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ORIGINAL

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

20040298

STATE OF NORTH DAKOTA,

Plaintiff and Appellee,

Supreme Court No. 20040298

vs.

District Court No. 03-K-00485

LOREN BERNSTEIN,

Defendant and Appellant.

FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT

FEB 16 2005

STATE OF NORTH DAKOTA

Appeal from a Final Judgment entered by the District Court
for Bottineau County, Northeast Judicial District, State of North Dakota
The Honorable John C. McClintock, Jr. presiding

BRIEF OF APPELLEE

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I. STATEMENT OF FACTS

The Appellee, while not disputing the general framework of the facts as contained in Appellant's Opening Brief, would highlight additional facts that were received and considered by the Court. The real property upon which the Court found the Defendant to have criminally trespassed is a parcel that was deeded to Caroljoy Richard from her father, LeRoy Bernstein in 1972. (Trial Transcript 6:24 – 7:4, App 1, 2). Mrs. Richard and her husband reside on this Outlot, and in 1987 allowed LeRoy Bernstein to move his house onto a portion of this Outlot. (T. 6:17 – 23, App. 1) The evidence was clear that since 1972, Mrs. Richard had full legal title to the real property in question, and that she allowed her father to live on the land in his home from 1987 to his passing in April of 2004. (T. 6:24 – 7:4; 9:12 – 15, App 1, 2, 3).

LeRoy Bernstein did not retain any legal interest in the real property after conveying it to his daughter in 1972.

During the days in question, Leroy Bernstein was in the hospital in Bottineau, and had been in the hospital for a couple of days. (T. 11:25 – 12:3, App. 5, 6). On the morning of Friday, October 31, Mrs. Richard observed the Defendant drive to LeRoy Bernstein's house, get out of his pickup and go into the garage. (T. 9:22 – 10:3, App. 3, 4). Upon making this observation, Mrs. Richard went outside to speak to the Defendant, who had come out of the garage. (T. 10:3 – 4, App. 10). Mrs. Richard informed the Defendant that LeRoy Bernstein's house was locked, to which the Defendant indicated that he needed to get clothes for LeRoy Bernstein. (T. 10:5 – 6, App. 4). Mrs. Richard informed the Defendant that she had clothes at her house, and that the Defendant did not need to go into the house. (T. 10:7 – 8, App. 4). After Mrs. Richard told the Defendant that he was not going into the house, that it was her property, and that there was nothing LeRoy Bernstein needed from the house, the Defendant became very angry and left, spinning the tires on his vehicle. (T. 10:10 – 15, App. 4).

It is important to note that while Mrs. Richard acknowledged that LeRoy Bernstein had authority over his house while he lived there, when he was not there Mrs. Richard watched over it. (T. 27:3; 28:16 - 23, App. 9, 10). Moreover, while LeRoy Bernstein was in the hospital there were other relatives who would take items to him. (T. 11:19 – 24, App. 5). Later that same day, the Defendant went back onto the property and walked into Mrs. Richard's house. (T. 11:15 – 24, App. 5). Mrs. Richard told the Defendant that LeRoy Bernstein already had clothes at the hospital,

as her aunt had taken them up there, and as LeRoy Bernstein was not in the swing bed he did not need those items yet. Id. During this conversation she told the Defendant once again not to come onto her property as she could bring their father anything he needed from his house. (T. 12:8 – 14, App. 12) Again, the Defendant became very angry and left. Id.

Following these exchanges with the Defendant, at approximately 4:30 that Friday afternoon, Mrs. Richard posted the no trespassing sign, which was properly signed and dated, at her property at the beginning of the driveway leading to her father's house. (T. 13:4 – 8, App. 7). The following Monday, as Mrs. Richard left for Minot, North Dakota, she noticed that the no trespassing sign was still where she had posted it. (T. 13:14 – 16, App. 7). When she returned from Minot that evening about 5:00 she noticed the no trespassing sign had been removed, so she posted another sign. (T. 13:21 – 14:19, App. 7, 8). Mrs. Richard subsequently learned that the Defendant had again gone on her property, removed the sign, and put it in LeRoy Bernstein's garage. (T. 14:21 – 25, App. 8).

At the conclusion of the Trial, the Judge found the Defendant guilty of criminal trespass. (T. 67:10 – 13, App. 13). The Court excluded the Defendant's proposed evidence on relevancy grounds. However, and contrary to Defendant's assertion at the close of his Statement of Facts, at no time did the Court indicate that the Defendant's state of mind was irrelevant. In fact, in explaining Its decision, the Court specifically stated that "So, I don't think it's reasonable that Loren Bernstein thinks that he could have been on there; he was told not to be on there." (T. 63:13 – 14, App. 12). This statement by the Court goes directly to the heart of the element of the

Defendant's intent, and shows that the Court did consider evidence of the Defendant's intent when arriving at a judgment.

II. ARGUMENT

A. The District Court did not err in refusing to admit into evidence Mr. Bernstein's testimony and his proffered Exhibit A.

There was no error on the part of the District Court Judge in refusing to admit the proffered evidence. Only Subsections 4 and 5 of the Defendant's Argument will be addressed by the State, and they will be addressed together, as there are no disagreements with Subsection 1 (Standard of Review), Subsection 2 (Charge facing the Defendant), and Subsection 3 (Elements of the Offense) of Defendant's Argument.

Contrary to Defendant's assertion that the Trial Court did not consider proposed evidence of Defendant's intent, thereby relieving the State of it's burden of proof, the Trial Court considered all relevant evidence presented, and entered a judgment based upon the evidence. A complete reading of the judgment and explanation of how the Judge arrived at that judgment makes it clear that the Court considered the element of the Defendant's intent in its deliberation.

