

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

STATE OF NORTH DAKOTA	)	
	)	
Plaintiff-Appellee,	)	Supreme Court No. 20160402
	)	
-vs-	)	Rolette County No. 40-2014-CR-00149
	)	
Duane Francis Azure,	)	
	)	
Defendant-Appellant.	)	

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**APPELLEE'S BRIEF**

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Appeal from Judgement after Verdict of GUILTY by Jury  
 Entered November 18<sup>th</sup>, 2016  
 Rolette County District Court  
 Northeast Judicial District  
 The Honorable Anthony Swain Benson, Presiding

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### STATEMENT OF ISSUES

- I. The Trial Court did not err in allowing the testimony of the Victim, Yvette Belgarde, through her sworn testimony at the preliminary hearing to be admitted at trial.
- II. The Trial Court did not err in allowing the testimony of B.C.I. Agent Allen Kluth regarding statements made to him by the Victim, Yvette Belgarde.
- III. The Trial Court did not abuse its' discretion when it denied the motion by the Defendant for a Judgment of Acquittal for insufficiency of the evidence.

### STATEMENT OF THE CASE

**The State agrees with the Statement of the Case as set forth by the Appellant.**

### STATEMENT OF FACTS

[¶1] On April 20, 2014, a number of calls were received by the Rolette County 911 Dispatch center. The calls were received but there was no response from the other side of the call. After a number of these calls were received with no response from the caller, officers were dispatched to the Duane Azure, Sr. residence to follow up. (Tr. Day 2 page 30-35)

[¶2] Rolette County Deputy Todd Parisien responded to investigate the source of the 911 call(s). When the Deputy arrived he encountered the Defendant, Mr. Duane Azure, Jr., at the front door. The Deputy inquired about someone calling 911 from the residence. The Defendant, Mr. Azure responded "she's over there" pointed into the residence. The Deputy was directed the living room where he found Ms. Belgarde lying on the floor. (Tr. Day 2 page 33)

[¶3] The Deputy described the demeanor and the actions of Mr. Azure as very

intoxicated and pacing back and forth. Also, that he would make comments to the Deputy and Ms. Belgarde such as, “get up you are faking” and “she’s not hurt”. The Deputy observed nervousness and tears as Ms. Belgarde told the Mr. Azure to get away from her as she laid on the floor shaking uncontrollably. (Tr. Day 2 page 35)

[¶4] The ambulance arrived and transported Ms. Belgarde to the local emergency room. She was then taken to Trinity Hospital in Minot, and then to Sanford in Bismarck due to her injuries. The initial statement by Ms. Belgarde was that, “she fell on the deck”.

[¶5] After receiving medical care and being stabilized at Sanford Hospital in Bismarck the Rolette County Sherriff’s Department received a call from Mrs. Belgarde admitting that her injuries resulted from Mr. Azure assaulting her and that she was afraid to say anything at the time.

[¶6] The Rolette County Sheriff’s Department requested a follow-up interview with Ms. Belgarde at the hospital in Bismarck. This was done by North Dakota Bureau of Criminal Investigations Special Agent Allen Kluth. The interview occurred May 7, 2014, in the hospital room of Ms. Belgarde. (Tr. Day 2 page 63-64)

[¶7] The interview revealed the events of April 20, 2014, and the details of the assault committed by Mr. Azure. The statement of Ms. Belgarde revealed that Mr. Azure was intoxicated after drinking throughout the day. The statement of Ms. Belgarde revealed that Mr. Azure had become angry and assaulted her as she was walking up the stairs to the residence. It was stated that he hit her, threw her down and stomped and kicked her resulting in sever injury to her hip and femur. (Tr. Day 2 page 64-67)

