

IN DISTRICT COURT, STATE OF NORTH DAKOTA, COUNTY OF GRAND FORKS

State of North Dakota,

Plaintiff,

vs.

David Juan Castaneda,

Defendant.

**MOTION TO QUALIFY KARI KERR WELSH AS AN EXPERT  
WITNESS FOR THE STATE  
District Court #18-08-K-00192 and #18-08-K-00416  
SA#104883 and 105221**

Pursuant to Rule 3.2 of the North Dakota Rules of Court, the State hereby moves to qualify Kari Kerr Welsh as an expert witness for the State in the dynamics of domestic violence. This motion is supported by the attached brief and accompanying documents.

DATED this \_\_\_\_ day of May, 2008.

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**BRIEF IN SUPPORT OF MOTION TO QUALIFY KARI KERR WELSH  
AS AN EXPERT WITNESS FOR THE STATE  
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I. KARI KERR WELSH SHOULD BE QUALIFIED AS AN EXPERT WITNESS FOR THE STATE IN THE AREA OF THE DYNAMICS OF DOMESTIC VIOLENCE RELATIONSHIPS.

According to North Dakota Rules of Evidence 702, a witness may testify if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” N.D.R.Ev. 702. A witness may be qualified as an expert by their knowledge, skill, experience, training, or education. N.D.R.Ev. 702. The State requests this Court to declare Kari Kerr Welsh, the Education and Prevention Coordinator at the Community Violence Intervention Center, as an expert witness in the field of domestic violence and specifically with relation to the dynamics of a domestic violence relationship. Ms. Kerr Welsh has a Bachelors degree in Psychology, a Masters Degree in Counseling, is licensed as a North Dakota Professional Counselor, has been employed with the Community Violence Intervention Center for twelve years, and has over 400 hours of training experience in the area of domestic violence. See Attachments 1-3.

Although this appears to be a case of first impression in North Dakota, the majority of states have addressed this area and permit such expert qualifications. See Cynthia Lynn Barnes,

*Admissibility of expert testimony concerning domestic-violence syndromes to assist jury in evaluating victim's testimony or behavior*, 57 A.L.R. 5<sup>th</sup> 315 (October 2005). In this case, Ms. Kerr Welsh should be qualified as an expert witness in the area of domestic violence dynamics as: A. Ms. Kerr Welsh's qualifications comply with Rule 702 of the North Dakota Rules of Evidence; B. The testimony is relevant under Rules 402 of the North Dakota Rules of Evidence; and C. The danger of unfair prejudice does not substantially outweigh the probative value of such testimony under Rule 403 of the North Dakota Rules of Evidence.

A. Ms. Kerr Welsh's Qualifications Comply With Rule 702 Of The North Dakota Rules Of Evidence.

North Dakota Rules of Evidence permit a witness to be qualified as an expert if, based on their knowledge, training, education, experience, or skill their testimony would assist the trier of fact to understand the evidence or to determine a fact in issue. N.D.R.Ev. 702. Ms. Kerr Welsh should be qualified as an expert in the area of the dynamics of domestic violence as: 1. She has the requisite training, education, knowledge, skill and experience to be qualified under Rule 702 of the North Dakota Rules of Evidence; and 2. Her testimony would assist the trier of fact to understand the evidence or a fact in issue.

1. Ms. Kerr Welsh has the requisite training, education, knowledge, skill and experience to be qualified under Rule 702 of the North Dakota Rules of Evidence.

Individuals with psychology and counseling degrees and numerous years of experience in the domestic violence field have been held to have the requisite training to be qualified as an expert. See Arcoren v. United States, 929 F.2d 1235, 1240 (8th Cir. 1991) (ruling that a witness should be qualified as an expert in domestic violence based on a degree in psychology from a reputable field and over 10 years of experience working with battered women), State v. Frost,

577 A.2d 1282, 1289 (N.J. App. Ct. 1990) (ruling that a witness qualified as an expert in battered women's syndrome because she held a bachelor's degree in psychology, master's degree in counseling, and was working on her P.h.D. was appropriate), Stevenson v. State, 612 S.E. 2d 522, 526 (Ga. Ct. App. 2005) (upholding qualification of a victim advocate as an expert in common victim behavior based on her experience working with victims and training in the area of domestic violence).

In State v. Schaller, the Wisconsin Appellate Court upheld the qualification of a victim-witness coordinator who had a degree in social work and served as a liaison between prosecutors and victims for a long period of time to testify that it was very common for domestic violence victims to minimize or recant an earlier assault accusation. State v. Schaller, 544 N.W.2d 247, 251 (Wis. Ct. App. 1995). In State v. Griffin, the executive director of the Iowa Coalition Against Domestic Violence was qualified as an expert witness based on her degree in social work, training in the area, counseling experience with over 2000 battered women, participation in a domestic violence task force, and her position with the coalition. State v. Griffin, 564 N.W.2d 370, 374 (Iowa 1997). The Court specifically noted that despite the fact that the expert had not published, she has sufficient education and experience to be qualified as an expert in this area. Id.