In the explanation of the judgment, the Court first concluded that Caroljoy Richards owned the parcel of property in question, therefore she was the party with authority to allow people on her property. (T. 62:13 – 21, App. 11). The Court also concluded that when LeRoy was in his house, he had authority over his house, but when he was gone Caroljoy Richards had charge of the premises. (T. 62:22 – 63:3, App. 11, 12). The Court indicated that the evidence was clear that Caroljoy, as owner

of the property, told the Defendant on that day not to be on the property: she told him directly with verbal conversation and she posted the property. (T. 63:9 – 12, App. 12). Therefore, with regard to the element of intent, the Judge concluded, "So, I don't think it's reasonable that Loren thinks that he could have been on there; he was told not to be on there." (T. 63:13 – 15, App. 12). (Emphasis added) In making this statement, it is abundantly clear that the Court not only considered the element of the Defendant's intent when arriving at a decision, the Court addressed this intent element in explaining the judgment, thereby finding that the State proved all elements required by North Dakota Century Code §12.1-22-03(3).

The Defendant argues that the Defendant had privilege and/or license to enter his father's house as it was his habit and his father had previously given him permission. State v. Purdy, 491 N.W.2d 402 (N.D. 1991); State v. Ronne, 548 N.W.2d 294 (ND 1990). However, this argument presupposes the fact that the Defendant's father would be present in his home at these times. At trial the evidence was clear that his father was not present in his house during the period at issue, and that during this absence Mrs. Richard repeatedly told the Defendant he could not be on the property and would have to leave. The Court considered this evidence and explained as much in its analysis of the evidence and final judgment. Specifically, the Court determined that " . . . when he [LeRoy] was not there, that she [Caroljoy Richard] was in charge of the premises." (T. 62:24 – 63:1, App. 11, 12). Accordingly, the Court determined that the Defendant did not have privilege or license to go on the property.

The Defendant also relies on the Pennsylvania case of Commonwealth v.

Namack, 663 A.2d 191 (Pa. Super. 1995). Namack, however, is distinguishable from the case at bar. 633 A.2d 191. Initially, as argued above and contained in the explanation of the judgment, the Court did consider the element of the Defendant's intent in arriving at its decision. Additionally, the Pennsylvania appellate court based it's decision on the fact that the Defendant apparently believed he had acquired an easement by prescription, which would be a legal right to be on the property which arises by operation of law. Id.

The same is not true in the Defendant's case – there has never been a suggestion that the Defendant obtained permission based upon a belief that a right to be on the property arose by operation of law. The evidence was clear that the owner of the land clearly and repeatedly told the Defendant he was not to enter on her land, which admonitions the Defendant chose to disregard. The Court determined that it was not reasonable that the Defendant thought he could have been on the land, and based upon the evidence found him guilty. (T. 63:13 – 15 , App. 12). Such a finding is clear evidence that Court considered the element of the Defendant's intent in its deliberation.

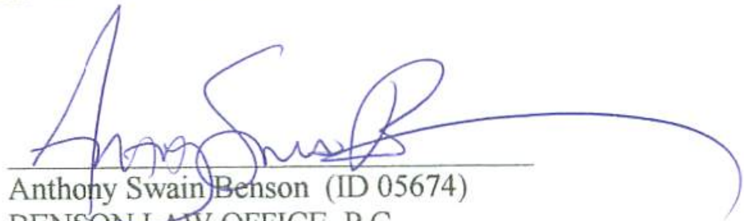
Finally, even assuming *arguendo*, that the proffered evidence was relevant, it was still not admissible under the Rules of Evidence. Rule 402 states that "All relevant evidence is admissible, except as otherwise provided by the constitution of the United States or the state of North Dakota, by any applicable Act of Congress, by statutes of North Dakota, by these rules, or by other rules adopted by the Supreme Court of North Dakota." (Emphasis added) The State originally objected to the proffered testimony and Affidavit on the basis of hearsay, pursuant to Rule 802 of the

North Dakota Rules of Evidence, but the Trial Court excluded it on relevancy grounds. However, the State is still of the position that the proffered evidence was inadmissible hearsay evidence, and therefore still would not admissible, both under Rules 802 and 402 of the North Dakota Rules of Evidence.

III. CONCLUSION

Based upon the foregoing, the State respectfully requests that the Trial Court's judgment and sentence be affirmed.

Respectfully submitted this 16 day of February 2005



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SUBMISSION OF ARGUMENT ON BRIEF PURSUANT TO RULE 34(f)

The State of North Dakota hereby submits its argument for the Court's consideration on brief, pursuant to Rule 34(f) of the North Dakota Rules of Appellate Procedure.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that copies of this document were sent by first class mail to be served upon and filed with the following person(s):

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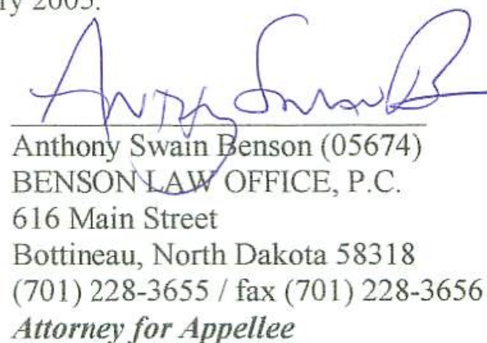
Dated this 16 day of February 2005.



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