

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20080220

SUPREME COURT NO.: 20080220
CRIMINAL NO.: 18-08-K-167

State of North Dakota,

Plaintiff-Appellee,

- vs -

Timothy Carlton Saulter,

Defendant-Appellant.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

NOV 13 2008

STATE OF NORTH DAKOTA

APPEAL FROM THE COURT JUDGMENT
NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY CASE NO. 18-08-K-00167
THE HONORABLE SONJA CLAPP, PRESIDING

APPELLANT'S BRIEF

BENJAMIN C. PULKRABEK
Attorney for Appellant

MS. MEREDITH H. LARSON
Attorney for Appellee

402 First Street NW
Mandan, ND 58554
(701)663-1929
N.D. Bar Board ID No. 02908

P.O. BOX 5607
Grand Forks, ND 58206-5607
(701)780-8281
N.D. Bar Board ID No. 05220

TABLE OF CONTENTS

Table of Contents	i
Table of Cases, Statutes and Other Authorities	ii
Abbreviations	iii
Statement of the Issues	1
Nature of the Case	2
Statement of the Facts	2
Conclusion	9
Exhibits	10
Rule 701 N.D.R. of Evi.	
Rule 702 N.D.R. of Evi.	
Rule 703 N.D.R. of Evi	
Certificate of Service	14

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

TABLE OF CASES

<u>Stave v. Miller</u> 530 N.W.2d 632 (N.D. 1995).	5
<u>State v. Bohl</u> 317 N.W.2d 790, (N.D. 1982)	5
<u>State v. Schimetz</u> 318 N.W.2d 808 (N.D. 1982)	6
<u>State v. Streeper</u> 2007 ND 25, 727 N.W.2d 759 (N.D. 1983)	6
<u>State v. Schmidkunz</u> 2006 ND 192, 721 N.W.2d 387 (ND 205)	6
<u>State v. Hernandez</u> 2005 ND 214, 707 N.W.2d 449	6
<u>State v. Fashing</u> 461 N.W.2d 102 (N.D. 1990)	7
<u>State v. Ohnstad</u> 359 N.W.2d 827 (N.D. 1987)	8

STATUTES AND OTHER AUTHORITIES

North Dakota Century Code:

N.D.R.of Evi. 701	3, 4, 5, 6
N.D.R.of Evi. 702	3, 6
N.D.R.of Evi. 703	3

ABBREVIATIONS

Page - P.

Line - L.

Transcript - Tr.

STATEMENT OF THE ISSUES

TRIAL ISSUES:

- I. Was the opinion testimony that Detective James Vigness gave during the trial admissible as opinion testimony of a lay witness under Rule 701 N.D.R. of Evid or was it inadmissible as testimony of an expert Rules 702 and 703 N.D.R. of Evid?

- II. Was there evidence sufficient to find Defendant Appellant Timothy Carlton Saulter's guilty of the crime aggravated assault?

NATURE OF THE CASE

An Information charging Defendant Appellant, Timothy Carlton Saulter (Mr. Saulter) with aggravated assault was filed on January 17, 2008. That Information was amended on March 3, 2008.

Mr. Saulter waived a preliminary hearing on the aggravated assault charge on March 6, 2008.

Mr. Saulter's trial on the aggravated assault charge was tried to the Court, the Honorable Sonja Clapp presiding on July 16, 2008. At the conclusion of that trial, Judge Clapp found Mr. Saulter guilty of the crime of aggravated assault.

On September 2, 2008 Mr. Saulter was sentenced and Judgment was entered. From that Judgment Mr. Saulter appealed. This case is now before the North Dakota Supreme Court.

STATEMENT OF THE FACTS

Jade Tandeski (Ms. Tandeski) with her son M. lived in apartment 202 at 2402, 30th Avenue South in Grand Forks, North Dakota. Tr.P.12, L.4-6 and L.19-24. Ms. Tandeski had dated Timothy Carlton Saulter (Mr. Saulter) for about 3 years. Tr.P.13 L.2-5.

