

NC Appeals Court Tosses Assault Conviction Based On Speculation

Donald Edward Sweat was arrested in February 2007 and charged in Lee County, North Carolina with assault with a deadly weapon inflicting serious injury. Unable to post his \$75,000 bail, he remained jailed until his April 2008 trial. He was convicted and sentenced to a minimum of 93 months and a maximum of 121 months imprisonment.

On April 7, 2009 the North Carolina Court of Appeals reversed his conviction on the basis of insufficient evidence: no one identified him as the perpetrator and there is no evidence he was at the crime scene. He was released several weeks later after almost 27 months of incarceration from the time of his arrest. The following are excerpts from the Court of Appeals' opinion in *North Carolina v. Donald E. Sweat*, No. 08-848 (NC COA, 4-7-2009):

The State's evidence tends to show that between 7:00 p.m. and 9:00 p.m. on 23 February 2007, brothers Joe and John Hunter were returning from a turkey shoot when they drove to check John's mailbox, which was located on Cletus Road about a mile and a half from John's home. The mailbox had been moved temporarily to the intersection of Cletus and Buchanan Roads while construction was being done on Cletus Road. Joe was driving the car when they pulled up to the mailbox. John stepped out of the car to check the mailbox, which was empty, and when he

turned back toward the car, he was attacked by an assailant. He was struck in the face and knocked to the ground, and struck in the face several more times as he tried to get up. John's cheekbone was cracked and his jawbone was broken by the blows. At that time, Joe Hunter got out of his car and told the assailant to leave John alone. The assailant threatened to kill Joe if he didn't get back in the car. Joe retreated. Meanwhile, John Hunter searched for his glasses which had been knocked off his face when he was hit. When he finally did find them, they were broken. John requires his glasses to see.

After the assailant forced Joe Hunter to retreat, he came back and put some type of knife to John's throat and told John if he moved, he would kill him. When John tried to get up again, the assailant cut John across the arm. The slash went through the sleeve of John's coat, and the cut later required nine stitches. The assailant told John, "I'm going to cut your damn head off." The assailant then left the scene. The Hunters then drove to John's house where they called the police at approximately 9:08 p.m. Neither John nor Joe could identify the assailant, and the only description they could give was that the assailant was a man or a boy. Neither of the two had seen defendant prior to being in court and neither could identify him as the attacker.

Defendant did not present any evidence. At the close of the evidence, defendant moved to dismiss the charge on the basis of insufficient evidence. The trial court denied the motion. The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury.

Defendant argues that the State failed to produce sufficient evidence of his identity as the perpetrator of the crime. Defendant contends no evidence shows that defendant was present at the scene of the crime, and that his motion to dismiss should have been granted.

In reviewing a decision on a motion to dismiss for lack of sufficiency of the evidence, we must view the evidence in the light most favorable to the State.

The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both.

None of the witnesses, notably the victim and the victim's brother who were at the scene of the attack, could identify defendant as Mr. Hunter's attacker. No evidence was presented that defendant's razor blade had any blood on it, nor do any of defendant's statements tie him to the specific attack on Mr. Hunter that night or provide any details that would place him at the scene of the crime. At most, the State's evidence raises a suspicion of guilt. However, mere suspicion or conjecture of defendant's identity as the perpetrator of the attack on Mr. Hunter, even if strong, is not sufficient to survive a motion to dismiss. The evidence allows an inference that defendant had the opportunity to commit the crime, nothing more. ... Thus, we conclude that the trial court erred in denying the motion to dismiss and we reverse the judgment and commitment for assault with a deadly weapon inflicting serious injury.

Reversed. Opinion is unpublished per N.C. Rule 30(e).

WV Supreme Court Broadens Self-Defense To Cover Battered Women

By Angie Rosser

The West Virginia Supreme Court of Appeals directed the acquittal and immediate release of Tanya Harden, a battered woman terrorized by life-threatening violence who killed her husband to protect herself and the lives of her children. She had been incarcerated for four years and nine months. (*West Virginia v. Harden*, No. 34268 (WV Sup Ct, 06-04-2009))

The court's opinion offered groundbreaking standards related to the relevance of past abuse and lethal threats faced by victims of domestic violence.

Tanya Harden's story is one shared by many



Tanya Harden the day of her arrest September 5, 2004.

women suffering from the violent and controlling behavior of abusive partners. Since her marriage at age 16, her husband prohibited her from working outside the home, from getting a driver's license and from having friends or family over without his permission and supervision.

In addition to being coerced and controlled, battered women endure repeated acts of violence and terror over time, comparable to the brutality survived by Tanya Harden documented in this case. The record states that for several hours her husband beat her with his fists and with the butt and barrel of a shotgun, threatened repeatedly to kill her and her children, and sealed the brutality with the vengeful crime of rape. The beatings and rape resulted in multiple severe injuries and frac-

tures of her face, arms and chest. Tanya Harden and her children are fortunate to be alive.

The recent decision by the Supreme Court recognizes that this battered mother took necessary steps to protect herself and her children. In the complex and dangerous dynamic of domestic violence, the legal system must consider past acts and patterns of abuse that cause a victim to know that further violence and death are imminent. This case is a clear example of self-defense, affirming that all individuals have the right to protect themselves in their own homes – regardless if the attacker is an intruding stranger or a cohabitating partner.

