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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20030107

State of North Dakota,

Plaintiff/Appellee,

-vs-

Maldonado
Paul Genaro Maldanodo Morales,

Defendant/Appellant.

SUPREME COURT NO. 20030107

DISTRICT COURT NO. 02-K-02453

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG - 1 2003

STATE OF NORTH DAKOTA

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BRIEF OF DEFENDANT/APPELLANT PAUL GENARO MALDANODO MORALES

APPEAL FROM JUDGMENT
ENTERED ON MARCH 25, 2003
IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA
THE HONORABLE NORMAN J. BACKES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE

This is an appeal from a Criminal Judgment and Commitment which was entered on the 25st day of March, 2003, by the Court, the Honorable Norman J. Backes, Judge of the District Court, presiding. The Defendant Paul Genaro Maldanodo Morales (hereinafter Mr. Morales) was charged by Information dated July 24, 2002, in Count 1, with Simple Assault on a Peace Officer in violation of Section 12.1-17-01, N.D.C.C., a Class C Felony, in Count 2 with Criminal Trespass, in violation of Section 12.1-22-03(1), N.D.C.C., a Class C Felony, in Count 3 with Preventing Arrest or Discharge of Other Duties, in violation of Section 12.1-08-02, N.D.C.C., a Class A Misdemeanor, in Count 4 with Criminal Mischief, in violation of Section 12.1-21-05, N.D.C.C. a Class A Misdemeanor, in Count 5 with Simple Assault (Domestic Violence) in violation of Section 12.1-17-01, a Class A Misdemeanor, and in Count 6 with Simple Assault in violation of 12.1-17-01, N.D.C.C., a Class B Misdemeanor. (App. at 16 through 18).[1] (Docket No. 1). Mr. Morales made his initial appearance on July 25, 2002. Counsel was appointed over objections by Mr. Morales to the assigned Public Defender (Docket No. 1 - 9). Defendant wrote a letter to the Court apologizing for his actions in Court. (Docket No. 10). Another appearance occurred on August 22, 2002, and the matter was continued. Another appearance occurred on September 19, 2002, and the matter was continued. (See Transcripts). Mr. Morales continued to object to his appointed counsel. The Court continued the appointment. Mr. Morales appeared with his

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[1]**The Appendix to Appellant's brief will be abbreviated "App."**

appointed counsel on October 17, 2002, and a contested preliminary hearing ensued. (See Transcript). The Court found that the State had established probable cause to support the felony charges. (October 17, 2002, Transcript at 19-20). Mr. Morales entered not guilty pleas to all charges.

On December 11, 2002, at the dispositional conference, the matter was set for a jury trial on March 25, 2003. A felony jury trial was conducted in Cass County District Court on March 25, 2003. The original Counts 5 and 6 were dismissed prior to trial. The Defendant was tried on the original counts 1,2, 3 and 4. The Court Dismissed Count 4, the Criminal Mischief Count, at the conclusion of the State's case, upon Defense Motion. (Trial Transcript at 125-126). The Jury found Mr. Morales guilty of Counts 1,2, and 3. On Count 1, the Court sentenced Mr. Morales to Four (4) years in the Custody of the North Dakota Department of Corrections and Rehabilitation, On Count 2, to One (1) year, and on Count 3 to One (1) year, all to run concurrent with each other and with another file, and gave credit for time served. (App. 19, Docket No. 47). A Notice of Appeal was filed on April 7, 2003 (Docket No. 52 & App. 22).

STATEMENT OF THE ISSUES

STATEMENT OF FACTS

This case involved events at a location in Fargo, North Dakota, at 510 4th Street North. Mr. Morales had been in a relationship with Pixie Lee Daugherty. (T42). Ms. Daugherty and Mr. Morales signed a lease for the residence together in April, 2001. (T43). Later they broke up and Mr. Morales moved out. (T44). The current lease was introduced as State's Exhibit 1. (T45). Ms. Daugherty had a vague memory of an incident when Mr. Morales was at her residence. Law enforcement was called to the residence. Ms. Daugherty's memory of the event was very limited due to intoxication and medication. (T46). The next day there were items in her bedroom which were broken. (T49). Photos of her apartment were introduced as State's Exhibits 2, 3, and 4. (T50). (Docket Nos. 39, 40, 41). These exhibits were received over objection. A lease signed by both Mr. Morales and Ms. Daugherty was introduced as Defense Exhibit 5. (T53). (Docket No. 42). Mr. Morales had never been legally evicted from the shared apartment. (T54). Ms. Daugherty did not remember seeing anyone "trash" her place on the night in question. (T54). A man named John Byrd was present at Ms. Daugherty's home that same night. He was also intoxicated. (T54). Ms. Daugherty denied that any of the property was damaged by Mr. Byrd. (T55). Further, Ms. Daugherty denied that any of the property damaged belonged to Mr. Morales. (T56). Ms. Daugherty felt the value of the damaged property was about $100. (T57).

