

IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA

\*\*\*\*\*

State of North Dakota,	*	
Plaintiff/Appellee,	*	Sup. Co. No. 20090117
v.	*	Walsh Co. No. 50-08-K-390
	*	<b>APPELLEE BRIEF</b>
Jennifer Sandvig Thompson,	*	<b>FILED</b>
Defendant/Appellant.	*	IN THE OFFICE OF THE CLERK OF SUPREME COURT
	*	'AUG 03 2009
	*	

STATE OF NORTH DAKOTA

\*\*\*\*\*

ON APPEAL FROM JUDGMENT OF CONVICTION  
DATED MARCH 17, 2009  
OF NORTHEAST JUDICIAL DISTRICT  
THE HONORABLE M. RICHARD GEIGER, PRESIDING

\*\*\*\*\*

Kelley M. R. Cole  
Walsh County Assistant State's Attorney  
ND Bar No. 06358  
Walsh County Courthouse – 3<sup>rd</sup> Floor  
600 Cooper Avenue  
Grafton, North Dakota 58237  
Telephone: (701) 352-1300  
Facsimile: (701) 352-0411  
Email: kcole@nd.gov

# TABLE OF CONTENTS

<b>Table of Contents.....</b>	<b>i</b>
<b>Table of Authorities .....</b>	<b>ii</b>
<b>Statement of the Case.....</b>	<b>1</b>
<b>Statement of Facts .....</b>	<b>1</b>
<b>Law and Argument.....</b>	<b>3</b>
<b>The evidence relating to text messages sent on October 31, 2008 was relevant.....</b>	<b>4</b>
<b>The State laid a proper foundation for the testimony and evidence regarding the text messages sent from Mrs. Thompson to Mr. Thompson on October 31, 2008.....</b>	<b>4</b>
<b>The district court did not error in determining that the text messages were admissible because they were non-hearsay or fell under an exception to the hearsay rule.....</b>	<b>10</b>
<b>The district court did not error in admitting State’s Exhibit 3 into evidence during the State’s cross examination of Mrs. Thompson.....</b>	<b>10</b>
<b>If the district court erred in allowing testimony regarding the text messages and State’s Exhibit 3 into evidence, then such error was harmless.....</b>	<b>12</b>
<b>Conclusion .....</b>	<b>13</b>

# TABLE OF AUTHORITIES

## NORTH DAKOTA CASES

State v. Freed, 1999 ND 185, 599 N.W.2d 858 .....	7, 8
State v. Miller, 2001 ND 132, 631 N.W.2d 587 .....	4
R & D Amusement Corp. v. Christianson, 392 N.W.2d 385 (N.D. 1986).....	5

## OTHER STATES

Dickens v. State, 927 A.2d 32 (Md.Ct.Spec.App. 2007) .....	9
In re: F.P., 878 A.2d 91 (Pa. Super. 2005) .....	8, 9
State v. Franklin, 280 Kan. 337, 121 P.3d 447 (2005).....	9

## NORTH DAKOTA RULES

N.D.R.Crim.P. 52(a) .....	12
N.D.R.Evid. 103(a) .....	7
N.D.R.Evid. 608(b) .....	11
N.D.R.Evid. 801(2).....	10
N.D.R.Evid. 901(a) & (b).....	5, 9

## **STATEMENT OF THE CASE**

This is an appeal from a conviction for simple assault-domestic violence. On February 18, 2009, a jury found Jennifer Sandvig Thompson guilty of simple assault- domestic violence. Mrs. Thompson was sentenced by the Honorable M. Richard Geiger on March 17, 2009. Mrs. Thompson appeals, contending that the district court abused its discretion in its evidentiary rulings regarding the admissibility of text messages sent from Mrs. Thompson to the victim, Wesley Thompson, on the day of the assault.

## **STATEMENT OF FACTS**

On October 31, 2008, Jennifer Sandvig Thompson and Wesley Thompson were married and had three children. (Trial Transcript (T) p.49). On the morning of October 31, 2008, Mrs. Thompson began sending text messages to Mr. Thompson asking for money and asking him to pick up the children and bring them to school. (T pp.51-54, 57-58, 148-151). A number of the text messages sent by Mrs. Thompson contained threatening statements directed at Mr. Thompson. (Id.) When Mr. Thompson arrived at their residence in Grafton, the children and Mrs. Thompson got in his vehicle. (T p.54). After driving the children to school, Mr. Thompson drove back to their residence to drop Mrs. Thompson off, so he could go to work. (T p.54-55). Mrs. Thompson refused to get out of Mr. Thompson's vehicle until he gave her \$150.00. (T p.55). Mr. Thompson offered to take her shopping, but Mrs. Thompson refused, stating she wanted cash. (T p.53). After approximately one hour, Mrs. Thompson raised her

demand to \$250.00, and eventually, Mr. Thompson drove to the police station in Grafton for assistance. (T. pp.55-56). Mrs. Thompson still refused to get out of the vehicle and Mr. Thompson requested assistance from Sheriff Lauren Wild. (T p.56). Sheriff Wild was successful in getting Mrs. Thompson to leave the vehicle and Mr. Thompson went to work. (T p.56).