[¶8] The State filed a complaint alleging that Mr. Azure committed the offense of Aggravated Assault resulting in substantial/permanent bodily injury in violation of N.D.C.C. §12.1-17-02(3). (Appellant's App., p. 6-8) The Court scheduled a preliminary hearing regarding the allegations. The Mr. Azure subpoenaed the Victim, Ms. Belgarde, as well as other witnesses. The preliminary hearing was rescheduled a number of times due to the Ms. Belgarde not being available and Mr. Azure's desire to submit her to examination under oath at the preliminary hearing. (Register of Actions Doc. Id. # 15, 18, & 20) The preliminary hearing was held on March 16, 2016, and Mr. Azure called the Ms. Belgarde to testify at the preliminary hearing. At the preliminary hearing, under subpoena by Mr. Azure, Ms. Belgarde was subjected to direct examination by the Mr. Azure.

[¶9] During the examination of the Ms. Belgarde it was directly and impliedly alleged that her allegations regarding the assault were fabricated and that she had not been assaulted by Mr. Azure. It was directly alleged that Ms. Belgarde had fabricated the complaint of being assaulted and that her motive for fabricating the allegations was financial, and with intent to bolster a potential claim against the property owners for damages. (Tr. Day 2, page 53-59)

[¶10] Ms. Belgarde died prior to trial. Her death was not associated with the assault according to the medical reports provided.

[¶11] Prior to trial the State filed a motion, and brief in support of the motion, to allow the testimony of Ms. Belgarde from the preliminary hearing, as well as certain statements that were made to B.C.I. Agent Allen Kluth during an interview before the

preliminary hearing. (Register of Actions, Doc. Id. #41 & 42) Then Mr. Azure objected to the motion. (Register of Actions, Doc. Id. #62) The Trial Court granted the State's motion in full. (Register of Actions, Doc. Id. #67, Appellant's App., p. 9)

[¶12] At trial, the transcript of Ms. Belgarde's testimony at the preliminary hearing was reviewed on the record after dismissing the jury. The transcript was read and modified with all parties present. A final version of the transcript from the preliminary hearing was agreed upon after omitting any irrelevant, unfairly prejudicial, or otherwise unapproved content from the testimony of Ms. Belgarde at the preliminary hearing. (Tr. Day 1, page 69, 71-93) The approved version of the transcript was read into the record by the District Court Law Clerk during trial.

### LAW AND ARGUMENT

#### **I. The Trial Court did not err in allowing the testimony of the victim, Yvette Belgarde, from the preliminary hearing to be admitted at trial.**

[¶13] The testimony of Yvette Belgarde was allowed after due consideration by the trial court and the court's review of the motions and briefs filed regarding the preliminary testimony. (Register of Actions, Doc. Id. #67, Appellant's App., p. 9)

[¶14] As the Appellant correctly states the standard of review for the issues presented is whether or not the Trial Court abused its discretion when ruling on the motions regarding testimony and the Defendant's motion for acquittal.

[¶15] The analysis of the Trial Court was accurate and the decision was correct in granting the State's motion to allow the testimony of Yvette Belgarde. The testimony was under oath at the preliminary hearing and was elicited by the Mr. Azure after

commanding her appearance under subpoena.

[¶16] The Mr. Azure established the sworn testimony of the Ms. Belgarde specifically in regards to the identity of the Defendant, Mr. Azure, as her assailant. (Tr. Day 2, page 53-54) as well as the allegation that the accusations were recently fabricated. (Tr. Day 2, page 58)

[¶17] At the time of the preliminary hearing the intentions of the Mr. Azure are indisputable. The Mr. Azure subpoenaed the Victim, Yvette Belgarde with the intent of impeaching her as to her explanation of the injury. She was questioned at length about the events that she described. The discrepancies in her story regarding her initial statement of falling and her later statement about the assault were argued by Mr. Azure.