Ms. Vanessa Brown is a friend of Ms. Daugherty. (T58). Ms. Brown was at Ms. Daugherty's place at 1:30 a.m. on July 24, 2002. They were having some

drinks. (T59). Present were Ms. Brown, "Pixie, LC, Johnny and Flo." (T60). Ms. Brown saw Mr. Morales in the bedroom. She testified, "the bedroom was a disaster. There was broken stuff all over." Ms. Brown looked at the photographs received as Exhibits 2, 3, and 4, (Docket Nos.39, 40, and 41, and they showed what the bedroom looked like when Mr. Morales was standing there. (T61). No one else had been in the bedroom. Ms Daugherty normally keeps her house fairly clean. (T62). When Ms. Brown saw Ms. Daugherty come out of the bedroom she was scared and "yelled that Paul had come in the window." (T62).

Ms. Brown had been drinking and was intoxicated. (T63). She did not see Mr. Morales do any damage. She did not see Mr. Byrd damage the place. (T63).

Fargo Police Officer Sara Gunther was dispatched to 510 4th Street North late on the evening of July 23, 2002. (T66). Ms. Daugherty had called that Mr. Morales was there and she wanted him removed and told never to come back. (T67). The officers spoke to Mr. Morales. He agreed to leave, and said that he understood that if he ever came back he would be arrested for trespassing. (T67). Mr. Morales did not give any indication that he lived at the residence. The officers were later dispatched back to Ms. Daugherty's residence upon the report that Mr. Morales had returned. (T67-68). When officers arrived there were several people in the entry who stated that Mr. Morales was in the back bedroom "throwing stuff around." (T68). A man was holding a knife when officers arrived. He was ordered to drop it and he did. (T68).

The officers ordered everyone out of the residence. (T69). Officers were

giving commands to Mr. Morales to come out with his hands up, that he was under arrest for trespass. (T69). Eventually an officer was able to enter the bedroom and used pepper spray on Mr. Morales. He was then subdued and handcuffed. (T70).

Items in the bedroom were knocked over and strewn around. The floor was "covered" with items. (T71). The officer was shown Exhibits 2, 3, and 4 and identified the items shown. (T71-72) (Docket Nos. 39, 40, and 41). The officer was not aware that Mr. Morales had been on the lease. (T72).

When the officers first entered the residence, Mr. Morales was standing in the living room. (T80). As the officers were moving the others out of the apartment, Mr. Morales ran into a back bedroom and slammed the door. (T81).

Officer Zieska told Mr. Morales he was under arrest and not to resist. (T81). Officer Zieska kicked the bedroom door in and poked his head in. Officer Ahlfeldt testified: "And at that time a ceramic coffee mug was thrown at Officer Zieska from the room striking him in the back of the head close to the neck." (T81, lines 22-24). Officer Zieska said "Ouch, that hurt." (T82). A fan had been thrown first. (T82). After the door was closed, the officer testified that there was "quite a ruckus. It sounded like he was tearing the whole bedroom apart." (T82). The ceramic coffee mug which hit Officer Zieska, broke when it hit him. (T82). The officer pointed out a broken coffee mug shown in Exhibit 2. (T83, Docket No. 39). He identified the mug as the item which hit Officer Zieska. (T83). Officer Zieska appeared "dazed from getting hit with the mug so hard." (T84). Officer Ahlfeldt then peaked into the room. Mr. Morales threw first a telephone and then a hammer, but neither item hit Officer

Ahlfeldt.

Other officers arrived. Again, Mr. Morales was subdued with the pepper spray and arrested. Six officers were in the room at that time. (T85). The officers inspected the windows to the bedroom, and saw that parts had been removed. T87).