Mr. Thompson stopped answering Mrs. Thompson's phone calls, but later transferred \$60.00 to Mrs. Thompson's account. (T p.57-58). After work, Mr. Thompson called Mrs. Thompson and together they took the children trick or treating. (T p. 59). At approximately 9:30-10:00 p.m., they returned to the house and Mrs. Thompson wanted to go out for the rest of the evening. (T p.60). Mr. Thompson brought her uptown to Polly's Lounge and gave her \$20.00. (Id.) Mr. Thompson returned home to watch the children and at approximately 10:30 p.m., Mrs. Thompson began sending several text messages to Mr. Thompson asking for money. (T p.61). Mr. Thompson responded that he was not going to bring her any more money. (Id.). At approximately 11:00 p.m., Mrs. Thompson arrived back at the residence, confronted Mr. Thompson and demanded that he give her more money. (T p.62). Mr. Thompson refused to go and get her more money. (T p.62-63). Mrs. and Mr. Thompson continued to argue regarding money and Mr. Thompson told Mrs. Thompson he was leaving. (T p. 63-64). Mr. Thompson went to leave and Mrs. Thompson began hitting him in the face and the back. (T p. 64-65). Mr. Thompson ran towards the bathroom and called 911. (T p.65).

Officers David Erickson, Wesley Vert and Brad Arin were dispatched to the residence at approximately 11:17 p.m. (T p.87). Upon arrival at the

residence, Officer David Erickson was let in to the residence by Mr. Thompson and observed that Mr. Thompson was holding a Kleenex to his left eye. Officer Erickson spoke with Mr. Thompson in the kitchen and was advised that they had been arguing about money and Mrs. Thompson had hit Mr. Thompson several times, resulting in injury to Mr. Thompson's eye. (Id.) Mr. Thompson denied hitting or doing anything else to Mrs. Thompson. (T p.89). Officer Erickson spoke with Mrs. Thompson on the porch of the residence. (Id.) Mrs. Thompson was advised of her Miranda rights and when asked how Mr. Thompson's eye was injured, Mrs. Thompson admitted she hit him. (T pp. 89 and 101) When asked if Mr. Thompson had hurt her, Mrs. Thompson said "no, he had not hurt her." (Id.) Officer Erickson placed Mrs. Thompson under arrest for Simple Assault – Domestic Violence and transported her to the Walsh County Law Enforcement Center (LEC). (T pp. 89-90). Upon arrival at the LEC, Officer Erickson allowed Mrs. Thompson to smoke a cigarette outside and Mrs. Thompson's mother, Tammy Schindler, arrived. (T p.90). After talking with her mother, Mrs. Thompson approached Officer Erickson and advised him that Mr. Thompson had pushed her. (Id.). Mrs. Thompson was charged with Simple Assault – Domestic Violence, a class B misdemeanor.

## **LAW AND ARGUMENT**

The district court did not abuse its discretion when it admitted evidence regarding text messages sent to Mr. Thompson from Mrs. Thompson the day of the assault.

**I. The evidence relating to text messages sent on October 31, 2008 was relevant.**

A trial court is granted broad discretion when deciding whether evidence is relevant, and this Court will not reverse unless that court abused its discretion. State v. Miller, 2001 ND 132, 136, 631 N.W.2d 587. At the pretrial conference, Mrs. Thompson objected to the text messages on grounds that they were hearsay and based on evidentiary foundation. (T pp.10-14). The State argued that the text messages were verbal statements against interest made by the defendant, which relate to the events of October 31, 2008. The argument between Mr. and Mrs. Thompson began early in the day and resulted in the assault that night. (T pp. 11-12). The district court ruled that the text messages were similar to verbal statements against interest and went to defendant's motive and testimony regarding the text messages would be allowed. The district court did not abuse its discretion in ruling the text messages sent on October 31, 2008 were relevant.

