, Dan Borgen, and the court:

Q. And when you talk about strangulation, what is that commonly explained as within the police department?

MR. BORGEN: Your Honor. I think that we are getting into the area of expert testimony. Mr. Vigness has not been disclosed as an expert. I don't have descriptions of what his opinion are going to be, what his qualifications were or anything like that prior to trial. So I would object to any – going into any area of expertise.

...

MS. LARSON: Sure. With respect to the first part, Your Honor, I think that's a basic evidence rule. Rule 701 specifically sets forth what a lay witness can testify to. I'm not attempting to qualify Detective Vigness as an expert. Though he may be qualified based on his experience, that's not what I'm trying to elicit.

Lay witnesses can testify based on their opinion if those opinions are rationally based on the profession (*sic*) of the witness or would help the trier of facts understand the facts at issue. And whether or not Miss Tandeski was strangled is certainly the fact at issue in this case.

Detective Vigness should be able to testify as to his experience investigating strangulations, what common signs there are for strangulation crime scenes as an officer would testify to who responded to a DUI call and would indicate for the Court when they have been drinking.

...

THE COURT: I am going to overrule the objection from the defense on the first issue and allow this witness to testify as to his knowledge, his specialized knowledge. Certainly, as we go along if it does get into the realm of any expertise beyond a lay witness and his training, you could certainly make another objection.

Id. at 92-95. Det. Vigness then testified that “strangulation” means “impediment of blood or airflow to the brain.” Id. at 95. He stated that a common indicator of strangulation is when a victim reports that there was external pressure placed on the neck. Id. at 96.

[¶6] The Assistant States Attorney asked Det. Vigness what the significance is of observing physical indicia of strangulation on the neck. Id. at 97. Det. Vigness testified. “The significance to me, and this is from the San Diego study –” Id. Then, the following exchange took place:

MR. BORGEN: Your Honor, I object. He is quoting a course that he took, again, that calls for the expert. He just said, according to my San Diego course that he took, it’s clearly going into the realm of specialized knowledge beyond common knowledge.

MS. LARSON: And. Your Honor, I can rephrase my question. I’m not asking specific to any prior training or statistics. My question is basically when you are investigating strangulation crimes, what is the significance of seeing a bruise on the neck area. This is not expert testimony. It’s pursuant to Rule 701. Furthermore, Mr. Borgen opened the door to this issue when he interviewed or when he cross-examined Officer Dvorak making note that there were no signs on the right side of the neck and very faint signs on the left side of the neck. So I should be allowed to clarify this issue for the Court.

THE COURT: I will sustain the objection with regard to any quotes from any courses that were taken. Miss Larson, if you want to restate that, you certainly can.

Id. at 97-98. The Assistant States Attorney then rephrased her question:

Q. When you interview someone as an investigator, within your role, what would be the significance of observing any physical signs of injury of someone who has allegedly been strangled?

A. In a large percentage of strangulations no visible signs are observable. Much smaller percentage there will be some signs that can be observed. Some might be observed but not very well photographed. And a much smaller percentage where you actually do see physical signs of a strangulation. To me, that represents that there has been significant pressure to produce those visible marks.

Id. at 98. Det. Vigness noted that Ms. Tandeski had reported to him that her neck was reddened and swollen, her voice became hoarse, and her neck was stiff and that these symptoms are consistent with strangulation. Id. at 100. Det. Vigness testified that, based

on his observations of Ms. Tandeski and his interview with her, he believed that she had been strangled. Id. at 101.

[¶7] The Defendant presented no evidence. Id. at 110. After closing arguments, Judge Clapp issued her verdict, finding the Defendant guilty of Aggravated Assault. Id. at 122-23. While explaining the basis for her judgment, Judge Clapp stated:

I do want to state that the evidence indicates that Miss Tandeski was grabbed around the neck, and whether it was one hand or two hands, is not determinative in this case. The fact is that as a result of the strangulation there was an impediment of airflow to either her brain or her lungs and impediment being a hand.

