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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	) ND Supreme Court No. 20190054
	) District Court No. 2017-CR-03594
Plaintiff/Appellee,	)
	)
vs.	)
	)
Michelle Vetter,	)
	)
Defendant/Appellant.	)

ORAL ARGUMENT REQUESTED

APPEAL FROM THE JURY VERDICT/JUDGMENT OF CONVICTION
/
APPEAL FROM THE AMENDED ORDER DEFERRING IMPOSITION OF SENTENCE AND ALL PREVIOUS ORDERS DENYING RELIEF

DEFENDANT'S/APPELLANT'S REPLY BRIEF

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[1] **THE ISSUE OF CONSTITUTIONALITY OF THE STATUTE**

[2] The State defends the constitutionality of the statute under which Ms. Vetter was prosecuted. There should be no issue but that the issue of unconstitutionality was preserved for appeal. Ms. Vetter challenged the statute at her preliminary hearing, in a motion to dismiss prior to trial, in her Rule 29 Motion to Dismiss at the close of the State's case, at the close of the case, and in post trial motions. It is now a primary issue Ms. Vetter asks the Court to consider in reversing her conviction of child abuse. Her reasons for doing so are set out in detail in the initial brief and will not be repeated here.

[3] The State's rebuttal supporting constitutionality appears to rely primarily on Simons v. State, 2011 ND 190, 803 N.W.2d 587 where the evidence showed prolonged, inhumane beatings, admittedly and intentionally inflicted by a parent on a child as discipline. The Simons jury had no need to debate whether what happened to that child constituted "child abuse". What can be taken from the Simons case, however, as applied to this case is that unless something is done to strike or limit the scope of what is "child abuse" that statute can be said to apply even where there is a one time, instantaneous, reactive, two second response, by a parent who has just been punched in the nose by her 8 year old child while "horsing around" during family playtime.

[4] This Court may have thought in Simons that it was sufficient admonition to leave it to a jury to decide what was unreasonable. But that is not enough to prevent the serious injustice that has occurred here. In Simons after reliance on Social Service Standards involving the definition of unlawful "use of force" as "a substantial risk of death, serious bodily injury, disfigurement or gross degradation for disciplinary purposes" this Court said, "Other degrees of force may be found to constitute unreasonable force under

the statute when considering the totality of the circumstance in a particular case. Here we have an "other degree of force" case where clearly that admonition by the Court in Simons, id, is shown to be insufficient.

[5] Clearly "totality of circumstance" and "intent" have been completely ignored in the prosecution of this case and a mistake has been made. If undefined "pain" had not been in the statute this case would not have made it past the Preliminary Hearing. The Court by its words said as much. The Judge felt constrained from dismissal by the notion that the "legislature in its wisdom" had added the word pain" as a standard sufficient for conviction and that affirmation by a child that there had been "mere" pain was in and of itself sufficient to send a case to a jury. (Preliminary Hearing, December 18, 2017, Tr. p. 29, l. 12 to p. 30, l. 15.)

[6] In this case a policewoman, untrained and inexperienced in the critical techniques of how to conduct a valid interview of an allegedly abused child, went to the child's school three days after the incident by prompting from an estranged husband's manipulations. Initially, the child didn't know why the policewoman was there to talk to her, but once the policewoman asked the child if something scary had happened lately, the child responded by asking the policewoman if she was referring to an event when she had hit her mom in the nose. (Interview of Minor Child, B.V., November 14, 2017, Tr. p. 1, ll. 22-24). Later in the interview, the policewoman also elicited from the child that her father had briefed her on what had happened before they came in for the interview. (Interview, Tr. p. 6, l. 4–7). The only fully licensed, practicing, clinical, forensic psychologist to present any evidence was Dr. Jeff Gregory. He interviewed B.V. out of the presence of either parent, and she told him that her mother had not hurt her. (Index

#184, P. 2, second paragraph under Interview with Ms. Vetter.) The "hurt" part was an embellishment of a story concocted by Kyle for purposes of gaining some advantage in a contentious divorce and, if anything, constituted alienation and infliction of psychological abuse by her father.