[¶18] The improper motive was also clearly established as an alternative explanation and the motivation for her allegedly “concocting” the story of being assaulted. The intent being “a slip and fall civil suit isn’t as good as an aggravated assault civil suit, correct?” (Tr. Day 2, page 58-59)

[¶19] Ms. Belgarde was unavailable at trial as defined under Rule 804 of the North Dakota Rules of Evidence and the testimony offered is not excluded by the rule against hearsay. The rule sets out the criteria and relevant points of analysis are summarized below:

RULE 804. EXCEPTIONS TO THE RULE AGAINST HEARSAY—  
WHEN THE DECLARANT IS UNAVAILABLE AS A WITNESS:

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

**(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or**



(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

**(1) Former Testimony. Testimony that:**

**(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and**

**(B) is now offered against a party who had, or, in a civil case, whose predecessor in interest had, an opportunity and similar motive to develop it by direct, cross-, or redirect examination.**

*(Emphasis Added )*

[¶20] As the Trial Court correctly determined the requirements under North Dakota Rules of Evidence Rule 804 were clearly satisfied in this instance and the relevant parts of the preliminary hearing transcript were admissible.

[¶21] The issue of preliminary hearing testimony is specifically addressed in State v. Roquette, 290 N.W.2d 260 (N.D. 1980) as cited in the Appellant's Brief. The Court in that case determined that the testimony given during a preliminary hearing was admissible at trial when the witness is unavailable. Although the Appellant does craft his illustration of the opinion in State v. Roquette to appear favorable to his argument, it in fact supports the finding of the Trial Court in allowing the testimony at trial. The Court determined that the use of the preliminary hearing testimony, in light of the witness being unavailable due to him being deceased, was in fact proper application of the Rule and in accordance with the law.

Specifically the Court acknowledged:

“The Rule 804 (b)(1) exception to the hearsay rule permits admission of testimony given at a preliminary hearing “even though the Defendant may have had significantly less motive to cross-examine the witness at a preliminary examination hearing than at trial”” State v. Garvey, 283 N.W.2d 153 (N.D. 1979) at 156. State v. Roquette, 290 N.W.2d 260 (N.D. 1980) at 265

[¶22] The Trial Court correctly determined that the preliminary hearing transcript was admissible at trial after finding that the Victim, Ms. Belgarde was unavailable as defined by Rule 804(a)(4) N.D.R.Ev. and that the testimony was not excluded by the rule against hearsay because it is specifically excepted under Rule 804 (b)(1).

[¶23] The Mr. Azure opines that the discussion in Barber v. Page, 390 U.S. 719 (1968) should be persuasive regarding the issue of confrontation. The issues presented in Barber are distinguishable. The testimony offered in that case was offered under the exception to the rules against hearsay due to the witness being unavailable. However, the witness was not deceased but only unattainable as he was in federal custody in prison. Additional factors such as the lack of cross examination at the preliminary hearing are also relevant. The Court in Barber specifically acknowledged that the State made no effort to secure the presence of the witness for trial. (*Id.* at 724) The analysis also acknowledges that the exception to the rule against hearsay when a witness is deceased rises out of necessity and, if the other conditions of confrontation are met during proceedings prior to trial, the testimony is generally admissible. (*Id.* at 723)

[¶24] The Mr. Azure had the opportunity to question the Ms. Belgarde through direct examination and question her credibility and her motives. The Mr. Azure specifically alleged that her statements about the assault were false and that she had changed her story. The testimony was under oath. The Trial Court did not err in finding that the preliminary hearing testimony of the Victim, Ms. Belgarde, was admissible at trial. The testimony under oath by Yvette Belgarde was elicited by Mr. Azure through direct examination at the preliminary hearing. The State would submit, that the direct examination of the Ms.