**II. The State laid a proper foundation for the testimony and evidence regarding the text messages sent from Mrs. Thompson to Mr. Thompson on October 31, 2008.**

The State agrees with Mrs. Thompson that there is not a specific opinion from this Court addressing the foundational requirements for admissibility of text messages. However, the foundational requirements for admissibility of text messages are the same as for other types of evidence and are addressed in the North Dakota Rules of Evidence. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence

sufficient to support a finding that the matter in question is what its proponent claims." N.D.R. Evid. 901(a). Authentication can be established by evidence presented through testimony of a witness with knowledge or by evidence of appearance, contents, substance, or other distinctive characteristics, combined with circumstances. See, N.D.R. Evid. 901(b)(1) and (4). The question of whether evidence should be excluded for lack of authentication is primarily within the sound discretion of the trial court. R & D Amusement Corp. v. Christianson, 392 N.W.2d 385, 386 (N.D. 1986).

Here, the district court ruled that testimony regarding the text messages sent from Mrs. Thompson would be allowed if the State, through its witness, could lay a foundation that they came from a phone that Mr. Thompson understood was the phone and phone number of Mrs. Thompson. (T p.14). At trial, Mr. Thompson testified that he and Mrs. Thompson often text back and forth to one another, that at the beginning of every message it says "FR Jen", which is the way she is identified in his phone. (T p.51). He further testified that at the end of every message it has her phone number, which he knows and recognizes, and her own signature, "Cause[sic]ImJenIcan". (Id). Mr. Thompson testified regarding text messages sent by Mrs. Thompson on the morning and night of October 31, 2008. (T pp.51-54, 57-58, 61). Mr. Thompson did not testify extensively regarding the messages that were sent, but testified regarding the general nature and content of the messages. The only text message Mr. Thompson actually quoted from memory was one that said, "I will fuck you up bad", in response to a question asked regarding any threats Mrs. Thompson had



made on October 31, 2008. (T p. 57). Mr. Thompson testified that he responded to messages sent the morning of October 31, 2008, by driving into town to their residence, picking up Mrs. Thompson and the children and driving the children to school. During this testimony, Mrs. Thompson's attorney objected, but the basis for the objection was hearsay, not lack of foundation. (T p.52). The trial court ruled these messages were not hearsay. See (T p.52). Mrs. Thompson herself testified and admitted that she was calling and texting Mr. Thompson from her cell phone the morning of October 31, 2008. (T p.136-137). She admits she was calling and texting him because she needed him to come into town to give the children a ride to school and to give her money. (Id.). Mrs. Thompson verifies, through her testimony that Mr. Thompson responded to her messages by driving into town and picking them up. On cross examination, Mrs. Thompson admitted to sending a number of messages to Mr. Thompson in which she was demanding money from him and calling him names. (T pp. 148-150). However, when asked whether she sent a text message stating, "I will fuck u up bad Wesley", Mrs. Thompson responded, "Not – could have." (T p.150). The State later presented a photograph of the text message to Mrs. Thompson in attempt to refresh her recollection. (T p.161). Mrs. Thompson indicated that the photograph shows she sent the message, but did not agree with the time of the message and stated Mr. Thompson could have sent that message from her phone. (T pp.161-162). In addition, Mrs. Thompson testified and confirmed both her cell phone number and that her signature is "CauseImJenlcan[sic]". (T pp.162-63).

Mrs. Thompson waived the issue of proper foundation regarding evidence relating to the text messages in this case, by failing to object to lack of foundation during trial.

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; N.D.R. Evid. 103(a) and 103(a)(1).

Mrs. Thompson's attorney did not object based on foundation during the testimony of Mr. Thompson or during the cross-examination of Mrs. Thompson, when the State offered State's Exhibit 3 into evidence. (T pp. 52 and 163). In fact, the district court directly asked Mrs. Thompson's attorney if he had any objection as to evidentiary foundation, to which he replied, "no". (T p.163). The district court received State's Exhibit 3 into evidence, absent any objection as to foundation and noting there was sufficient foundation based on Mrs. Thompson's testimony, as well as, Mr. Thompson's testimony. (T p.164).

By failing to object at trial, Mrs. Thompson failed to preserve this issue for review on appeal unless it is obvious error. See, State v. Freed, 1999 ND 185 ¶13, 14, 599 N.W.2d 858. This Court has the power to notice obvious error only in exceptional circumstances in which the defendant has suffered serious injustice. Id. at ¶14. Here, the district court did not commit obvious error in admitting evidence regarding the text messages. The State laid sufficient foundation to admit the text messages.