The officers did not recover the coffee mug as evidence, even though normally any weapon used in an assault would be collected as evidence. (T89).

Officer Witte arrived at the scene and was told by Officer Zieska that he, Officer Zieska, had been struck by an object thrown by Mr. Morales. (T96). Mr. Morales was throwing various items which were coming out into the hallway. (T97). Officer Ahlfeldt had testified that Officer Zieska does not swear, but Officer Witte testified that he has heard Officer Zieska swear. (T101).

Officer Zieska testified that he was hurt when he was hit by the coffee mug. (T108). He said something like "ow" and "probably stifled some profanity under [his] breath." (T108). The officer testified that his neck was sore the next day, and it hurt, but he did not seek medical attention, no pictures were taken, and he was not aware of any bruising. (T109).

Officer Zieska testified the object looked like a white coffee mug. (T109). The officer was shown Exhibit 2 (Docket No. 39), and pointed out what he said was the mug that he believed was the one which hit him. (T110). The officer was in full summer uniform and had identified himself as a police officer. (T112). This officer again testified that they did not recover the coffee mug, and he did not know why. (T113).

Argument

I. The Trial Court Erred by Failing to Give a Jury Instruction on the Issue of Mr. Morales'es Legal Right to Enter the Premises as a Lessee of the Premises

The evidence established that Mr. Morales had been on the lease of the premises in question with Ms. Daugherty. Exhibit 5 (Docket 42). Exhibit 1 was a later lease on which Ms. Daugherty was the only lessee. (Docket 38). The evidence established that Mr. Morales was never evicted from the premises through any legal process. Defense Counsel requested that the Court instruct the jury on the legal aspects of the lease. (Tr. 128). The Court denied the request. (Tr. 129).

In ***State v. Farzaneh*, 468 N.W.2d 638 (ND 1991)**, this Court stated:

> We have previously said that the trial court is not required to instruct the jury in the specific language requested by the defendant even though it is a correct statement of the law. ***State v. Erban*, 429 N.W.2d 408, 413 (N.D. 1988)**; ***State v. White*, 390 N.W.2d 43, 45 (N.D. 1986)**; ***State v. Dilger*, 338 N.W.2d 87 (N.D. 1983)**. All that is required is that the jury be fairly informed of the applicable law. **Erban, 429 N.W.2d at 414; State v. Dachtler, 318 N.W.2d 769, 774 (N.D. 1982)**.

The standard is whether Mr. Morales was "substantially harmed" by the Court's failure to give his requested instruction. ***State v. Wiedrich*, 460 N.W.2d 680 (ND 1990)**. Mr. Morales was charged with the Class C version of criminal trespass, in violation of **N.D.C.C. Section 12.1-22-03**:

> **12.1-22-03. Criminal trespass.**
>
> 1. A person is guilty of a class C felony if, knowing that he is not licensed or privileged to do so, he enters or remains in a dwelling or in highly secured premises.
>
> 2. A person is guilty of a class A misdemeanor if, knowing that he is not licensed or privileged to do so, he:

a. Enters or remains in any building, occupied structure, or storage structure, or separately secured or occupied portion thereof; or

b. Enters or remains in any place so enclosed as manifestly to exclude intruders.

3. A person is guilty of a class B misdemeanor if, knowing that that person is not licensed or privileged to do so, that person enters or remains in any place as to which notice against trespass is given by actual communication to the actor by the person in charge of the premises or other authorized person or by posting in a manner reasonably likely to come to the attention of intruders. The name of the person posting the premises must appear on each sign in legible characters. A person who violates this subsection is guilty of a class A misdemeanor for the second or subsequent offense within a two-year period.

4. A person is guilty of a class B misdemeanor if that person remains upon the property of another after being requested to leave the property by a duly authorized person. A person who violates this subsection is guilty of a class A misdemeanor for the second or subsequent offense within a two-year period.

