

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff - Appellee,)	Supreme Court No.'s 20160402
)	
vs.)	*
)	
Duane Francis Azure, Jr.,)	District Court No. 40-2014-CR-00149
)	
Defendant - Appellant.)	

APPEAL FROM THE CRIMINAL JUDGMENT
ENTERED NOVEMBER 18, 2016
NORTHEAST JUDICIAL DISTRICT
HON. ANTHONY BENSON

BRIEF OF APPELLANT

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ISSUES

[1] I. The court should not have allowed the Preliminary Hearing testimony of Yvette Belgarde to be admitted at trial.

[2] II. The court should not have allowed Agent Kluth to testify at trial regarding the hearsay statements made to him by Yvette Belgarde.

[3] III. The court abused its discretion in denying Azure's motion for acquittal due to insufficiency of the evidence.

STATEMENT OF CASE

[4] This is an appeal from Criminal Judgment entered after a jury found Duane Francis Azure, Jr. (Azure) guilty of the charge of Aggravated Assault in violation of North Dakota Century Code Section 12.1-17-02. A Preliminary Hearing was held on March 16, 2015 and the victim Yvette Belgarde testified at the Preliminary Hearing. Yvette Belgarde later died of unrelated causes and she was not able to testify at trial. (Tr. 2, page 48). A jury trial was held in Rolla, Rolette County, North Dakota on November 16 and 17, 2016, and the State introduced the Preliminary Hearing testimony of Yvette Belgarde after the trial court overruled Azure's objection to the admission of such testimony. (Tr. 2, page 50-1). On November 18, 2016, Mr. Azure was sentenced to 10 years of incarceration with 6 years suspended for 3 years of supervised probation. Mr. Azure timely filed the Notice of Appeal on December 12, 2016. (App. 11)¹.

STATEMENT OF FACTS

[5] On April 20, 2014 at 9:25 p.m., Rolette County Sheriffs Deputy Todd Parisien

¹The Appendix to Appellant's brief will be abbreviated "App."

was dispatched to the Duane Azure, Sr. residence for a 911 call. (Tr. 2, page 30 & 44).² The door to the residence was opened by Azure (by Duane Azure, Jr. the Defendant herein) and Mr. Azure directed Deputy Parisien to Yvette Belgarge. (Tr. 2, page 32). Yvette Belgarde informed Deputy Parisien that she injured herself when she slipped and fell on the deck and that no one had been present when her injuries occurred. (Tr. 2, page 34). Ms. Belgarde informed Deputy Parisien that Azure arrived at the residence “just prior” to the deputies arrival. Id. Deputy Parisien heard Yvette Belgarde tell the ambulance EMT’s that she was injured when she fell, and Yvette Belgarde did not allege any other reason for her fall on April 20, 2014. (Tr. 2, page 44).

[6] After she had fallen and been injured on April 20, 2014, Yvette Belgarde sent her daughter, Nasha Bercier, a Facebook message (State’s Exhibit 1) which said “Nashay, call D ambulance, I think I broke by lef at D.J. Dad’s, I can’t move.” (Tr. 2, page 117 - 118).

[7] Approximately a week and a half to 2 weeks later, Yvette Belgarde began to change her story and reported the incident as an assault. (Tr. 2, page 39). As a result, BCI Agent Allen Kluth interviewed Yvette Belgarde on May 7, 2014 at Sanford Hospital in Bismarck, North Dakota. (Tr. 2, page 64). During her interview with Agent Kluth, Yvette Belgarde changed her story regarding how she was injured and alleged that she was injured when Azure beat her up, kicked her, shoved her to the ground, and threw her against a house. (Tr. 2, page 65). However, Agent Kluth was aware that Yvette Belgarde

²There are 2 transcripts of the Jury Trial, Day 1 and Day 2. The Day 1 transcript will be referred to as Tr.1 and the Day 2 transcript referred to as Tr.2.

had told medical professionals at the Quentin Burdick Hospital that she was injured when she slipped on steps (Tr. 2, page 80-1); that she told medical professionals at a Minot hospital that she was injured when she slipped and fell on a deck (Tr. 2, page 81); and that she told the orthopedic surgeon who treated her, Dr. Gattey, that a slip and fall created her injuries. (Tr. 2, page 82).

[8] On March 16, 2015, Azure was charged by Criminal Information with Aggravated Assault in violation of North Dakota Century Code 12.1-17-02(3) for allegedly causing bodily injury or substantial bodily injury to Yvette Belgarde. An Amended Criminal Information was filed on November 8, 2016 and a 3rd Amended Criminal Information was filed on November 15, 2016. (Informations, App. 6-8).