Belgarde regarding her statements about how her injuries occurred, and the suggestion that she fabricated the events of the assault, were exactly the intent and motivation of Mr. Azure at the preliminary hearing. The purpose of commanding the presence of the Ms. Belgarde at the preliminary hearing, under subpoena by Mr. Azure, was to question the Ms. Belgarde about her statements to law enforcement and Mr. Azure's right to confront and question the witness was more than satisfied. The liberties that may be taken at a preliminary hearing arguably allowed Mr. Azure to question Ms. Belgarde without potential limitations that would have been applicable under the rules of evidence. The examination of Ms. Belgarde at the preliminary hearing allowed the ability to scrutinize her statements and allegations beyond what would be allowed in a trial setting.

**II. The Trial Court did not err in allowing the testimony of B.C.I. Agent Allen Kluth regarding statements made to him by the Victim, Yvette Belgarde.**

[¶25] In addition to the testimony of Ms. Belgarde from the preliminary hearing the State sought to admit testimony from Agent Allen Kluth regarding statements made to him during his interview of Ms. Belgarde.

[¶26] The specific information communicated to Agent Kluth was regarding the identity of the Mr. Azure and the details of the assault that Ms. Belgarde communicated to him. (Tr. Day 2, page 65-68) The authority offered to allow Agent Kluth to testify regarding these statements was rooted in North Dakota Rules of Evidence 801(d). The Trial Court correctly determined that the statements made to Agent Kluth during his interview of Ms. Belgarde met the conditions defined in Rule 801(d) which state:

Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

**(1) A Declarant-Witness's Prior Statement. The declarant testifies and is**

**subject to cross-examination about a prior statement, and the statement: (B) is consistent with the declarant's testimony and is offered: (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; (C) identifies a person as someone the declarant perceived earlier.**

[¶27] The Trial Court determined that the statements made to Agent Kluth happened prior to the preliminary hearing and that Ms. Belgarde testified, and was subject to examination regarding her statements to law enforcement, during the preliminary hearing. The statements that Ms. Belgarde made to Agent Kluth were specifically acknowledged during her examination at the preliminary hearing. (Tr. Day 2, page 52)

The Court agreed that Mr. Azure had impliedly, or directly, alleged fabrication during the preliminary hearing. The testimony of Agent Kluth regarding the prior consistent statements made to him by Ms. Belgarde was correctly determined to be admissible.

[¶28] Mr. Azure suggests that the Trial Court was incorrect in its analysis because Ms. Belgarde was not available at trial and was not cross-examined regarding her statements to law enforcement about the assault. However, the parameters of North Dakota Rules of Evidence 801(d)(1)(b)(i) do not confine the testimony to only the time of trial. The testimony of Ms. Belgarde from the preliminary hearing was, with some modification, replicated at trial through a “cold reading” of the approved parts of the transcript. This was done by reading the questions and answers from the transcript using the District Court Law Clerk as a stand in for Ms. Belgarde. The examination by Mr. Azure at the preliminary hearing thoroughly addressed the statements made by Ms. Belgarde. Both her initial statements to medical personnel, describing a fall, as well as her later statements to

law enforcement, regarding the assault she reported later, were addressed during the preliminary hearing. Mr. Azure questioned her credibility and alleged fabrication during this examination.

[¶29] The Court correctly relied upon State v. Ramsey, 2005 ND 42, 692 N.W.2d 498 as well as State v. Neufeld, 1998 ND 103, 578 N.W.2d 536 in the Order Granting Hearsay Testimony (Appellant's App., p. 9)

[¶30] The Trial Court acknowledged that in the above cases the victims were present at trial to testify. However, the presence at trial is not a requirement under the rule. The facts in State v. Ramsey are similar in that the statement of the victim was alleged to be fabricated and the result of improper motive and influence. The out of court statements made by the victim to the mother, aunt, law enforcement and case workers was appropriately determined to be admissible under North Dakota Rules of Evidence 801(d)(1)(b)(i).

[¶31] The analysis in State v. Neufeld is similar. The Court allowed testimony of two friends of the victim regarding out of court statements that were made. The testimony involved the details that the victim told them regarding the abuse years prior to trial. This was admissible to rebut the allegation of recent fabrication regarding the abuse that was reported.

[¶32] Both opinions determine that the out of court statements at issue are not considered hearsay under the Rule and are admissible if the conditions of North Dakota Rules of Evidence 801(d)(1)(b)(i) are met.

[¶33] The statement made by Yvette Belgarde was made through her testimony at

the preliminary hearing. At the preliminary hearing Ms. Belgarde testified under direct examination, by Mr. Azure, about her allegations. The testimony identified Duane Azure, Jr. as her assailant and the details of the assault. The testimony also described her interview with Agent Kluth and the information that she relayed to him about the incident. The discrepancies in her statements were thoroughly argued at the preliminary hearing. Mr. Azure alleged fabrication and improper motive through his examination, questioning Ms. Belgarde about her statements to medical responders and doctors describing a slip and fall and later changing her story to an assault. The allegation that the motive to report the injuries as an assault was to bolster civil lawsuit was directly alleged.

[¶34] The Trial Court correctly allowed the testimony of Agent Kluth regarding the statements made to him by Ms. Belgarde. The agent was cross-examined about what he was told by Ms. Belgarde and her prior statements during his testimony at trial.

**III. The Trial Court did not abuse its' discretion when it denied the motion by Mr. Azure for a Judgment of Acquittal for insufficiency of the evidence.**

[¶35] The Trial Court did not abuse its' discretion in denying the motion for acquittal for lack of evidence made by Mr. Azure after the close of the State's case in chief. The evidence presented to the jury included the testimony of Yvette Belgarde identifying the Defendant, Duane Azure, Jr. as her assailant and the details of the assault. (Tr. Day 2, page 53-59) The Jury heard testimony about the injuries to Yvette Belgarde and the impairment she suffered through the testimony of one of her surgeons, Dr. Gattey. (Tr. Day 2, page 94-102) The family of Yvette Belgarde testified to the lasting impact of

the assault and the changes in demeanor and personality that they observed as well as the difficulties in mobility and rehabilitation as a result of her injuries. (Tr. Day 2, page 129-137, 148-156)

As established in State v. Putney, 2016 ND 59, 877 N.W.2d 28, ¶8;

[W]e look only to the evidence and reasonable inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt. State v. Rufus, 2015 ND 212, ¶ 6, 868 N.W.2d 534 (quoting State v. Corman, 2009 ND 85, ¶ 8, 765 N.W.2d 530).

[¶36] The evidence was sufficient to determine guilt beyond a reasonable doubt when viewed in its entirety. The issues of weight and credibility are for the jury to determine as the fact finders at trial. The jury heard the testimonial evidence regarding the statements by Yvette Belgrade describing the actions of the Mr. Azure and the details of the assault. This testimony also included the statements made to various medical personnel which contradicted her statement to law enforcement and the explanation that fear influenced the statements she made initially. The injuries sustained and the permanent impairment was supported by the testimony of Dr. Gattey as well as the testimony from family who cared for her and assisted her due to the lasting disability caused by the assault. The emotional impact and the change to her personality after suffering the assault were described by family members including anxiety and panic that they would observe when Ms. Belgrade would see Mr. Azure after the assault occurred. (Tr. Day 2, page 152-155)

[¶37] The Trial Court correctly determined that the evidence was sufficient to

support a conviction and denied the motion for acquittal. The evidence presented at trial clearly identified Mr. Azure as the assailant. The culpability as required to prove the offense of Aggravated Assault was supported by the evidence and the testimony presented during trial. The injuries that Ms. Belgarde suffered created a permanent impairment as was established by the testimony of Dr. Gattey and the testimony of the family members of Ms. Belgarde at trial. The jury weighed the evidence, including discrepancies in the testimony, and found that all of the elements of Aggravated Assault causing permanent impairment were proven at trial.

### CONCLUSION

[¶38] The Trial Court did not err in allowing the testimony of Yvette Belgarde from the preliminary hearing to be admitted at trial or the testimony of B.C.I. Agent Allen Kluth regarding the statements she made to him about the assault. The Trial Court correctly applied the Rules of Evidence and supported its finding with articulate and correct reasoning and the application of the law was not incorrect or erroneous.

[¶39] Although the position of Mr. Azure is that the evidence is insufficient to sustain a conviction his logic is based on an alternative record which is not available for consideration in this case. The record on appeal at this time includes the testimony of Yvette Belgarde which was created at the preliminary hearing and allowed to be read at trial. The record on appeal also includes the testimony of Agent Allen Kluth regarding the statements made to him by Yvette Belgarde. The argument presented by Mr. Azure argues that without these substantial pieces of evidence the jury would not have been able to convict Mr. Azure. However, the record we have includes these pieces of testimony and



therefore the argument is not valid.

[¶40] The Trial Court correctly viewed the evidence presented by the State and determined, after viewing the evidence most favorable to the prosecution, that it was sufficient to prove the necessary elements of the allegations. The Trial Court appropriately allowed the weight and credibility of the evidence presented, and the facts to be determined by the jury.

[¶41] For the above reasons THE VERDICT AND JUDGEMENT SHOULD BE AFFIRMED.

Respectfully submitted this 11<sup>th</sup> day of May, 2017,

ROLETTE COUNTY STATE'S ATTORNEY



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**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

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	)	Supreme Court No. 20160402
Plaintiff-Appellee,	)	
	)	Rolette County No. 40-2014-CR-00149
-vs-	)	
	)	
Duane Francis Azure,	)	
	)	<u>Affidavit of Service</u>
Defendant-Appellant.	)	

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[¶1] I, Kelly Albertson, certify that on the 11<sup>th</sup> day of May, 2017, I served the following document:

A) Appellee's Brief

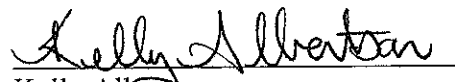
Electronically E-mailed to the following E-mail addresses: [supclerkofcourt@nd.courts.gov](mailto:supclerkofcourt@nd.courts.gov)  
[hartllaw@gondtc.com](mailto:hartllaw@gondtc.com)

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Office of the Clerk  
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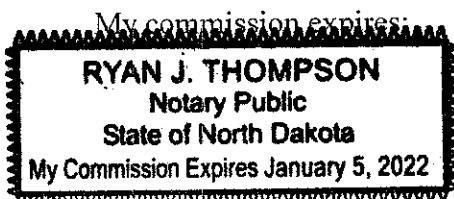
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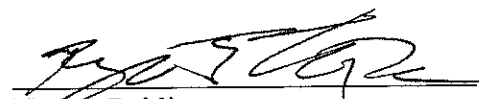
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Dated this 11<sup>th</sup> day of May, 2017

  
\_\_\_\_\_  
Kelly Albertson

Subscribed and sworn to before me this 11<sup>th</sup> day of May, 2017.



  
\_\_\_\_\_  
Notary Public  
Rolette County, ND

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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Plaintiff-Appellee,	)	Supreme Court No. 20160402
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	)	
Duane Francis Azure,	)	
	)	
Defendant-Appellant.	)	<u>Affidavit of Service</u>

[¶1] I, Kelly Albertson, certify that on the 12<sup>th</sup> day of May, 2017, I served the following document:

A) Appellee’s Brief

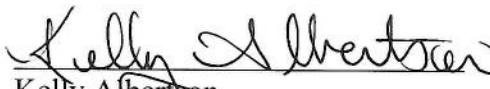
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PO Box 319  
Rugby, ND 58368

Dated this 12<sup>th</sup> day of May, 2017

  
Kelly Albertson

Subscribed and sworn to before me this 12<sup>th</sup> day of May, 2017.

My commission expires:

  
Notary Public  
Rolette County, ND