5. This section does not apply to a peace officer in the course of discharging the peace officer's official duties.

Violations of subsections 1,2 and 3 all require that the person is guilty of trespass if he "knows he is not licensed or privileged" to enter or remain at the premises. This Court has specifically discussed the issue of "license or privilege" under **N.D.C.C Section 12.1-22-03(1)** in ***State v. Ronne,458 N.W.2d 294 (ND 1990)***, as follows:

> **Section 12.1-22-03(I), N.D.C.C.**, provides that a person is guilty of criminal trespass if, knowing he is not licensed or privileged to do so, he enters or remains in a dwelling. Privilege is the freedom or authority to act and to use property. ***State v. Mehralian*, 301 N.W.2d 409 (N.D. 1981)**; cf. ***State v. Haugen*, 458 N.W.2d 288 (N.D. Criminal No. 890306, 1990)** ["privilege" in burglary statute means that a person is privileged if he may naturally be expected to be on premises often and in the natural course of his duties or habits]; ***State v. Kreth*, 150 Vt. 406, 553 A.2d 554 (1988)** [in criminal trespass statute "licensed" refers to a consensual entry while "privileged"

> refers to a nonconsensual entry where the actor may naturally be expected to be on the premises often and in the normal course of his duties or habits]; ***Commonwealth of Pennsylvania v. Corbin*, 300 Pa.Super. 218, 446 A.2d 308 (1982)** ["licensed or privileged" phrase in a burglary statute means any person is privileged if he may naturally be expected to be on the premises often and in the natural course of his duties or habits].

Clearly, Mr. Morales defended this case in part on the theory that he was "licensed or privileged" to be on the premises. The action by the police to "trespass" him from the premises was not legally proper if he was, in fact, "licensed or privileged" to be there. He was on a lease, Exhibit 5, and he was never lawfully evicted. Defense counsel argued contract law to some extent, that unless Mr. Morales was evicted legally, the new lease, Exhibit 1, was of no effect, because a novation of a contract requires the consent of all parties to the original contract. It is Mr. Morales'es position that the Trial Court erred when it failed to give an instruction on this issue as requested. He was substantially harmed by the Trial Court's failure, because the Trial Court did not define "license or privilege" and Mr. Morales was consequently deprived of an instruction on his theory of his defense. This failure constitutes reversible error, and should result in setting aside his conviction of criminal trespass.

II. The Trial Court Erred by Failing to Give an Instruction on a Lesser Included Offense.

Defense Counsel requested that the Court instruct on a lesser included offense on the criminal trespass count, in a timely and appropriate manner, and the Trial Court denied the request. (Tr. 129-131). The Court's discussion of the issue on those pages with counsel is confusing. Again, the issue of "license or privilege" is included in Subsections 1,2 and 3 of the statute, **N.D.C.C. Section 12.1-22-03(1)**.

This Court has explained the test for determining when an instruction on a lesser include offense should be given in ***State v. Ellis*, 2001 ND 84, ¶11, 625 N.W.2d 544**, as follows:

> [¶11] We apply a two-step process to decide whether a defendant is entitled to an instruction on a claimed lesser included offense. ***State v. Carlson*, 1997 ND 7, ¶ 34, 559 N.W.2d 802.** First, the offense must be a lesser included offense of the offense charged, and second, there must be evidence which creates a reasonable doubt as to the greater offense, but supports a conviction of the lesser included offense beyond a reasonable doubt. ***Id.*** A lesser offense is necessarily included in a greater offense if it is impossible to commit the greater offense without committing the lesser offense. ***Id., at ¶ 35.*** **Section 12.1-01-04(15), N.D.C.C.**, defines an "included offense" as an offense "[w]hich is established by proof of the same or less than all the facts required to establish commission of the offense charged."

The State's entire case in chief was based upon proof of a violation of either Subsection 3 or 4 of **N.D.C.C. Section 12.1-22-03.** The evening started with Mr. Morales present at the premises, and the police were called and asked to remove him. This implies clearly that he was welcome at the location up to a point. There is no evidence to the contrary. So, at some point, it was accepted that Mr. Morales was "licensed or privilege" to be there. The police were asked to come and then "trespassed" him from the premises. The testimony went to great lengths to prove that, on the first call, the officers told Mr. Morales that he would be arrested if he came back, and that he acknowledged this and said he understood. The second call was identical to the first; that Mr. Morales had returned to the premises. So the jury had before it a record with the uncontested, established evidence that Mr. Morales was "licensed or privileged" to be on the premises at some point, in the