[9] A Preliminary Hearing was held on March 16, 2015 at which time the State called Deputy Parisien to testify, and Azure called Yvette Belgarde to testify.³ Yvette Belgarde passed away prior to trial from causes unrelated to this action. (Tr. 2, page 48). Prior to jury trial, the State filed a Motion to admit the Preliminary Hearing testimony of Yvette Belgarde (Register of Actions, Doc. Id.# 41) and Azure filed a response objecting to such testimony. (Register of Actions, Doc. Id.#62). The trial court entered an Order allowing the hearsay testimony of Yvette Belgarde to be admitted at trial (Register of Actions, Doc. Id.#67; App. 9). At trial, Azure's counsel objected to the admission of the Preliminary Hearing testimony of Yvette Belgarde being admitted, and the court overruled the objection and allowed Yvette Belgarde's Preliminary Hearing testimony to

³ The March 16, 2015 Preliminary Hearing testimony of Yvette Belgarde was transcribed early in the proceedings and is contained within the Register of Actions at Doc. Id.# 38.

be presented to the jury. (Tr. 2, 50-1).

LAW AND ARGUMENT

[10] A defendant may appeal to the Supreme Court from a jury conviction and the denial of his motion for acquittal due to lack of evidence. North Dakota Century Code §29-28-03 & 29-28-06.

[11] A “trial court has broad discretion in evidentiary matters, and its rulings will only be reversed if its discretion has been abused.” State v. Neufeld, 1998 ND 103, §17. “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. Ramsey, 2005 ND 42, §8.

[12] I. The court should not have allowed the Preliminary Hearing testimony of Yvette Belgarde to be admitted at trial.

[13] Prior to trial the State filed a Motion and Brief to Offer the hearsay testimony of Yvette Belgarde. (Register of Actions Doc. Id.# 41). Azure objected to the State’s Motion (Register of Actions Doc. Id.# 62), and the court entered an Order allowing the hearsay testimony (Register of Actions Doc. Id.# 67; App. 9). At trial, Azure again objected to the introduction of the Preliminary Hearing testimony of Yvette Belgarde which was overruled by the court. (Tr. 2, page 50-1).

[14] Rule 804 of the North Dakota Rules of Evidence controls the introduction of hearsay when the declarant is unavailable as witness. Yvette Belgarde had died of unrelated causes prior to trial and she was therefore unavailable at trial pursuant to Rule 804(a)(4). N.D.R.Ev. 804(a)(4). Rule 804 then provides that former testimony (ie: the

Preliminary Hearing testimony of Yvette Belgarde) “is not excluded by the rule against hearsay if the declarant is unavailable as a witness . . . and is now offered against a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination.” N.D.R.Ev. 804(b)(1)(B) (emphasis added).

[15] A defendant’s right to confront witnesses against him is guaranteed by the Sixth Amendment. Nelson v. O’Neil, 402 U.S. 622 (1971). While Azure did subpoena Yvette Belgarde’s attendance at the Preliminary Hearing and examined her under direct examination, it is recognized that “a defendant may have had significantly less incentive to cross-examine the witness at the preliminary examination hearing than at the trial.” State v. Roquette, 290 N.W.2d 260, 266 (N.D. 1980) (quoting State v. Garvey, 283 N.W.2d 153, 156 (N.D. 1979)). A witness’s testimony at preliminary hearings is often shorter, more limited in scope, and strategically different from what the examination of that witness would be at trial, Barber v. Page, 390 U.S. 719 (1968), and this strategic difference is the “similar motive” required by N.D.R.Ev. 804(b)(1)(B) before former testimony becomes admissible and not excluded as hearsay. North Dakota Rules of Evidence 804(b)(1)(B) does not allow prior testimony to be admitted if the party against whom such evidence is offered didn’t have a “similar motive” to develop such testimony at the prior proceeding.