On January 15, 2008 Ms. Tandeski was in the bedroom of her apartment braiding Mr. Saulter's hair when she got a phone call from a friend who was having marital problems. Tr.P.14, L.17-23. After that phone call Mr. Saulter pushed redial and her friends brother answered the phone. Mr. Saulter then started calling Ms. Tandeski names and the name calling escalated into a physical altercation. Tr.P.15, L.2-25, P.16,L.1-25,

P.17, L.1-25 and P.24, L.1-23.

During the trial the State was able to get in the testimony of Detective Vigness because the trial judge ruled it was not expert testimony under Rules 702 and 703 North Dakota Rules of Evidence but was admissible as lay witness testimony under Rule 701 N.D.R.Evid. Tr.P.94, L.23-25, P.25, L.1-4 and P.98, L.5-8.

ISSUE I.

Was the opinion testimony that Detective James Vigness gave during the trial admissible as opinion testimony of a lay witness under Rule 701 N.D.R. of Evid or was it inadmissible as testimony of an expert Rules 702 and 703 N.D.R. of Evid?

During the State's questioning of Detective Vigness, the questions asked required answers from Detective Vigness about the knowledge he had obtained from training and conferences about strangulation crimes. This caused the Defense to object because Detective Vigness' testimony would be expert testimony and no expert testimony had been disclosed by the State in its response to the Defenses Discovery Motion. Tr.P.90, L.23-25, P.9, L.1-25 and P.92, L.1-22.

The Defendant Appellant's first objection to expert testimony was:

"MR. BORGAN: 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 opinions 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." Tr.P.92, L.23-25 and P.93, L.1-4.

The State's response to that objection was:

“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.” Tr.P.93, L.10-25 and P.94, L.1-3.

The Court then overruled Defendant Appellant’s objection.

“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.” Tr.P.94, L.23-25 and P.95, L.1-4.

Defendant Appellant’s second objection about expert testimony was:

“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.” Tr.P.97,11-16.

The State's response was:

"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. Its' 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." Tr.P.97, L.17-25 and P.98, L.1-4.

The Courts ruling was:

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. Tr.P.98, L.5-9.

The above rulings by the trial judge on Mr. Saulter's expert testimony objection allowed Detective Vigness's testimony to be admissible as opinion testimony of a lay witness under Rule 701 N.D.R.of Evid. Therefore, the State did not have to disclose Detective Vigness as an expert in its response to the Defenses Discovery Motion.

Rule 701 N.D.R. Evid. type testimony is set out in the following cases:

State v. Miller 530 N.W.2d 632 (ND 1995) - Rule 701 limits the opinion testimony of lay witnesses to those that are "rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness' {s} testimony or the determination of a fact in issue." See also State v. Bohl, 317 N.W.2d 790 (N.D. 1982).

Witnesses who are not experts in medicine may still testify regarding the seriousness of wounds when the facts testified to are such that “{a}ny reasonable person with common sense is capable of expressing a view on such matters without first having to be qualified or treated as an expert witness.” State v. Schimetz, 328 N.W.2d 808, 815 (N.D. 1982).

Deputy Grande observed the lacerations to Miller’s face and mouth. The drinking process is within everyone’s common knowledge. Thus, the opinion was rationally based on Deputy Grande’s perception and, because it aided the Court in understanding Miller’s ability to drink following the accident, was admissible under Rule 701, N.D.R. Evid.

State v. Streeper 2007 ND 25, 727 N.W.2d 759 [¶23] The decision whether to admit expert witness testimony rests within the district court’s sound discretion and will not be reversed unless the court has abused its discretion. State v. Schmidkunz, 2006 ND 192, ¶ 15, 721 N.W.2d 387. “Rule 702, N.D.R.Ev., envisions generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which the witness is to testify.” State v. Hernandez, 2005 ND 214, ¶ 8, 707 N.W.2d 449 (citation omitted). “If a witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences that are (i) rationally based on the perception of the witness and (ii) helpful to clear understanding of the witness’ testimony or the determination of a fact in issue.” N.D.R.Ev. 701.