totality of the circumstances. He and Ms. Daugherty had been in a relationship, and they had cohabited together at that address. The difference between Subsection 1. and 2. is the kind of place entered. Subsection 1., ***supra***, applies to entry of "a dwelling or in highly secured premises." Subsection 2., ***supra***, applies to entry of "any building, occupied structure, or storage structure, or separately secured or occupied portion thereof; or .... in any place so enclosed as manifestly to exclude intruders." So, subsections 1 and 2 both contain elements not contained in subsection 3 or 4, that being the proof of the type of property entered. The State's entire case in chief on this subject was an effort to prove a violation of subsection 3,and perhaps subsection 4. The State relied upon the notice given to Mr. Morales that he was no longer welcome at the residence. The proof of a violation of subsections 3 and 4 is less than for subsections 1 and 2 because you need not establish the nature of the "place" involved. The only proof required for subsections 3 and 4 is whether the Defendant "entered or remained" in a place where he was not "licensed or privileged to be." When you view the entire record, especially when considering the way the State presented its case, Mr. Morales was deprived of a fair trial because the jury should have been given the option of considering one or both of the lesser forms of criminal trespass, which would be a Class B Misdemeanor. Obviously the State recognized it had a problem with Mr. Morales'es legal right to be at the place in question, because he was not arrested for trespassing the first time the officers arrived. He had to be told he would need to leave and would be arrested if he returned. This is misdemeanor trespassing, by definition. If he was

guilty of a felony, he could have and should have been arrested the first time. In fairness, the Trial Court should have fashioned an instruction on one or more lesser forms of trespass, and its failure to give such an instruction constitutes reversible error.

III. The Evidence was Insufficient to Sustain a Conviction of Simple Assault of a Peace Officer.

It is Mr. Morales'es position that the evidence was not sufficient to sustain his conviction for simple assault of a peace officer, as charged in Count 1 of the Information. The evidence established that the police did not recover the "coffee mug" or object he allegedly threw at the officer. The officer did not receive any medical attention. There was no evidence that he was bruised by this "coffee mug". No pictures were taken of any injury. The officer did not file a workman's compensation claim. The only evidence that the officer sustained "bodily injury" was his testimony that it "hurt" when he claims the mug hit him, and that his neck was sore the next day. Another officer heard the "injured" officer make an exclamation when he was supposedly struck by this mug. There was conflicting testimony about the color and nature of this mug, and there was no good explanation as to why the mug, if it existed, was never recovered.

Defense Counsel did make a timely and appropriate Motion under **Rule 29(a), North Dakota Rules of Criminal Procedure**, for a judgment of acquittal at the close of the evidence, properly preserving the issue for appeal (Tr. 128-131). ***State v. Yineman*, 2002 ND 145, 651 N.W.2d 648.** In that case, this Court stated:

[¶8] Evidentiary sufficiency and evidentiary weight are distinct concepts. In ***State v. Kringstad***, we explained:

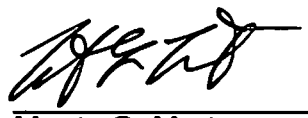
> A conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. When a court, be it an appellate court or a trial court on motion for entry of a judgment of acquittal, concludes that evidence is legally insufficient to support a guilty verdict, it concludes that the prosecution has failed to produce sufficient evidence to prove its case. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial in such a case.

353 N.W.2d 302, 306 (N.D. 1984) (citations omitted). ***Id.*** Based upon this standard, Mr. Morales believes that the prosecution failed to produce sufficient evidence to prove its case, and asks that his conviction of Count 1 be reversed and that the charge be dismissed.

CONCLUSION

WHEREFORE, Petitioner prays that this Court reverse the Judgment of the Trial Court, and vacate the judgments of conviction, and order that Count 1 be dismissed and that he be granted a new trial on Count 2.

Respectfully submitted this 1st day of August, 2003.



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RE: Paul Genaro Maldonado Morales, Defendant/Appellant and State of North Dakota, Plaintiff/Appellee

Supreme Court No. 20030107
Cass County Case No. 09-02-K-02453

CERTIFICATE OF SERVICE BY MAIL

I, Monty G. Mertz, do hereby certify that, on the 1st day of August, 2003, I served the Brief of Petitioner/Appellant and the Appendix upon the following, by placing true and correct copies in envelopes addressed as follows:

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and depositing the same, with postage prepaid, in the United States Mails at Fargo, North Dakota.

Dated this 1st day of August, 2003.

Monty G. Mertz
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