[16] The Preliminary Hearing testimony of Yvette Belgarde that was presented to the jury was redacted before trial, (Tr. 1, pages 68-70), and the full / non-redacted transcript of Yvette Belgarde’s Preliminary Hearing testimony is contained at Register of Actions, Doc. Id.#38. To ascertain the motive for Azure’s counsel’s questioning of Yvette

Belgarde at the Preliminary Hearing, the entire transcript of Ms. Belgarde's Preliminary Hearing testimony must be considered. It then becomes clear that Azure's counsel's motive for questioning Yvette Belgarde at the Preliminary Hearing was to establish that Yvette Belgarde had conspired and concocted the story alleging Azure had assaulted her in an effort to pursue a civil suit for aggravated assault against Azure's parents who were the owners of the property where Yvette Belgarde had sustained her injuries. However, trial counsel never alleged that Yvette Belgarde conspired or concocted her story, or that it was a recent fabrication. See, Tr. 1, page 22. Therefore, Yvette Belgarde's Preliminary Hearing testimony is not excepted by North Dakota Rules of Evidence 804(b)(1)(B) because Azure was not pursuing a similar motive at trial, i.e.; the conspiracy / concoction motive which had been advanced at the Preliminary Hearing where Yvette Belgarde testified. Azure was not able to develop Yvette Belgarde's testimony at trial, and Azure's trial counsel noted that Azure would have "numerous other questions for [Yvette Belgarde] at this point." (Tr. 2, page 59).

[17] II. The court should not have allowed Agent Kluth to testify at trial regarding the hearsay statements made to him by Yvette Belgarde.

[18] Hearsay is a statement that "the declarant does not make while testifying at the current trial or hearing." N.D.R.Ev. 801(c)(1) (emphasis added). The declarant was Yvette Belgarde. The statements improperly admitted into evidence include both the Preliminary Hearing testimony of Yvette Belgarde on March 16, 2015, and Yvette Belgarde's statements to Agent Kluth on May 7, 2014 which were made at Sanford Hospital in Bismarck, North Dakota. The statement Yvette Belgarde gave to Agent

Kluth was not made at a trial, hearing or deposition, it was not made under oath, and such statements are therefore not nonhearsay under 804(b)(1)(A). Obviously, both of the above statements were not made while Yvette Belgarde was testifying at trial on November 16 and 17, 2016.

[19] Rule 801(d)(1) of the North Dakota Rules of Evidence provides that a declarant's prior statement is not hearsay if "the declarant testifies and is subject to cross-examination about a prior statement." Yvette Belgarde's Preliminary Hearing testimony was presented to the jury at trial, (Tr. 2, pages 51-9), but she was not subject to cross-examination about such testimony at trial. Likewise, Yvette Belgarde's statements to Agent Kluth on May 7, 2014 were presented to the jury at trial, (Tr. 2, pages 64-76), but she was not subject to cross-examination about such testimony at trial. In order for either Yvette Belgarde's Preliminary Hearing testimony from March 16, 2016 or her May 7, 2014 statements to Agent Kluth to not be hearsay under Rule 801(d)(1) Yvette Belgarde must have testified at trial and been subject to cross-examination. Even if the Court determines that Yvette Belgarde's Preliminary Hearing testimony constitutes trial testimony, such testimony was not subject to cross-examination at either trial or the Preliminary Hearing as required under Rule 801(d)(1) in order for such testimony to be considered nonhearsay.

[20] In its Order Regarding Hearsay Testimony (Register of Actions, Doc. Id. #67; App. 9), the district court found that Yvette Belgarde's statements "were not considered hearsay by definition of Rule 801 of the North Dakota Rules of Evidence." (Order Regarding Hearsay Testimony, ¶12, App. 9) and relied upon State v. Neufeld, 1998 ND

103. However, Neufeld is distinguishable from the instant case. In Neufeld, the trial court allowed testimony from witnesses Tande and Smith regarding prior statements made by Neufeld's stepdaughter to them. State v. Neufeld, 1998 ND 103, ¶8. Neufeld's stepdaughter was the declarant who had previously made the statements to witnesses Tande and Smith. The North Dakota Supreme Court reasoned that the testimony of Tande and Smith was not hearsay under North Dakota Rules of Evidence 801(d)(1) because "Neufeld's stepdaughter testified at trial and was subject to cross-examination by the defense." State v. Neufeld, 1998 ND 103, ¶18 & 20. Neufeld is not analogous since the declarant herein, Yvette Belgarge, did not testify and was not subject to cross examination at trial.

[21] III. The court abused its discretion in denying Azure's motion for acquittal due to insufficiency of the evidence.

[22] "When reviewing the sufficiency of the evidence on appeal," the Court views the evidence in the light most favorable to the prosecution and gives the prosecution "the benefit of all inferences reasonably to be drawn in its favor." State v. Himmerick, 499 N.W.2d 568, 574 (N.D. 1993). If the Court concludes that "the prosecution has failed to produce sufficient evidence to prove its case" and that "no rational factfinder could have found the defendant guilty beyond a reasonable doubt," the Court "must allow for the entry of a judgment of acquittal." Id. (quoting State v. Kringstad, 353 N.W.2d 302 (N.D. 1984)).