The prosecution against Tanya Harden ultimately failed in its attempt to argue that she had a responsibility to leave the home that evening to avoid further attacks from her husband. What would have resulted if she tried to escape after her husband had held a

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Wayne and Sharmon Stock were shot to death in their Murdock, Nebraska farmhouse on April 17, 2006. A mildly retarded nephew, Matthew Livers, was questioned the day after the murder by Nebraska State Patrol and Cass County Sheriff's Office investigators. Livers confessed after 11 continuous hours of questioning. He also implicated his cousin Nicholas Sampson.

Based on Livers' confession, he and Sampson were charged with two counts of first-degree murder and held without bail in the Cass County Jail.

Two days after the murders authorities impounded a Ford Contour that Sampson drove, but which was owned by his brother. No blood or other evidence was found during a 6-hour search of the car on April 19. Nor was any evidence incriminating Livers or Sampson found at the crime scene or during a search of their residences.

David Kofoed, director of the Douglas County (Omaha) CSI unit, was involved in the crime scene investigation and the car search. Eight days after the car was searched, Kofoed told a reporter for the Omaha *World-Herald* newspaper that he re-examined the car and found a small spot of blood under the car's dashboard. The blood tested positive for matching Wayne Stock. That physical evidence was considered confirmation of Livers' confession.

While Livers and Sampson languished in jail a strange picture emerged from testing of the crime scene evidence and further investigation. The evidence pointed to two perpetrators ... but those people were not the cousins. They were Gregory Fester and Jessica Reid, a romantically involved couple from Wisconsin.

When questioned Fester and Reid admitted to the crime and had knowledge of details not released to the public. After the couple were arrested for the murders, the charges were dismissed against Livers and Sampson and they were released after six months in jail.

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shotgun to her stomach in front of her young son asking her if she wanted to die? What would have happened to the three children in the home that night that she might have had to leave behind after her husband had already put a shotgun to her son's head and said no one would walk out of the house that night?

This case is a reminder of the unrealistic expectations and responsibilities often placed on battered women to "just leave."

Omaha Crime Lab Director Charged With Fabricating Evidence In Murder Case

Fester and Reid pled guilty to avoid the possibility of the death penalty after a trial. They were both sentenced to life in prison without the possibility of parole.

Suspicious about Kofoed's actions related to the blood evidence were fueled when Livers and Sampson each filed a federal civil rights lawsuit that among other claims alleges the blood evidence was planted.

An in-house investigation by Douglas County Sheriff Tim Dunning cleared Kofoed of wrongdoing. However, a special prosecutor was appointed by the State of Nebraska to investigate Kofoed's role in the Stock murder case, and the FBI also conducted an investigation. Kofoed told the *World-Herald* during an interview in the fall of 2008 that the blood could have gotten under the dashboard by "accidental contamination."

On April 22, 2009 Kofoed was charged in Cass County Court with one felony count of tampering with physical evidence. Kofoed was alleged to have falsified the report of when he allegedly found the blood in the car. He stated in the report that he found the blood on May 8, 2006, when 11 days before that he told a newspaper reporter he had found it. He also did not log, date or even bag the alleged blood swab, and he omitted from his report that another lab technician found no trace of blood when he examined the same area of the car after Kofoed had done so.

Special Prosecutor Clarence Mock told reporters that he wasn't alleging that Kofoed planted the blood evidence because there is no evidence the blood was recovered from the car. Instead Mock said: "This charge addresses the creation of an actual police report that was false, and Dave Kofoed knew that it was false, and he failed to inform anybody about that during the case."

The court's opinion reflects the understanding that "imposition of the duty to retreat on a battered woman who finds herself the target of a unilateral, unprovoked attack in her own home is inherently unfair. During repeated instances of past abuse, she has 'retreated,' only to be caught, dragged back inside, and severely beaten again."

This precedent-setting opinion holds great significance, not only for battered women struggling to stay alive, but also in signaling forward movement of society's under-

On April 23 a four-count federal indictment was unsealed charging Kofoed with:

- Deprivation of the civil rights of Matthew Livers, a misdemeanor that carries a maximum sentence of up to one year in jail.
- Deprivation of the civil rights of Nicholas Sampson, a misdemeanor that carries a maximum of up to one year in jail.
- Mail fraud, a felony offense that carries a penalty of up to 20 years in federal prison.
- Destruction, alteration or falsification of records, a felony punishable by up to 20 years in federal prison.

Kofoed, 52, pled not guilty to the state and federal charges, and refused to resign from the crime lab, although he was placed on administrative leave. He told reporters in his defense, "They [Livers and Sampson] didn't go to jail because of the CSI Unit. They went to jail because of a bad confession."

Kofoed and the Douglas County CSI Unit have been involved in many murder investigations, and Sampson's original defense attorney Jerry Soucie said he thought his indictments would raise questions about some of those cases, particularly two cases in which the defendant was convicted without discovery of the victim's body.

Locke Bowman is a lawyer affiliated with Northwestern University's Center on Wrongful Convictions that is representing Livers in his federal lawsuit. Bowman said about the indictments, "These allegations against Dave Kofoed are profoundly disturbing. The presentation of false evidence against an innocent man is the ultimate nightmare in terms of law enforcement misconduct."

On September 10, 2009 a federal court jury acquitted Kofoed. His state trial is expected to take place in 2010.

Sources:

Douglas County official charged with mishandling blood in Murdock case, *Omaha World-Herald*, April 23, 2009. Federal Charges against Kofoed unsealed, *Omaha World-Herald*, April 23, 2009. Kofoed verdict: Not guilty, *Omaha World-Herald*, April 23, 2009.

standing of the serious and lethal nature of domestic violence.

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