And the Court does find this strangulation is supported by such things as her difficulty in breathing, her stiff neck, her swollen neck, and her bruising and redness around her neck.

Id. at 123. Judgment was entered against the Defendant and this appeal follows.

Appellant's App. at 8-10, 16.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED DETECTIVE VIGNESS' LAY OPINION TESTIMONY

[¶8] It was not an abuse of discretion for the district court to admit Det. Vigness' lay opinion testimony. North Dakota Rule of Evidence 701 allows opinion testimony by lay witnesses as long as the testimony is limited to opinions that are "(i) rationally based on the perception of the witness and (ii) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." N.D.R.Ev. 701. This rule is based on Federal Rule of Evidence 701. N.D.R.Ev. 701, explanatory note. The admission of lay opinion testimony will only be overturned if the trial court abused its discretion. State v. McNair, 491 N.W.2d 397, 401 (N.D. 1992) (citing United States v. Hoffner, 777 F.2d 1423, 1425 (10th Cir. 1985); Bohannon v. Pegelow, 652 F.2d 729, 732 (7th Cir. 1981)). "A trial court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably or if it misinterprets or misapplies the law." State v. Streeper, 2007 ND 25, ¶ 11, 727 N.W.2d 759 (quoting State v. Ramsey, 2005 ND 42, ¶ 8, 692 N.W.2d 498). Because the trial court did not abuse its discretion by admitting Det. Vigness' lay opinion testimony, the Defendant's conviction should be affirmed.

[¶9] The North Dakota Supreme Court has previously allowed police officers to give lay opinion testimony under Rule 701. In State v. Streeper, an officer was allowed to offer his lay opinion about calculating the time when digital photos were taken. Streeper, 2007 ND 25, ¶ 24, 727 N.W.2d 759. The officer testified about a forty-hour training course in which he took part, and the trial court stated that the jury could decide whether his training and experience were sufficient to support his opinion. Id. Admitting

the lay opinion testimony was not an abuse of discretion. Id. ¶ 25. The officer's specialized training did not require the State to certify him as an expert before eliciting his opinion testimony. Id. ¶ 24. Similarly in this case, Det. Vigness has received specialized training, but that does not mandate that he be qualified as an expert to offer his opinion. Trial Tr., p. 91-92, July 16, 2008.

[¶10] In State v. Miller, a deputy was allowed to offer his lay opinion as to whether the Defendant would have been able to drink alcohol after suffering a laceration to his lip. State v. Miller, 530 N.W.2d 652, 656 (N.D. 1995). The Court noted that the deputy's opinions were rationally based on his observations and aided the court in understanding a fact in issue. Id. (citing N.D.R.Ev. 701). Similarly in this case, Det. Vigness testified about the effects and symptoms of an injury, namely strangulation. Trial Tr., p. 95-101, July 16, 2008. His testimony was rationally based on his perceptions and helped the court understand a fact in issue. See N.D.R.Ev. 701. Because the court did not abuse its discretion, the Defendant's conviction should be affirmed.

[¶11] Other jurisdictions have allowed officers to testify to their opinions in cases involving physical injuries, without being qualified as experts. In Kent v. State, the Supreme Court of Indiana allowed an officer that had received training as an Emergency Medical Technician to testify that a child's injuries were not consistent with the child having fallen in the bathtub. Kent v. State, 675 N.E.2d 332, 338-39 (Ind. 1996). The officer's specialized training did not mandate that he be qualified as an expert witness. Id. at 339. Similarly in this case, Det. Vigness has received specialized training, but that does not require that he be qualified as an expert to offer his opinion rationally based on his perceptions. Trial Tr., p. 91-92, July 16, 2008.