In the case at hand, Ms. Kerr Welsh has the requisite qualifications to be an expert in the area of domestic violence dynamics. Ms. Kerr Welsh has her bachelor's degree in psychology, a master's degree in counseling, has had over 400 hours of training in the areas of domestic violence and sexual assaults, is a licensed professional counselor in the State of North Dakota, is a North Dakota Certified Comprehensive Direct Service Provider through North Dakota Council on Abused Women's Services/Coalition Against Sexual Assault, a Certified STAR Instructor

through the Federal Law Enforcement Training Center, has over 12 years of experience working specifically with victims of domestic violence and sexual assaults, has performed professional trainings both nationally and regionally to law enforcement, medical professionals, educators, legal professionals, clergy, and human service providers for a total of over 439 hours. See Attachments 1-3. As in State v. Griffin and State v. Schaller, Ms. Kerr Welsh's resume is impressive, her experience and education in this area is undeniable, and although this is a case of first impression for this Court, is of the type that has been consistently held to be within the bounds of Rule 702 for qualification as an expert.

2. Ms. Kerr Welsh's testimony would assist the trier of fact to understand the evidence or a fact in issue.

Courts have held that the intricate dynamics of a domestic violence relationship is a subject that is beyond the knowledge of an average juror and not commonly understood by lay persons. See Arcoren v. United States, 929 F.2d 1235 (8<sup>th</sup> Cir. 1991), State v. Townsend, 897 A.2d 316 (N.J. 2006), Odom v. State, 711 N.E.2d 71, 75 (Ind. App. 1999), State v. Grecinger, 569 N.W.2d 189, 195 (M.N. 1997), Commonwealth v. Goetzendanner, 679 N.E.2d 240, 244 (Mass. App. Ct. 1997), Cynthia Lynn Barnes, Admissibility of expert testimony concerning domestic-violence syndromes to assist jury in evaluating victim's testimony or behavior, 57 A.L.R. 5<sup>th</sup> 315 (October 2005). In Odom v. State, the Indiana Appellate Court specifically indicated that although a victim may testify and offer reasons for a recantation, the jurors may not understand completely the complexity of the victim's behavior. 711 N.E.2d at 76. Furthermore, the Court went on to note that even assuming that a victim is in a place where she would understand her own behaviors, she may not be willing to admit them all to a jury. Id. The Court qualified an expert in the area of domestic violence to offer additional reasons to

explain recantation and its common occurrence in domestic violence victims. Id. The expert testimony was limited to testify in general terms to explain common responses of victims when posed with hypothetical questions based on facts already introduced into evidence and to refrain from commenting specifically on the victim's credibility. Id. In the case at hand, the State intends to qualify Ms. Kerr Welsh as an expert in the area of the dynamics of domestic violence relationships. The purpose of her testimony would be to explain to the jury the complex nature of a domestic violence relationship and common reactions of victims in those relationships. Specifically in this case, the State anticipates that the victim will be minimizing the behavior of the Defendant quite significantly compared to the night in which she reported the incident. This issue has profound effects for the jury considering the nature of the charges which include Terrorizing with a weapon, Interference with a Telephone During An Emergency Call, Aggravated Assault, and Felonious Restraint. The testimony of officers will contradict the testimony Ms. Alarid will likely provide to the jury. This is an issue that goes beyond the lay knowledge of an average juror as Ms. Alarid's behavior is extremely counterintuitive. As in Odom v. State, the State intends to provide expert testimony to the jury to provide a common framework for them to understand the victim's testimony and her minimization of the Defendant's behavior. Although North Dakota has no specific case law on this issue, numerous states in the nation have permitted such testimony. See Cynthia Lynn Barnes, Admissibility of expert testimony concerning domestic-violence syndromes to assist jury in evaluating victim's testimony or behavior, 57 A.L.R. 5<sup>th</sup> 315 (October 2005). While some prosecutors initially offered such testimony under the premise of "battered women's syndrome", in this case the State has no intention of having its expert articulate a syndrome for this type of behavior. The State's testimony would be limited to Ms. Kerr Welsh providing general information to the jury

regarding the common behaviors of a domestic violence victim and the dynamics of such relationships. Further, as in Odom v. State, Ms. Kerr Welsh would refrain from asserting her opinion on the specific facts of the case or the credibility of the victim, but instead would be testifying based on hypothetical questions presented by the prosecutor. Based on those reasons, the State would request that Ms. Kerr Welsh be qualified as an expert witness.

B. The Proposed Testimony Is Relevant Under Rule 402 Of The North Dakota Rules Of Evidence.

Expert testimony about victim behavior is relevant in domestic violence because the victim's credibility is linked to her behavior. Expert testimony that it is not uncommon for a victim to later deny or minimize her abusers' conduct has been ruled relevant to explain the possible reasons for the inconsistencies between a victim's testimony and initial report to law enforcement. See U.S. v. Dade, 136 Fed. Appx. 973 (9<sup>th</sup> Cir. 2005) (holding that admission of expert testimony regarding battered women's syndrome was relevant in domestic violence case where testimony assisted the jury in understanding victim's unusual behavior towards the defendant), People v. Gomez, 72 Cal. App. 4<sup>th</sup> 405 (Cal. App. 2004) (holding that admission of expert testimony that domestic violence victims often later deny or minimize batterer's conduct was relevant in domestic violence prosecutions to explain possible reasons for victim's inconsistent testimony, even where only one incident of domestic violence occurred), State v. Weaver, 2002 SD 76, 648 N.W.2d 355 (S.D. 2002) (holding that expert testimony was relevant and admissible to explain why a victim of domestic violence would recant allegations of abuse and live with the defendant a month after obtaining a protection order against him).