The following answers given by Detective Vigness to the questions asked by the State are examples of expert testimony and not the testimony of a lay witness.

“Q. Based on your interview with her and all of the components of that, what was

your belief regarding whether there was an impediment of airflow or blood flow to the brain or lungs in Jade Tandeski?

A. Yes. What she had described had happened to her and the symptoms of what she had experienced, I believe that she was describing to me that she had been strangled.

Q. What was that based on?

A. Based on my understanding of the mechanics of strangulation and from my questions and her answers. Tr. P.101, L.6-18.

The trial judge erred when she allowed Detective Vigness to testify because:

1) The testimony Detective Vigness gave was that of an expert and the State failed to disclose Detective Vigness as an expert witness in response to the defenses Rule 16 Discovery Motion.

2) The Defendant Appellant twice objected to Detective Vigness' testifying as an expert and over these objections the trial judge allowed Detective Vigness to give expert testimony.

ISSUE II

Was there evidence sufficient to find Defendant Appellant Timothy Carlton Saulter's guilty of the crime aggravated assault?

In order to successfully challenge the sufficiency of the evidence on appeal, the defendant must show that the evidence viewed in the light most favorable to the verdict permits no reasonable inference of guilt. State v. Fashing, 461 N.W.2d 102 (N.D. 1990).

The standard of review for insufficiency of the evidence is a strict standard of review that only allows a motion for judgment of acquittal to be granted if the evidence is

insufficient to sustain a conviction of the offenses charged. State v. Ohnstad, 359 N.W.2d 827 (N.D. 1987).

In this case Jade Tandeski made three statements pertaining to this case. Tr. P.34, L.13 and P.35, L.1-20. In one of these statements Ms. Tandeski was asked if her airway was blocked and she replied, “No”. Tr. P.37, L.5-7.

Ms. Tandeski admitted to variations in each of the statements she made to law enforcement. Tr. P.42, L.12-14. She then claimed her recollection of what happened to her was much clearer in today's testimony than when she made her statements in the past. Tr. P.42, L.15-18. Therefore during her trial testimony she could testify that she had been strangled by Mr. Saulter and this created an impediment of airflow to her brain or lungs even though she had in a prior statement said her airflow wasn't blocked.

In order to explain the three different statements, Ms. Tandeski gave law enforcement about the events that occurred on January 15, 2008 the State asked the following questions of Detective Vigness.

“Q. When you interview victims of domestic violence, is it common or uncommon that they may attempt to qualify their statements when they're accusing their batterer of a crime?

A. That's common.

Q. And the reasons being?

A. There may be an attempt to minimize the suspect's behavior. They may want to assume some blame for themselves for some reason. They may not want the suspect to be prosecuted for a variety of reasons.

Q. Is it possible they may have some fear that the defendant would be reading their statement some day?

A. That's very possible. Tr.P.106, L.8-22.

The above statements by Detective Vigness were expert testimony and should have been excluded because the State failed to disclose Detective Vigness as an expert in response to Defendant Appellant's Discovery Motion and because the Defense twice during the trial objected to Detective Vigness's testifying as an expert. Without this testimony from Detective Vigness there is no explanation as to why Ms. Tandeski told three different stories about the events that happened on January 15, 2008.

CONCLUSION

For the above and foregoing reasons this case should be remanded to the trial court for a new trial or dismissed as a matter of law.

The above statements, made by Detective Vigness give an experts explanation as to why Ms. Tandeski would give three different stories and to why Ms. Tandeski's last statement would be the most accurate. Without the expert explanation there is no reason to find the last statement of Ms. Tandeski to be the most believable.

DATED at Mandan, North Dakota, this 13th day of November, 2008.

Benjamin C. Pulkrabek
BENJAMIN C. PULKRABEK
402 - 1st Street NW
Mandan, North Dakota 58554
(701)663-1929
N.D. Bar Board ID #02908
Attorney for Defendant-Appellant