[23] In the instant case, the evidence presented at trial was almost entirely the hearsay statements of Yvette Belgarge made at the Preliminary Hearing held on March 16, 2015

and hearsay statements Yvette Belgarde gave Agent Kluth on May 7, 2014. The only other substantive additional testimony was that of Deputy Parisien who responded to the 911 call at the Duane Azure, Sr. residence and that of Dr. Gattey, the orthopedic surgeon who treated Yvette Belgarde. However, the testimony of Deputy Parisien and Dr. Gattey cannot support a conviction, but rather requires a finding that Yvette Belgarde's injuries were not caused by Azure and mandates his acquittal.

[24] Deputy Parisien who responded to the 911 call testified that Yvette Belgarde told him that "she had slipped and fell on the deck and when she fell she had heard a cracking noise." Ms. Belgarde further told Deputy Parisien that no one was present when she slipped, and that Azure had arrived at the Duane Azure, Sr. residence "just prior to [Deputy Parisien's] arrival." (Tr. 2, page 34). Deputy Parisien further testified that the deck Yvette Belgarde said she fell on was "quite elevated" and its stairway was "quite steep." (Tr. 2, page 37). On cross-examination, Deputy Parisien clarified that the deck was about 6 - 8 feet high at its highest and about 4 - 5 feet high in the middle where the steps were. (Tr. 2, page 41). It wasn't until a week and a half to 2 weeks later that Yvette Belgarde reported the incident as an assault. (Tr. 2, page 39).

[25] Dr. Gattey, the orthopedic surgeon who treated Yvette Belgard testified that he had been told that she fell off a deck, (Tr. 2, page 99), and that based upon his 30 years of experience in treating injuries such as Yvette Belgarde presented with, that it was possible that a fall could have caused her injury. (Tr. 2, pages 100-101; 109). Later, Yvette Belgarde apparently told Dr. Gattey that she had been treated roughly, but she did not state by who. (Tr. 2, page 103). However, when Dr. Gattey interviewed Yvette

Belgarde and took her history, she never indicated that she was a victim of domestic violence. (Tr. 2, page 105). Although the state was attempting to establish at trial that Azure had inflicted the injuries on Yvette Belgarde, Dr. Gattey testified on re-direct that he had “never seen a case caused by a kick by a human. . . . No, I’ve never seen that injury caused by a kick by a human, no.” (Tr. 2, page 110-11). Dr. Gattey had seen the type of injury that Yvette Belgarde presented with caused from a “fall from a bull or a fall from a horse.” (Tr. 2, 112).

[26] Nashay Bercier, the daughter of Yvette Bercier, and Sandra Karlson and Wanda Belgarde, both sisters of Yvette Belgarde also testified at trial. However, their testimony was limited to introducing 2 pictures they had taken of Yvette Belgarde and to their perception of how Yvette Belgarde’s life changed after she suffered the injuries in question. None of these 3 witnesses testified in any manner whatsoever that Azure caused the injuries to Yvette Belgarde. The trial testimony of Deputy Parisien and Dr. Gattey, even when considered with the testimony of Nashay Bercier, Sandra Karlson and Wanda Belgarde, is insufficient for a rational factfinder to find Azure guilty beyond a reasonable doubt. The evidence presented at trial isn’t simply contradictory, it is insufficient to prove, beyond a reasonable doubt, that Azure inflicted the injuries upon Yvette Belgarde.

CONCLUSION

[27] Yvette Belgarde did not testify at trial and her Preliminary Hearing Testimony and statements she made to Agent Kluth are clearly hearsay under North Dakota Rules of Evidence 801 and 804, and the trial court abused its discretion when it allowed such

statements into evidence.

[28] Apart from the hearsay testimony of Yvette Belgarde, the state failed to present sufficient evidence from which a rational factfinder could find Azure guilty beyond a reasonable doubt.

[29] Therefore, Azure asks that the Court reverse his conviction and enter a judgment of acquittal.

Respectfully submitted this __12__ day of April, 2017.

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CERTIFICATE OF SERVICE

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[1] I hereby certify that a true and correct copy of the following documents:

Brief of Appellant

Appendix of Appellant

was, on the _13th___ day of _____April_____, 2017 served upon:

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via the electronic filing system of the North Dakota Supreme Court.

[2] Dated this ___13th___ day of ___April_____, 2017.

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