[¶12] In State v. Fisher, an officer that investigated a death testified that the hemorrhages in the whites of the victim's eyes were consistent with strangulation. State v. Fisher, 580 S.E.2d 405, 410 (N.C. Ct. App. 2003). The officer testified to this opinion without being qualified as an expert. Id. Similarly, Det. Vigness was properly allowed to testify that Ms. Tandeski's injuries and symptoms were consistent with strangulation. Trial Tr., p. 100-01, July 16, 2008. This testimony was rationally based on Det. Vigness' perceptions and it helped the court understand a fact in issue. See N.D.R.Ev. 701. The trial court did not abuse its discretion. Thus, the Defendant's conviction should be affirmed.

[¶13] The North Dakota Supreme Court and courts of other jurisdictions have previously allowed officers to give their lay opinion testimony regarding whether a subject is intoxicated. Det. Vigness' testimony was similarly based on his training and experience. In City of Fargo v. McLaughlin, the North Dakota Supreme Court allowed an officer to testify to whether the result of a high gaze nystagmus (HGN) test led to his opinion that the Defendant was under the influence of alcohol, as long as the HGN test was performed with other field sobriety tests and the officer had training and experience in administering the test. City of Fargo v. McLaughlin, 512 N.W.2d 700, 707-08 (N.D. 1994). The officer's training and experience did not mandate that he be qualified as an expert. Instead, testimony regarding his training and experience was necessary to lay a foundation for his lay opinion testimony. Similarly in this case, Det. Vigness' training and experience should not preclude him from offering lay opinion testimony.

[¶14] In Harris v. District of Columbia, officers were allowed to testify that, in their opinion, the Defendant was under the influence of drugs, as long as the officers had

experience in being around people that were under the influence of drugs. Harris v. District of Columbia, 601 A.2d 21, 26 (D.C. 1991). Again, the officers' experience did not require that they be qualified as experts before offering their opinions. Id. Testimony regarding the officers' experience was necessary to lay the foundation for their lay opinion testimony. Id. Similarly, Det. Vigness' testimony was based on his experience as a detective investigating domestic violence and strangulation cases. Testimony regarding his experience as a detective was proper to lay a foundation for his lay opinion testimony. Admitting Det. Vigness' testimony was not an abuse of discretion. Thus, the Defendant's conviction should be affirmed.

[¶15] The Eighth Circuit Court of Appeals has stated, "Personal knowledge or perceptions based on experience is a sufficient foundation for [lay opinion] testimony." United States v. Oslund, 543 F.3d 1048, 1058-59 (8th Cir. 2006) (quoting In re Air Crash At Little Rock Ark., 291 F.3d 503, 515 (8th Cir.), cert. denied, 537 U.S. 974 (2002)). Det. Vigness' testimony was properly admitted because it was based on his perceptions and experience. He was allowed to testify to how he defines strangulation, based on his experience investigating strangulation crimes. Trial Tr., p. 95, July 16, 2008. He described indicators and symptoms of strangulation that he typically looks for in his investigations. Id. at 96. Det. Vigness testified to the significance of observing physical signs of injury, based on the cases he has investigated. Id. at 98-99. The only time he referred specifically to information he received in a training session there was an objection that was sustained. Id. at 97-98. Det. Vigness testified regarding the interview he conducted with Ms. Tandeski and the symptoms and injuries that she described. Id. at 99-101. He then testified that, based on his perceptions, her symptoms and injuries were

consistent with strangulation and that it was his opinion that she had suffered an impediment of air or blood flow to the brain or lungs. Id. 100-01.

[¶16] All of Det. Vigness' testimony was rationally based on his perceptions and experience and was helpful to the court to determine whether Ms. Tandeski suffered an impediment of air flow to the brain or lungs, which was a fact in issue. See N.D.R.Ev. 701. He was not testifying regarding scientific, technical, or specialized knowledge. See N.D.R.Ev. 702. He was not testifying to the physiological effects of strangulation from a medical perspective. He was merely basing his opinions on his perceptions and experience. Thus, Det. Vigness' testimony met the requirements of Rule 701 and was properly admitted. See N.D.R.Ev. 701. Because the court did not abuse its discretion, the Defendant's conviction should be affirmed.