[7] Searching for a consensus on when "pain" has been willfully inflicted should not be left to the jury without some clarification as to what scope or level of pain is necessary to make an occurrence such as happened here a felony. The presiding judge here found any showing of "mere pain" is sufficient to save the statute's constitutionality. In defining unlawful use of force this Court has previously relied on limitations and adjectives such as "a substantial risk of death, serious bodily injury, disfigurement or gross degradation for disciplinary purposes". But if a lesser standard such as causing mere "pain" is going to be used it must be defined in some meaningful manner, or the statute is unconstitutional for vagueness. What happened in this freakish incident should not be considered as the kind of event this Court was talking about in Simons, id, when it said, "Other degrees of force may be found to constitute unreasonable force".

[8] **THE STATE'S STATEMENT OF THE FACTS**

[9] Ms. Vetter takes issue with a number of prejudicial embellishments and characterizations of the facts as stated in the State's Response Brief. Most offensive to her is the representation in Paragraph No. 10 of the State's Brief where it is represented that she was given an opportunity to make a statement. The entire operation against her took place in secret and had been a long ongoing venture by her husband. No one, not her child, not her husband, no one, ever brought up the subject or accused her of abuse of the child. She was confronted cold by police officers who had handcuffs but no warrant

at her place or work. She asked to talk to an attorney. She offered to meet with the police with her attorney present. The police were supplied with dates when she would do that. Her attorney offered dates when he could meet. Her side of the story was not wanted unless it could be taken without her attorney being present. She was hauled off to jail. She was literally banished from her home and child and treated like a terrorist who would run. The statement that she was given an opportunity to provide a statement and did not do so is plain and simply false.

[10] Any reading of the trial transcript, which is relatively short casts serious doubt on numerous characterizations of the facts made by the State in its Appeal Response Brief. The child was totally isolated from her mother for months. When Ms. Vetter was finally given an hour to see her child it was supervised. Mr. Vetter had a four month unfettered opportunity to educate, brainwash and program the child to his liking. The child was taken by him to the school for a police interview that defies all protocol for questioning of an allegedly abused child. At trial she was briefed by the prosecution before being put on the witness stand and even then this 8 year old child's testimony was filled with, "I don't know"[s] or "could be" or gave hesitant responses to questions that included a guilty premise like, "Did you mean to hit your mom". It was a "are you still beating your wife" type question to an immature and confused child.

[11] Mr. Vetter had exclusive custody and control over the child for four months after the incident and all access was denied to Ms. Vetter. Only by reading the child's testimony from line 1 on page 14 of the Trial Transcript to line 9 on page 30 can one get some sense of the confusion, inconsistency and unreliability of this child's coached testimony.

[12] Interviews and testimony of the minor child do not show consistency in recollection of the event that took place on November 11, 2017. Both Appellant and the estranged husband recount horseplay involving teasing about a booger in Appellant's nose, B.V.'s hit to Appellant's nose and Appellant's immediate reaction thereto (Preliminary Hearing, December 18, 2017, Tr. p. 18, ll. 7-15 and Trial Transcript p. 33, l. 17 – p. 34, l. 5, respectively). However, B.V.'s recollection of the incident didn't remain the same throughout interviews or during her testimony at the Trial. During her interview with Deputy Kopp, B.V. stated she was playing with her father, slipped and bumped her mother in the nose (Interview of Minor Child, B.V., November 14, 2017, Tr. p. 2, l. 25 – p. 3, l. 4). In her interview with Ms. Hilfer at the Children's Advocacy Center, B.V. stated that her father was tickling her and she stood up and bumped her mother in the nose (Transcript of Child Advocacy Center Interview of Minor Child, BV, Index #148, November 29, 2017, Tr. p. 9, ll. 12-24). In her first statement at the Trial, she says that she bumped her mother in the nose while resituating herself (Trial Transcript p. 15, l. 25 – p. 16, l. 4). She then stated she hit her mother in the nose during horseplay regarding a booger in Appellant's nose (Trial Transcript p. 21, l. 17 – p. 22, l. 11).