Additionally, as cited in the previous section, Courts have consistently held that expert testimony on the counterintuitive behavior of domestic violence victims is helpful to jurors and

can assist them with understanding the complex nature of these types of relationships. The State anticipates that testimony during trial by Ms. Alarid may be confusing to the jury and her behaviors following her initial report to law enforcement equally puzzling. After initially reporting the very serious allegations to law enforcement stemming from 18-08-K-192, law enforcement were called to the same residence just one month later to a report of a possible physical domestic. Upon arrival, law enforcement found the Defendant and Ms. Alarid in the same apartment and the Defendant in violation of the order prohibiting contact. Not only would her desire to be alone with the Defendant after the allegations she made in 18-08-K-192 be confusing to a jury, but the State also anticipates that Ms. Alarid will be greatly minimizing the fear that she initially had of the Defendant when she reported the incident and may be recanting some of her original statement. The testimony that would be provided by Ms. Kerr Welsh would be relevant to explain the complex dynamics of a domestic violence relationship and the common behaviors of victims of domestic violence.

C. The Danger Of Unfair Prejudice Does Not Substantially Outweigh The Probative Value Of Such Testimony Under Rule 403 Of The North Dakota Rules Of Evidence.

Under Rule 403 of the North Dakota Rules of Evidence, evidence that is relevant under Rule 402 of the North Dakota Rules of Evidence may not be excluded pursuant to Rule 403 unless its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. N.D.R.Ev.403. Expert testimony regarding common domestic violence victims' behaviors and responses is permissible under Rule 403 as its probative value is not substantially outweighed by danger of unfair prejudice when an expert

does not opine regarding whether the victim in the case is a victim of domestic violence but left that determination to the jury. State v. Newell, 710 N.W.2d 6 (Iowa 2006).

In People v. Ellis, the court held that the danger of unfair prejudice did not substantially outweigh the probative value of the expert testimony when the State had specifically indicated that the proposed expert had not had any contact with the victim, had no familiarity with the specific facts of the case, would not comment on whether the alleged victim in the case was a battered woman, and would not vouch for the credibility of the witness. People v. Ellis, 650 N.Y.S.2d 503 (NY Sup. Ct. 1996). The expert testimony was ruled admissible because it was not offered to show that the crime charged or prior assaults occurred, but rather to assist the jury in understanding the possible reasons for the behavior of the victim following her report to law enforcement. Id., see also Nixon v. United States, 728 A.2d 582, 595 (D.C. 1999) (indicating that courts routinely find that limitations on expert testimony that include preventing the expert from commenting on whether the defendant is a batterer, whether the witness is a victim, and whether the defendant is guilty sufficiently dispel any fear of unfair prejudice); State v. Schaller, 544 N.W.2d 247, 253 (Wis. Ct. App. 1995) (where the Court allowed an expert to testify regarding common victim behaviors and the expert refrained from commenting on whether that particular alleged victim was in fact a victim of domestic violence)

As in People v. Ellis, the State has indicated that its intentions are to have Ms. Kerr Welsh testify regarding common behaviors of domestic violence victims, the dynamics of domestic violence relationships, and answer hypothetical questions based on her training, education, and experience working in the domestic violence field. The State has no intention of having Ms. Kerr Welsh testify regarding battered women's syndrome, whether Ms. Alarid herself is a battered women or a victim of domestic violence, or to comment on any specifics of

the case including the credibility of Ms. Alarid. Further, the State does not intend to have Ms. Kerr Welsh become familiar with the case file or to speak with Ms. Alarid. As was permitted in People v. Ellis, the State's intention is to use Ms. Kerr Welsh's testimony to assist the jury to understand the possible reasons that Ms. Alarid would minimize or recant her prior allegations or consensually have contact with the Defendant following her report. Rule 403 requires that the danger of unfair prejudice must *substantially* outweigh any probative value. In this case, it is the State's position that the proposed testimony does not rise to that level as the State will take safeguards to ensure that Ms. Kerr Welsh's testimony would not take the ultimate fact-finding decisions out of the jury's hands.

#### CONCLUSION

Therefore, the State respectfully requests that this Court grant the State's Motion to Qualify Kari Kerr Welsh as an Expert Witness in the Dynamics of Domestic Violence.

DATED this \_\_\_\_ day of May, 2008.

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The Court hereby orders to qualify Kari Kerr Welsh as an expert in the field of the  
dynamics of domestic violence.

DATED this \_\_\_\_ day of May, 2008.

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Judge of District Court

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