Mrs. Thompson recites a number of unpublished decisions from the States of Minnesota and Kansas<sup>1</sup> to argue that the State failed to establish a proper foundation for admission of testimony regarding text messages sent from Mrs. Thompson to Mr. Thompson. In these cases, the appellate court upheld the trial courts' decisions to either exclude or admit evidence regarding text messages, finding that the trial court did not error or abuse its discretion. State v. Haines, No. A07-1743 (Minn.App. December 23, 2008); State v. Loye, No. A08-1101 (Minn.App. June 16, 2009); and State v. Winder, 189 P.3d 580 (Kan.App. 2008).

Mrs. Thompson argues that text messages are "inherently unreliable" citing a Superior Court of Pennsylvania decision, In re: F.P., to support her assertion that this Court should adopt a higher standard in reviewing the authenticity and admissibility of text messages. 878 A.2d 91, 95 (Pa.Super. 2005). However, the Superior Court of Pennsylvania found "no justification for constructing unique rules for admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis *as any other document* to determine whether or not there has been adequate foundational showing of their relevance and authenticity." Id. at 96 (emphasis added). Although this case deals with e-mails and instant messages rather than text messages, they all are very similar in the electronic nature in which they are sent. The Court recognized, that "unless the purported author of the message is actually witnessed sending the e-mail, there is always the possibility it is not from

---

<sup>1</sup> Mrs. Thompson cites the case of State v. Winder, 189 P.3d 580 (Kan.App. 2008), but does not indicate that this decision is an unpublished opinion of the Kansas Court of Appeals.

whom it claims”, but also recognized that “the same uncertainties exist with traditional written documents.” Id. at 95.

The State urges this Court to review the district court’s decision in this case regarding the admissibility and authentication of text messages as it would any other evidence pursuant to N.D.R. Evid. 901. In this case, there was sufficient evidence to support a finding that the text messages were sent by Mrs. Thompson. Based upon the testimony of Mr. Thompson regarding the identifying information; Mr. Thompson’s actions in response Mrs. Thompson’s messages; the circumstances of that day; and Mrs. Thompson’s own testimony and admissions regarding the text messages, there was sufficient evidence to support the authenticity of those text messages. In State v. Franklin, sufficient evidence established the defendant sent the text messages because “the content of the text messages parallel[ed] the evidence of defendant’s activities and statements.” 280 Kan. 337, 342, 121 P.3d 447 (2005).

In addition, in Dickens v. State, the Maryland Court of Special Appeals, upheld the trial court’s decision to admit a text message when the phone number on the text message directly showed it was from a phone that appellant possessed up until he discarded it shortly after he killed the victim. 927 A.2d 32, 37 (Md. Ct. Spec. App. 2007). Here, there has been no evidence presented that the cell phone was possessed by anyone other than Mrs. Thompson. In fact, there was substantial evidence that Mrs. Thompson was the only one who possessed her cell phone on October 31, 2008. (T pp.162-163).

Therefore, the district court did not abuse its discretion when it admitted testimony regarding text messages sent by Mrs. Thompson to Mr. Thompson and State's Exhibit 3 into evidence.

**III. The district court did not error in determining that the text messages sent by Mrs. Thompson were admissible because they were non-hearsay or fell under an exception to the hearsay rule.**

N.D.R. Evid. 801(2), provides that a party's own statement, if offered against a party, is not hearsay and is admissible at trial. Here, the text messages are similar to any other verbal statements made by a party. The district court correctly ruled that the statements by Mrs. Thompson were admissible as statements against interest or as statements made by a party-opponent. (T p.14). The text messages were not inadmissible hearsay and the district court did not abuse its discretion in admitting the content of the text messages into evidence.

**IV. The district court did not error in admitting State's Exhibit 3 into evidence during the State's cross examination of Mrs. Thompson.**

During Mr. Thompson's direct testimony, a proper foundation was laid to admit testimony regarding text messages he received from Mrs. Thompson on October 31, 2008. (T pp. 51-52). In addition, Mr. Thompson testified that he received a threatening message from Mrs. Thompson that said, "I will fuck you up bad". (T p.57). On cross examination by the State, the State asked Mrs. Thompson about the contents of specific text messages she sent to Mr. Thompson the morning of October 31, 2008. (T pp. 148-150). Mrs. Thompson

agreed she sent a number of the messages, but when asked if she sent a message at 8:20 a.m. that morning, stating, "I will fuck you up bad Wesley", Mrs. Thompson stated, "Not – could have". (T p.150). During a recess of the trial, the State obtained a photograph of the text message that was sent to Mr. Thompson from Mrs. Thompson (State's Exhibit 3), and requested that the district court allow the State to inquire further of Mrs. Thompson. (T p.159-160). Mrs. Thompson objected stating, N.D.R. Evid. 608(b) as her basis and indicating Mrs. Thompson had already admitted to sending the message. (Id.). The district court ruled that the State could inquire further regarding the message and use State's Exhibit 3 to refresh her memory, but if Mrs. Thompson unequivocally acknowledges she sent it, the Court would not admit State's Exhibit 3. (T p.160).