[13] The State chides counsel for making reference in her Appeal brief to prior criminal cases, a divorce action, multiple hearings, and counseling interviews outside this criminal proceeding. To the extent this may have happened it was in response to the fact that on May 21, 2018 the Trial Court granted Motions in Limine that prohibited the State from introducing testimony and witnesses related to any events that took place either prior to or after the incident in question. The incident was the one that took place

in the Vetter family room on the evening of November 11, 2017. In the *in limine* Order, in addition to precluding evidence of events taking place prior to or after November 11, 2017, the State was prohibited from using any hearsay statement alleged to have been made by the minor child. (See App. 67 or Docket #112, the Amended Order on Motions in Limine). The granting of that Order dramatically affected the manner in which this case was defended. Appellant agrees with Appellee's statement in ¶2 which reads, "the Appellee asks that all references to the prior criminal case (08-2016-CR-2755), involving the Appellant, be disregarded" with exception that the Court take notice that this case was dismissed due to lack of evidence (Index No. 41 – Order Not Finding Probable Cause and Dismissing Complaint).

[14] The *in limine* Order of the Court was repeatedly ignored and the very matters Ms. Vetter was assured would be precluded were allowed into evidence. The first effort to violate the Order by the State was in its Opening Statement (Trial Tr. P. 11, l. 18 to P. 12, l. 11) Following opening statement however came nearly a dozen violations of that same Order where the very things supposedly precluded were allowed in the form of 3rd party reports, photographs, and testimony of events both before and after this incident. This occurs between Trial Tr. P. 38, l. 14 and repeatedly until P. 64, l. 25 of that record.

[15] Any references by defense counsel to matters outside of the incident itself pales in contrast to what the State was allowed to do after it was told it could not. If the Court will accept and read the Decision of Judge Hill it will know exactly what is meant. Judge Hill's Decision after a lengthy trial is an illuminating expose of what has really taken place in this case and we ask the Court again to take notice of it in the interest of justice. Even if any reference to facts in that Decision have found their way into Counsel's brief

for Ms. Vetter if those facts are all blacked out it is still clear from the paucity of evidence that the facts of what actually happened do not make out a case of a Class C felony of Child Abuse.

[16] **THE INSUFFICIENCY OF THE EVIDENCE**

[17] In this section of the State's Response brief there is provided a cite and quote that shines light on a standard that can be applied to this case. Quoting from State v. Corman, 2009 ND 85, 765 N.W. 2d 530, the Supreme Court instructs:

> "a conviction rests on insufficient evidence only when, after reviewing the evidence in light most favorable to the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational finder could find the Defendant guilty beyond a reasonable doubt. In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence or judge the credibility of witnesses." (Paragraph No. 15, State's Brief)

[18] By *all testimony,* what we have here is a 2 to 5 second reflective reaction from a mother just punched in the nose. This from the complaining estranged husband who also said he had never before in this child's life seen the mother physically harm the child. Given those uncontroverted facts the defense can live with the Corman standard quoted above. No rational finder of fact could say that, "The state presented undisputed evidence that B.V.'s mother *willfully* struck her daughter B.V....." as is asserted by the State's counsel in Paragraph No. 17 of its Response Brief.

[19] This case should be dismissed.

[Remainder of page intentionally left blank]

[20] Respectfully submitted.

Dated this 14th day of August 2019.

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CERTIFICATE OF COMPLIANCE

¶ 1 The undersigned, as attorney for Michelle Vetter and as the author the Appellant's Reply Brief, certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the Appellant's Reply Brief, excluding addendum, footnotes or endnotes, complies with the page limit requirement of eight (8) pages for Appellant's Reply Brief as contained in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

¶ 2 Oral Argument is requested because the fundamental issues in this case are complex, fact intensive and are ripe for an engaging, productive discussion about how the law should have been applied to the facts in the case and that such a discussion would be helpful to the court. Rule 28 (h), NDRAppP.

Dated this 14th day of August, 2019.

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CERTIFICATE OF ELECTRONIC SERVICE

¶ 1 I hereby certify that a true and correct copy of the foregoing Appellant's Reply Brief was served on August 14, 2019, by sending via electronic mail to the following:

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Dated this 14th day of August 2019.

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