[¶17] In addition, the Defendant opened the door to Det. Vigness' testimony when the Defendant's attorney cross-examined Off. Dvorak regarding the victim's injuries. Trial Tr., p. 78-79, July 16, 2008. The Defendant's attorney introduced Defendant's Exhibit 2, which was a picture of the victim's neck. Id. at 78. The Defendant's attorney then showed the photograph to Off. Dvorak and asked him whether the victim's neck looked swollen, to which Off. Dvorak replied that it did not. Id. at 79. This called into question the severity of Ms. Tandeski's injuries. Det. Vigness' testimony that Ms. Tandeski's injuries were consistent with strangulation put the injuries in their proper context. Id. at 100-01. The testimony was rationally based on Det. Vigness' perceptions and helped the court determine a fact in issue. See N.D.R.Ev. 701. Admitting the testimony was not an abuse of discretion, thus the Defendant's conviction should be affirmed.

II. THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF AGGRAVATED ASSAULT

[¶18] There was sufficient evidence to prove that the Defendant willfully caused serious bodily injury to Ms. Tandeski. N.D.C.C. § 12.1-17-02(1). The definition of serious bodily injury includes “impediment of air flow or blood flow to the brain or lungs.” N.D.C.C. 12.1-01-04(29). When reviewing a conviction for sufficiency of the evidence, the Court does not resolve conflicts in the evidence or weigh the credibility of witnesses. State v. Fasching, 461 N.W.2d 102, 103 (N.D. 1990) (citing City of Mandan v. Thompson, 453 N.W.2d 827 (N.D. 1990)). To overturn a conviction, the Defendant must show that the evidence, when viewed in a light most favorable to the verdict, permits no reasonable inference of guilt. Id. at 102-03 (citing State v. Jacobson, 419 N.W.2d 899, 901 (N.D. 1988)).

[¶19] The evidence presented by the State clearly supports a finding of guilt. Ms. Tandeski testified that the Defendant lifted her off her feet by the neck with two hands. Trial Tr., pp. 15-16, July 16, 2008. She testified that it was difficult for her to get air, that her throat was tight, and that later there were bruises on her neck. Id. at 17, 29. There was no doubt in her mind that she suffered an impediment of air flow to her brain or lungs. Id. at 43. Amanda Sawyer, Off. Dvorak, and Off. Beseke observed bruises, redness, and swelling on her neck. Id. at 55, 64-65, 83-84. Det. Vigness testified that Ms. Tandeski’s symptoms and injuries were consistent with having been strangled. Id. at 100-01. Judge Clapp ruled that the State had proven beyond a reasonable doubt that the Defendant willfully caused serious bodily injury to Ms. Tandeski and that she had suffered impediment of air flow to her brain or lungs. Id. at 123. This conclusion was

supported by the evidence of her difficulty breathing, stiff and swollen neck, and the redness and bruising on her neck. Id. There was ample evidence presented to support the Defendant's conviction. Thus, his conviction should be affirmed.

CONCLUSION

[¶20] For all the foregoing reasons, the State respectfully requests that this Court affirm the Defendant's conviction.

DATED this ____ day of November, 2008.

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State of North Dakota

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Timothy Carlton Saulter,)	
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Defendant and Appellant.)	

AFFIDAVIT OF SERVICE BY E-MAIL

STATE OF NORTH DAKOTA)
) SS
 COUNTY OF GRAND FORKS)

25th The undersigned, being of legal age, being first duly sworn deposes and says that on the day of November, 2008, she served via e-mail true copies of the following documents:

BRIEF OF APPELLEE

and that said email was served on the address of:

Benjamin C. Pulkrabek and said e-mail address is: Pulkrabek@lawyer.com

Cheri Kergal
 States Attorney's Office

Subscribed and sworn to before me this 25 day of November, 2008.

J. Fleck
 Notary Public

JENNIFER FLECK
 Notary Public
 State of North Dakota
 My Commission Expires Apr. 13, 2013