The State showed State's Exhibit 3 to Mrs. Thompson and Mrs. Thompson questioned the time the message was sent; stated she "could have" sent the message; and explained that Wesley could have sent the message from her phone. (T pp. 161-162). The State questioned Mrs. Thompson regarding her cell phone number, the location of her cell phone that morning and her signature. (T. pp.162-163). The State then offered State's Exhibit 3 into evidence. The district court asked Mrs. Thompson's attorney if he had any objection as to foundation. (T p.163) Mrs. Thompson's attorney did not object as to foundation. (Id.) The district court received State's Exhibit 3 into evidence, noting sufficient foundation was established through the testimony of both Mr. Thompson and Mrs. Thompson. (T p.164).

Based upon the above circumstances and Mrs. Thompson's responses to the State's questions regarding the text message, the district court did not abuse its discretion in allowing the State to further inquire of Mrs. Thompson and in admitting State's Exhibit 3 into evidence.

**IV. If the district court erred in allowing testimony regarding the text messages and State's Exhibit 3 into evidence, then such error was harmless.**

N.D.R Crim. Pro. 52(a), provides that "[a]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." In this case, even if testimony regarding the text messages and State's Exhibit 3 had not been admitted into evidence, there was ample evidence to support a jury verdict of guilty in this case. Mrs. Thompson has not shown that her substantial rights were affected by the evidentiary rulings of the district court.

Mr. Thompson's testimony, the testimony of Officers David Erickson and Brad Arin, as well as, the photographs of Wesley Thompson's injuries, provided ample evidence for the jury to convict Mrs. Thompson of Simple Assault – Domestic Violence.

During trial, Mrs. Thompson put on substantial evidence regarding prior bad acts of Mr. Thompson. (T pp. 112-135). The court allowed testimony at trial regarding specific bad acts of Mr. Thompson, dating back to 1999, to show Mrs. Thompson's state of mind in evaluating the events of October 31, 2008. (T pp. 18-23).

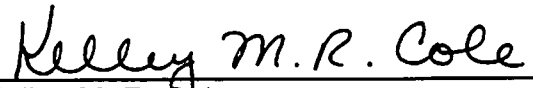
Therefore, even if this Court finds that the district erred in admitting the evidence regarding the text messages, such error was harmless.

### CONCLUSION

The State requests that this Court uphold the evidentiary decisions made by the district court and affirm the conviction.

Dated this 3rd day of August, 2009, at Grafton, North Dakota.

Respectfully submitted,



Kelley M. R. Cole  
Kelley M. R. Cole  
Walsh County Assistant State's Attorney  
ND Bar # 06358  
Walsh County Courthouse  
600 Cooper Avenue – 3<sup>rd</sup> Floor  
Grafton, North Dakota 58237  
Telephone: 701-352-1300  
Facsimile: 701-352-1104  
Email: kcole@nd.gov  
Attorney for the State/Appellee



IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

\*\*\*\*\*

State of North Dakota,	*	
	*	Sup. Co. No. 20090117
Plaintiff/Appellee,	*	
v.	*	Walsh Co. No. 50-08-K-390
	*	
Jennifer Sandvig Thompson,	*	
	*	
Defendant/Appellant.	*	
	*	

\*\*\*\*\*

AFFIDAVIT OF SERVICE BY MAIL

Christine F. Ferguson, being first duly sworn, deposes and says that on the 3<sup>rd</sup> day of August, 2008, at Grafton, ND, she served the:

APPELLEE BRIEF

upon: Blake Hankey

by mailing a true and correct copy to:

Mr. Blake D. Hankey  
 Attorney at Law  
 301 N. 3<sup>rd</sup> St., 3<sup>rd</sup> Fl., Ste. 300  
 Grand Forks, ND 58201

*Christine F. Ferguson*  
 \_\_\_\_\_  
 Christine F. Ferguson

SUBSCRIBED AND SWORN to before me this 3rd day of August, 2009.

KELLEY M. R. COLE  
 Notary Public  
 State of North Dakota  
 My Commission Expires Oct. 2, 2014

*Kelley M. R. Cole*  
 \_\_\_\_\_  
 Notary Public  
 State of North Dakota  
 My Comm. Expires: