

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

State of North Dakota,)	
)	Supreme Court No.
Petitioner,)	
)	District Court No. 51-2015-CR-01459
)	
vs.)	
)	
)	
The Honorable Stacy J. Louser and)	
Alexander Justin Pittenger,)	
)	
Respondents.)	

BRIEF OF PETITIONER

**Appeal from Oral Order Entered on January 9, 2017
In District Court, Ward County, State of North Dakota
The Honorable Stacy J. Louser, Presiding**

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[¶2] STATEMENT OF THE ISSUE

[¶3] I. Whether the trial court abused its discretion in ordering that Pat Helfrich was an expert and that his testimony would be expert testimony.

[¶4] STATEMENT OF THE CASE

[¶5] The State filed a criminal complaint charging Alexander Justin Pittenger (hereinafter “Pittenger”) with Gross Sexual Imposition, in violation of N.D.C.C. § 12.1-20-03(1)(d), and Corruption or Solicitation of Minors, in violation of N.D.C.C. § 12.1-20-05(1), on June 29, 2015. (See Petitioner’s Appendix p. 1).

[¶6] Pittenger appeared before the District Court on July 6, 2015, for an Initial Appearance, and not guilty pleas were entered at that time. (See Petitioner’s App. p. 1). Pittenger appeared on August 13, 2015, at a Preliminary Hearing. (See Petitioner’s App. p. 2). A Pretrial Conference was held on October 21, 2015. (See Petitioner’s App. p. 2). Jury Trial was ordered to commence on May 9, 2016. (See Petitioner’s App. p. 3). An Order to Reschedule Trial was issued on May 9, 2016. (See Petitioner’s App. p. 5).

[¶7] Jury Trial commenced on July 18, 2016. (See Petitioner’s App. p. 5). The trial court issued an Order for Mistrial on July 22, 2016. (See Petitioner’s App. p. 6).

[¶8] Jury Trial commenced on January 9, 2017. (See Petitioner’s App. p. 7). On January 9, 2017, the State called Special Agent Pat Helfrich to testify in its case-in-chief. (See Transcript of Trial). Pittenger objected to Special Agent Pat Helfrich on the grounds that he was an expert witness. (See Transcript of Trial). The trial court ruled and orally ordered that Special Agent Pat Helfrich was an expert witness and that any testimony received by him would be expert testimony. (See Transcript of Trial).

[¶9] On January 10, 2017, the State informed the trial court that it would be filing a Petition of Supervisory Writ. (See Transcript of Trial). The State requested that the jury

remain impaneled and that the trial court order a stay of proceedings. (See Transcript of Trial). The trial court granted the State's request. (See Transcript of Trial). This Petition for Supervisory Writ follows.

[¶10] STATEMENT OF THE FACTS

[¶11] Jury Trial commenced on January 9, 2017. (See Petitioner's App. p. 7). On January 9, 2017, the State called Special Agent Pat Helfrich to testify in its case-in-chief. (See Transcript of Trial). Pittenger objected to Special Agent Pat Helfrich on the grounds that he was an expert witness. (See Transcript of Trial). The trial court ruled and ordered that Special Agent Pat Helfrich was an expert witness and that any testimony received by him would be expert testimony. (See Transcript of Trial).

[¶12] On January 10, 2017, the State informed the trial court that it would be filing a Petition of Supervisory Writ. (See Transcript of Trial). The State requested that the jury remain impaneled and that the trial court order a stay of proceedings. (See Transcript of Trial). The trial court granted the State's request. (See Transcript of Trial). This Petition of Supervisory Writ follows.

[¶13] LAW AND ARGUMENT

[¶14] I. Whether the trial court abused its discretion in ordering that Pat Helfrich was an expert and that his testimony would be expert testimony.

[¶15] A. Standard of Review.

[¶16] “An appeal may be taken by the state from [a]n order granting the return of property or suppressing evidence, when accompanied by a statement of the prosecuting attorney asserting that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.” N.D.C.C. § 29-28-07(5).

“[A]ppeals by the State pursuant to Section 29-28-07(5) are limited to appeals from the granting of a motion to suppress under Rule 12(b)(3), N.D.R.Crim.P., and from the granting of a motion to return evidence under Rule 41(e), N.D.R.Crim.P.” State v. Miller, 391 N.W.2d 151, 154 (N.D. 1986). “The following defenses, objections and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits: [...] (C) suppression of evidence; (D) severance of charges or defendants under Rule 14; and (E) discovery under Rule 16.” N.D.R.Crim.P. 12(b)(3). The trial court ordered “[a]ll proposed jury instructions and any motions in limine must be filed at least 22 days before trial. Failure to raise said motions will be deemed waived.” (See Petitioner’s App. p. 8).

[¶17] “Under N.D. Const. art. VI, § 2, and N.D.C.C. § 27-02-04, [the North Dakota Supreme Court] may review a district court decision under [its] supervisory authority.” State ex rel. Madden v. Rustad, 2012 ND 242, ¶ 5, 823 N.W.2d 767 (citing State ex rel. Roseland v. Herauf, 2012 ND 151, 819 N.W.2d 546). In the exercise of its general superintending control over inferior courts, the supreme court may control the course of litigation in district courts to prevent injustice in cases where there is no appeal. See

State ex rel. Lemke v. District Court, 49 N.D. 27, 186 N.W.381 (N.D. 1921); State v. ex rel. Shafer v. District Court of Third Judicial Dist., 49 N.D. 1127, 194 N.W. 745 (N.D. 1923); State ex rel. Johnson v. Broderick, 75 N.D. 340, 27 N.W.2d 849 (N.D. 1947); Patten v. Green, 369 N.W.2d 105 (N.D. 1985). The North Dakota Supreme Court “exercise[s] [its] authority to issue supervisory writs rarely and cautiously on a case-by-case basis and only to rectify errors and prevent injustice in extraordinary cases when no adequate alternative remedy exists.” State ex rel. Madden v. Rustad, 2012 ND 242, ¶ 5, 823 N.W.2d 767 (citing State ex rel. Roseland v. Herauf, 2012 ND 151, 819 N.W.2d 546).

[¶18] The basis for the motion and objection to Special Agent Pat Helfrich testifying as a lay witness was reasonably available and could have been determined without a trial on the merits. Pittenger had the benefit of hearing the entirety of Special Agent Pat Helfrich’s testimony, and did not object, at the jury trial which took place from July 18, 2016 through July 21, 2016. (See Transcript of Trial). Pittenger chose to lay in wait and raise the motion for suppression of Special Agent Pat Helfrich’s testimony until the time he took the stand at the second trial, commencing on January 9, 2017. The decision to lay in wait does not convert the objection; it remains a motion to suppress evidence which falls within the purview of N.D.R.Crim.P. 12(b)(3).

[¶19] “The decision whether to allow opinion testimony from either a lay witness or an expert witness is ‘within the district court’s sound discretion and will not be reversed unless the court has abused its discretion.’” State v. Saulter, 2009 ND 78, ¶ 9, 764 N.W.2d 430 (quoting State v. Streeper, 2007 ND 25, ¶ 23, 727 N.W.2d 759). “A district court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, when

its decision is not the product of rational mental process leading to a reasoned determination, or when it misinterprets or misapplies the law.” State v. Saulter, 2009 ND 78, ¶ 9, 764 N.W.2d 430 (quoting City of Fargo v. Levine, 2008 ND 64, ¶ 5, 747 N.W.2d 130; Leet v. City of Minot, 2006 ND 191, ¶ 7, 721 N.W.2d 398).

[¶20] In the alternative that the State is not permitted to appeal the oral order of the trial court under N.D.C.C. § 29-28-07, this is an appropriate case for the North Dakota Supreme Court to exercise its supervisory jurisdiction because the State lacks another adequate remedy. See State ex rel. Madden v. Rustad, 2012 ND 242, ¶ 6, 823 N.W.2d 767. The State’s ability to appeal is limited under N.D.C.C. § 29-28-07. If Pittenger were found not guilty by a jury, the State could not appeal. Id. If Pittenger were found guilty by a jury, on appeal he would not likely raise an issue about the order requiring Special Agent Pat Helfrich to testify as an expert at trial, and the possibility the State could raise the issue is remote. Id.

[¶21] **B. The trial court abused its discretion in ordering that Pat Helfrich was an expert and that his testimony would be expert testimony.**

[¶22] “The admission of lay opinion testimony is governed by N.D.R.Ev. 701, which provides: ‘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 a clear understanding of the witness’ testimony or the determination of a fact in issue.’” State v. Saulter, 2009 ND 78, ¶ 10, 764 N.W.2d 430.

[¶23] “The admission of expert testimony is governed by N.D.R.Ev. 702, which provides, ‘[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Id. at ¶ 11. “A critical distinction between Rule 701 and Rule 702 testimony is that an expert witness ‘must possess some specialized knowledge or skill or education that is not in the possession of the jurors.’” Id. (quoting Certain Underwriters at Lloyd’s, London v. Sinkovich, 232 F.3d 200, 203 (4th Cir. 2000); Redden & Saltzburg, Federal Rules of Evidence Manual 225 (1975)).

[¶24] “Lay opinion testimony is limited to testimony that is ‘rationally based on the perception of the witness.’” State v. Saulter, 2009 ND 78, ¶ 12, 764 N.W.2d 430 (citing N.D.R.Ev. 701). “This requires the witness to have observed the incident or have first-hand knowledge of the facts that form the basis for the opinion.” State v. Saulter, 2009 ND 78, ¶ 12, 764 N.W.2d 430 (citing Fed. R. Evid. 701 advisory committee’s note). “Furthermore, N.D.R.Ev. 602 states that ‘[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter[,]’ except for expert witnesses who may give opinion testimony under N.D.R.Ev. 703.” Id. “A lay witness offering an opinion, therefore, must base an opinion on his or her perception or personal knowledge of the matter.” Id.

[¶25] “Lay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.” State v. Saulter, 2009 ND 78, ¶ 15, 764 N.W.2d 430 (citing United States v. Peoples, 250 F.3d 630, 641 (8th Cir. 2001)). “While a witness’s testimony is not necessarily expert testimony simply because the witness has specialized knowledge and was chosen to carry out an investigation because of that knowledge, the

witness's testimony is expert testimony if the testimony is rooted exclusively in his expertise or is not a product of his investigation but instead reflects his specialized knowledge." Id. (citing United States v. Rigas, 490 F.3d 208, 224 (2d Cir. 2007)).

[¶26] Special Agent Pat Helfrich was called by the State to testify as a lay witness. The State informed the trial court that it intended to ask Special Agent Pat Helfrich who he had received the Iphone 4s from, what he did with that phone, why he performed an extraction on the phone, and if he recognized a particular set of messages as being located on or within the phone. The State informed the trial court that Special Agent Pat Helfrich would be testifying about what he did, what he saw, and what he found, as he was the individual who performed the investigation specific to the contents of the Iphone 4s.

[¶27] Ultimately, Special Agent Pat Helfrich would testify that he searched a container, the Iphone 4s, and would testify what he found in that container. Furthermore, Special Agent Pat Helfrich would not have been offering an expert opinion, as he would have merely presented the data he had downloaded from the Iphone 4s, and merely identified the downloaded information as coming from the Iphone 4s. See Commonwealth v. Cannon, 2014 Pa. Super. Unpub., LEXIS 2966; and Commonwealth v. McCallum, 2014 Pa. Super. Unpub., LEXIS 852, 2014 WL 10917628.

[¶28] The State informed the trial court that it did not call Special Agent Pat Helfrich as an expert witness, as he was permitted to testify based on his perception and personal knowledge of the matter pursuant to N.D.R.Ev. 701. (See Petitioner's App. p. 13). The State acknowledged that Special Agent Pat Helfrich may have specialized knowledge, but directed the trial court to State v. Saulter for the appropriate analysis in determining if that specialized knowledge alone would prohibit Special Agent Pat Helfrich from

testifying as a lay witness. (See Petitioner's App. p. 14).

[¶29] The trial court found that because Special Agent Pat Helfrich possessed specialized knowledge, he was an expert. (See Petitioner's App. p. 15). The trial court failed to take into consideration that Special Agent Pat Helfrich would be testifying based upon his perception and personal knowledge obtained during his investigation. Id.

[¶30] The trial court found that this case was akin to State v. Saulter. Id. at 16. The trial court acknowledges that State v. Saulter sets out that a witness offering a lay opinion must have observed the incident or have first-hand knowledge of the facts that form the basis for the opinion, rationally basing that opinion on his perception or personal knowledge of the matter. Id. However, the trial court failed to recognize the distinction that exists between the testimony of Special Agent Pat Helfrich in this matter, and the testimony offered by Detective Vigness in State v. Saulter. Detective Vigness did not perform an investigation. Detective Vigness reviewed the reports and investigation of other officers and offered an opinion based upon that review using specialized knowledge. In addition, Detective Vigness offered testimony to hypothetical questions. The State clearly defined the parameters of Special Agent Pat Helfrich's testimony would be in this case: testimony concerning events to which he had first-hand knowledge and that which he perceived. (See Petitioner's App. p. 19).

[¶31] The trial court did not dispute that Special Agent Pat Helfrich's testimony would concern events to which he had first-hand knowledge and to which he perceived. Id. However, instead of applying the appropriate legal analysis to the testimony that was going to be offered, the trial court chose to look at testimony that had occurred at a prior

trial. Id. Ultimately, the trial court effectively ruled that once the State had presented its case at a previous trial, the State could not present its case in any other manner. Id. at 17-18. The State is unable to find any legal authority which supports such a finding by the trial court.

[¶32] After the mistrial, the State pinpointed evidence and testimony that it deemed to be ineffective or unnecessary and took steps to address those deficiencies in the second trial. The testimony of Special Agent Pat Helfrich fell within those categories. The State did not offer Special Agent Helfrich as an expert at the first trial, nor at the second trial. The State maintained that Special Agent Helfrich was a lay witness, and if he had previously offered an opinion, it was based upon his first-hand knowledge and his perception. In addressing Pittenger and the trial court's concerns, the State was not indicating that it was now limiting Special Agent Pat Helfrich's testimony to avoid him being an expert, the State was simply trying to indicate that those concerns need not be addressed, as Special Agent Pat Helfrich's testimony would not include the same information.

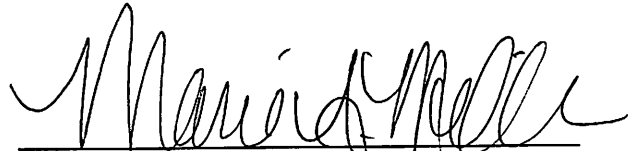
[¶33] The trial court titled its written order, "Order Excluding Testimony Due to Non Compliance with Rule 16 Discovery Request." The issue of discovery could not be reached without the trial court first ordering Special Agent Pat Helfrich was an expert. That issue is a pre-trial suppression issue, one which Pittenger had knowledge of and certainly could have raised. Pittenger could have filed a Motion to Suppress Special Agent Pat Helfrich offering testimony which was outside the scope of his first-hand knowledge and perception. Pittenger chose not to file such a suppression motion, but instead chose to lay in wait in hopes of disguising the issue as a discovery violation.

The title of the trial court's order does not convert what the trial court actually did. The trial court ordered that Special Agent Pat Helfrich's anticipated testimony was expert testimony. The trial court misinterpreted or misapplied the law, and abused its discretion when it ordered Special Agent Pat Helfrich could only testify as an expert, and in doing so suppressed his testimony.

[¶34] CONCLUSION

[¶35] The trial court abused its discretion in ordering Special Agent Pat Helfrich to testify as an expert. The trial court misapplied or misinterpreted the current law in the State of North Dakota. The State requests that the trial court's order be reversed and that Special Agent Pat Helfrich be permitted to testify as a lay witness.

Dated this 12th day of January, 2017.



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