

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

State of North Dakota,

Plaintiff - Appellee,

vs.

Supreme Court No. 20170345
District Court No. 09-2015-CR-02085

Ashley Kenneth Hunter,

Defendant - Appellant.

SUPPLEMENTAL APPELLEE'S BRIEF

Appeal from Criminal Judgment
Entered September 5, 2017,
East Central Judicial District
the Honorable Norman Anderson, Presiding

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[¶ 2] **TABLE OF AUTHORITIES**

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State v. Zimmerman, 524 N.W.2d 111 (N.D. 1994) ¶ 31

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N.D.R.Ev. 403 ¶ 31

N.D.R.Ev. 608 ¶ 42

N.D.R.Ev. 701 ¶ 41, 42

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Other Sources

Paul G. Cassell, The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction from False Confessions, 22 Harv.L.J. & Pub.Pol’y 523, Spring 1999 ¶ 31

David A. Perez, Comment: The (In)admissibility of False Confession Expert Testimony, 26 Touro L. Rev. 23, Comment (2010)..... ¶ 31

[¶ 3] ISSUES PRESENTED

[¶ 4] I. Whether the district court erred in finding Hunter gave a voluntary statement to law enforcement.

[¶ 5] II. Whether the district court erred in excluding the expert testimony of Alan Hirsch.

[¶ 6] III. Whether the district court erred in excluding the expert testimony of private investigator Jon Jacobson.

[¶ 7] IV. Whether the district court erred in excluding the testimony of Neil Buck.

[¶ 8] V. Whether the district court erred in excluding the opinion testimony of lay witness Lori Manderson.

[¶ 9] VI. Whether the district court erred in admitting a photograph of a toolbox.

[¶ 10] STATEMENT OF THE CASE

[¶ 11] This Appellee's Supplemental Brief responds to Appellant's Supplemental Statement, dated February 18, 2018.

[¶ 12] STATEMENT OF THE FACTS

[¶ 13] Relevant facts are contained within Appellee's Brief and are otherwise woven into the following arguments.

[¶ 14] ARGUMENT

[¶ 15] I. The district court did not err in finding Hunter gave a voluntary statement to law enforcement.

[¶ 16] Hunter claims the court erred when it found he voluntarily gave a statement to investigators. (Appellant’s Supplementary Statement, ¶¶14-22.)

[¶ 17] A. Standard of review

[¶ 18] “Because the district court is in a superior position to judge credibility and weight, we give great deference to the district court’s determination of voluntariness.” State v. Crabtree, 2008 ND 174, ¶13, 756 N.W.2d 189 (citations omitted). This court does not conduct a de novo review; rather, it will reverse “only if the court’s decision is contrary to the manifest weight of the evidence.” Id.

[¶ 19] B. District court’s decision of voluntariness

[¶ 20] “A voluntariness inquiry focuses on two elements: ‘(1) the characteristics and condition of the accused at the time of the confession and (2) the details of the setting in which the confession was obtained.’” Id. at ¶12. Voluntariness is determined by the totality of circumstances. Id. It depends upon questions of fact to be resolved by the district court. Id. at ¶13.

[¶ 21] The State addressed the voluntariness issue in significant detail in Appellee’s Brief, ¶¶35-44, incorporated by reference. The court addressed it in its opinion denying Hunter’s suppression motion. (Doc ID#329:13-24.)

[¶ 22] The court was in the best position to judge the evidence. Furthermore, although Hunter did not testify, the court had an opportunity to observe and assess Hunter throughout nearly two years of court hearings. Refer also to ¶32 of this Brief. The court had ample evidence to support its voluntariness decision. Hunter’s

will was not overborn. The court’s decision was not contrary to the manifest weight of the evidence.

[¶ 23] II. The district court did not err in excluding the expert testimony of Alan Hirsch.

[¶ 24] During the middle of trial, Hunter gave notice of Alan Hirsch as an expert witness on “false confessions”. He argues the court erred in excluding that testimony. (Appellant’s Supplemental Statement, ¶¶23-32.) Hunter already raised this complaint in his Amended Appellant’s Brief, ¶75. The State responded in Appellee’s Brief, ¶75. However, because Hunter devotes a significant part of his Supplemental Statement to this topic, the State further responds here.

[¶ 25] A. Standard of review

[¶ 26] “The ultimate decision whether to admit expert witness testimony rests within the district court’s sound discretion.” State v. Schmidkunz, 2006 ND 192, ¶14, 721 N.W.2d 387 (citations omitted). This Court will not reverse that decision unless the court has abused its discretion. Id. “An abuse of discretion is never assumed, and the burden is on the party seeking relief affirmatively to establish it.” Id. “The district court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination.” Id.

[¶ 27] B. District court excluded Hirsch’s testimony

[¶ 28] Rule 702, N.D.R.Ev., governs the admissibility of testimony by an expert witness. A witness qualified as an expert by knowledge, skill, experience,

training or education may testify in the form of an opinion if their experience will help the jury understand the evidence or determine a fact in issue. Id.

[¶ 29] Hunter proposed Hirsch testify as an expert on the general topic of false confessions. Hirsch would not testify as to whether Hunter had given a false confession. (Trial Tr. 1895:22-1896:2, 1896:24-1897:4.) The court heard from Hirsch through a live video link as an offer of proof. (Trial Tr. 1882:6-1893:13.) Thereafter the court excluded Hirsch's testimony. The court stated: (1) many jurisdictions exclude expert testimony on false confessions; (2) it was not clear there was a "science" of false confessions; (3) cross-examination and argument could identify when a defendant was tricked or coerced into confessing; (4) Hirsch was not a psychiatrist, psychologist or researcher; (5) Hunter had no identifiable personality disorder making him amenable to suggestion by law enforcement; (6) a jury can recognize and understand the concept of suggestive interrogation and false confession without an expert; (7) the court would instruct the jury that people have been known to admit to criminal acts they did not commit; (8) Hirsch's testimony would not aid the jury in determining whether Hunter's confession was voluntary, coerced or credible; (9) Hunter was not a person easily prodded into admitting anything; and (10) Hunter spent far more time during his interview denying the crimes than admitting them. (Trial Tr. 1897:5-1902:17; Doc ID#596.) The court used a stylized jury instruction which stated, in pertinent part: "It is not uncommon for people to confess honestly to a crime that they have committed. It is also known

that people, for various reasons, may admit to crimes they did not in fact commit.”
(Doc ID#578:25.)

[¶ 30] C. Distinguishing Hunter’s arguments

[¶ 31] In his Supplemental Statement, Hunter referenced 27 cases and three law review articles in support of Hirsch’s testimony. Space limitations do not allow for distinguishing each. Instead, the State addresses several to provide some context. Hunter references United States v. Shay, 57 F.3d 126 (1st Cir 1995), United States v. Hall, 93 F.3d 1337 (7th Cir. 1996) and United States v. Belyea, 159 Fed.Appx. 525 (4th Cir. 2005) (unpublished). (Appellant’s Supplemental Statement, ¶¶28-30.) The Shay and Hall cases are distinguishable because, according to Benally, they stand “only” for the proposition that expert testimony is admissible when the expert will testify to a defendant’s identifiable medical disorder that raises a question regarding his cognitive voluntariness. United States v. Benally, 541 F.3d 990, 996 (10th Cir. 2008) (citations omitted) (affirmed district court decision to exclude testimony of expert who did not examine defendant, but would testify generally about causes of false confessions). Hunter identified no medical disorder contributing to his statements. In Belyea, the 4th Circuit remanded where the trial court: (1) denied the defendant an opportunity to make a proffer of his proposed expert’s testimony, and (2) the court’s primary reason for excluding the testimony was that “juries know people lie”. Belyea, 159 Fed.Appx. at 529. However, in Hunter’s case the court heard a proffer from Hirsch, gave many reasons for excluding Hirsch’s testimony and instructed the jury that some people falsely

confess. Hunter also references State v. Ramsey, 2005 ND 42, ¶27, 692 N.W.2d 498, State v. Randall, 2002 ND 16, ¶15, 639 N.W.2d 439 and State v. Zimmerman, 524 N.W.2d 111, 116 (N.D. 1994) in his discussion about N.D.R.Ev. 403. (Appellant's Supplemental Statement, ¶26.) However, those three cases provide little guidance because they do not relate to an interplay between Rule 702 and Rule 403 in an alleged false confession context. Hunter references three law review articles regarding expert testimony on false confessions. (Appellant's Supplemental Statement, ¶31.) Notwithstanding those articles, both federal and state jurisdictions throughout the country have excluded the use of expert testimony on false confessions in situations akin to Hunter's. See e.g., U.S. v. Phillipos, 849 F.3d 464, 471-72 (1st Cir. 2017) (trial court's exclusion of expert testimony on false confessions was reasonable where there was "no indication that there is a body of reliable material" and it "would introduce the jury ... to a kind of 'faux science'"); Humphrey v. Riley, 731 S.E.2d 740, 745 (Ga. 2012) (whether someone might be persuaded to give a false confession through persuasive interrogation techniques is not beyond the ken of the average juror); State v. Kirk, 2015 WL 7356576 (Minn.Ct.App. 2015), review denied, (Feb.16, 2016)(defendant's constitutional right to present a complete defense was not infringed by excluding expert testimony on false confessions); State v. Casey, 517 S.W.3d 570 (Mo.Ct.App. E.D. 2016), reh'g and/or transfer denied (Dec. 30, 2016), transfer denied (May 30, 2017) (court acted within discretion by excluding expert testimony about false confessions where confession was videotaped and viewed by jury); People v Jeremiah, 147 A.D.3d

1199, 47 N.Y.S.3d 490 (3d Dep't 2017) (court did not abuse discretion in excluding expert offering general testimony about false confessions); Commonwealth v. Alicia, 92 A.3d 753 (Pa. 2014) (on interlocutory appeal, court concludes general expert testimony on false confessions improperly invites jury to determine those interrogation techniques were used in present case; whether confession is false is best left to jury's common sense and life experience after developing circumstances surrounding the confession using cross-examination and argument). See generally, Paul G. Cassell, The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions, 22 Harv.J.L. & Pub. Pol'y 523, 602-03 Spring 1999 (alleged false confession cases have been miscategorized due to reliance on inaccurate second-hand media accounts, where defendants were actually guilty and, in distilling the cases, the false confession problem was not pervasive and largely concentrated among the "mentally retarded"); David A. Perez, Comment: The (In)admissibility of False Confession Expert Testimony, 26 Touro L.Rev. 23 (2010) (false confessions are extraordinarily rare and the evidence offered by false confession experts is unreliable). Furthermore, a federal court excluded Hirsch's general and specific testimony on false confessions. United State v. Jacques, 784 F.Supp.2d 59, 66-68 (D.Mass. 2011) (if court allowed defendant to put on false confession testimony, the government should be allowed to put on testimony that true confessions happen and at a far greater rate).

[¶ 32] In Hunter's case, the jury was able to see and hear Hunter's recorded interview and follow along in a transcript. (Doc ID#148 and 468.) No bright lights.

No arm twisting. No yelling. No threats. No evidence Hunter had a medical diagnosis indicating suggestibility. No grueling hours of interview. Hunter was left to his own thoughts in the room for about 30-minutes before the interview began and for about 30-minutes again in the middle of the interview. In significant part the interview consisted of Hunter narrating while officers sat back in their chairs and listened. He spent much of the interview denying responsibility. However, he also described unique observations about the crimes, for example the sound the knife made as it struck bone in Flower's murder, how the hammer hitting Traut's head sounded like a "hardcore pop ... a big bang" and how his body stiffened in response. (Doc ID#148:71, 121, 127, and 468.)

[¶ 33] III. The district court did not err in excluding the expert testimony of private investigator Jon Jacobson.

[¶ 34] Hunter argues private investigator Jon Jacobson should have been allowed to testify as an expert. (Appellant's Supplemental Statement, ¶¶33-36.) He indicated Jacobson would testify to: (1) evidence collection techniques; (2) his analysis of what the evidence collected in the case meant to Hunter; (3) standards for DNA analysis and his analysis of DNA reports; (4) his personal analysis of police interviews and evidence; (5) his own investigation and interviews; and (6) "any other matters relevant to the analysis of evidence." (Doc ID#333, ¶4.) The State argued Jacobson was unqualified to be an expert as proposed. (Doc ID#379, §3, and 382.) For example, he had never collected evidence, had very little training on collection procedures and no training on analysis. *Id.* He had no formal

education on the topic of police interviews and no formal training in DNA analysis.
Id.

[¶ 35] The court excluded Jacobson as an expert. It stated: (1) Jacobson could advise counsel on areas where police evidence collection or interview techniques could have been better, counsel could explore those through cross-examination of the State's witnesses and then argue those to the jury; (2) Hunter could put on a DNA expert if he had one, Jacobson was not one but could advise counsel on areas for cross-examination; and (3) Jacobson could not testify as an expert witness. (Trial Tr. 1753:21-1757:15.)

[¶ 36] Hunter's intended use of Jacobson would not assist the jury and would invade the jury's duty and right to weigh the evidence. The court did not abuse its discretion in excluding Jacobson as an expert.

[¶ 37] IV. The district court did not err in excluding the testimony of Neil Buck.

[¶ 38] In evidentiary matters, the district court has broad discretion. This Court will not overturn a decision to admit or exclude evidence absent an abuse of discretion. Blackcloud v. State, 2018 ND 50, ¶9, ___ N.W.2d ___.

[¶ 39] Hunter argues the court should have allowed Neil Buck to testify. (Appellant's Supplemental Statement, ¶¶37-38.) As context, prior trial testimony showed Megan Wartman dated Hunter and was present at the Flower's murder scene (Scene 1) and in the hideout (Scene 3) on the other side of the block from the Traut murder scene (Scene 2). Hunter alleged Wartman was a tie between both

murders and had a motive for both murders. In support of that allegation, Hunter made a proffer of Buck's potential testimony. (Trial Tr. 1520:7-1532:19.) Hunter claimed Buck would say: (1) Buck was looking for drugs and Wartman helped arrange a methamphetamine transaction in a parking lot at some unspecified time before the murders; (2) Dan Aubol, housemate of Traut (second murder victim), was involved in that transaction; and (3) Traut was with Aubol in the car during the transaction. Buck did not otherwise know Aubol or Traut. During that proffer the State noted: (1) Buck's story was of questionable reliability because, among other things, he currently had ten open counts of possession of child pornography and had five convictions for false information to law enforcement; (2) Traut's autopsy showed no evidence of illegal drug use; and (3) after an exhaustive search of the Aubol/Traut residence (Scene 2), investigators found no drug paraphernalia, not so much as a marijuana seed or stem and no methamphetamine. (Trial Tr. 1520:14-18, 1530:3-10.) After extensive give-and-take between Hunter's counsel and the court, the court excluded Buck's testimony because it: (1) was "too collateral", (2) was "too speculative", (3) would "confuse the issues", and (4) Hunter had not established how Buck's testimony was relevant to who killed Flowers and Traut. (Trial Tr. 1524:19-1532:19, 1732:11-1739:13; Doc ID#585.) However, the court advised Buck could be used as a character witness against Wartman, with some limits. (Trial Tr. 1737:19-1738:33.) The court did not abuse its discretion.

[¶ 40] V. The district court did not err in excluding the opinion testimony of lay witness Lori Manderson.

[¶ 41] The ability of a lay witness to offer an opinion is limited to one that is: (1) rationally related to the witness's perception, and (2) helpful to understand the witness's testimony or determining a fact in issue. N.D.R.Ev. 701. The admissibility of opinion testimony from a lay witness is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Crisler, 2017 ND 249, ¶6, 902 N.W.2d 925.

[¶ 42] Hunter argues the court should have allowed lay witness Lori Manderson to opine as to who she thought killed Traut. (Appellant's Supplemental Statement, ¶¶38-41.) Manderson had a dating relationship with Christopher Doss, both of whom lived in the apartment in which Hunter hid out between the Flowers and Traut murders, and thereafter (Scene 3). Near the close of cross-examination, Hunter's counsel asked Manderson: "... in your opinion, who do you think committed the murder on Sam Traut." (Trial Tr. 1442:10-12.) The State objected. The court and parties discussed the objection outside the hearing of the jury. (Trial Tr. 1442-1448.) Hunter now argues the court erroneously excluded her opinion because it did not understand Rule 701. However, the court quoted Rule 701 verbatim. (Trial Tr. 1444:1-5.) It concluded Manderson's opinion met neither of the two elements under Rule 701, and it was for the jury to decide who committed the crimes. (Trial Tr. 1444:5-9.) The court advised Hunter that Manderson may be able to testify to a prior witness's character for truthfulness based upon reputation or opinion evidence under N.D.R.Ev. 608. (Trial Tr. 1444:10-13, 1736:6-15.) The court did not abuse its discretion.

[¶ 43] VI. The district court did not err in admitting a photograph of a toolbox.

[¶ 44] Hunter argues the court should not have admitted a photograph of a toolbox found in the garage of Scene 2 (Traut's murder). (Hunter Supplemental Statement, ¶43.) Hunter already raised this argument in his Amended Appellant's Brief, ¶76. The State responded in Appellee's Brief, ¶76, incorporated by reference. The court did not abuse its discretion by allowing in the photograph of the toolkit.

[¶ 45] CONCLUSION

[¶ 46] For all the reasons provided above, the State respectfully requests this Honorable Court affirm the verdict and conviction.

[¶ 47] Respectfully submitted on March 20, 2018.

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[¶ 48] **CERTIFICATE OF SERVICE**

[¶ 49] A true and correct copy of the foregoing document was sent by e-mail on March 20, 2018 to: Samuel A Gereszek (sam@egflawyer.com), and by U.S. Mail to Ashley K. Hunter, Inmate, NDSP, P.O. Box 5521, Bismarck, ND 58506-5521.

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