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20070141

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The State of North Dakota,	)	
	)	Supreme Court No. 20070141
Plaintiff and Appellee,	)	
	)	District Court No. 18-06-K-1059/001
vs.	)	
Dennis Roy Haugen,	)	
Defendant and Appellant.	)	

ON APPEAL FROM CRIMINAL JUDGMENT
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE KAREN BRAATEN PRESIDING.

BRIEF OF APPELLEE

Carmell F. Mattison (06052)
Assistant States Attorney
Grand Forks County
P.O. Box 5607
Grand Forks, ND 58206
(701) 780-8281

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STATEMENT OF THE CASE

[¶1] Dennis Roy Haugen (Defendant, herein), appeals from a judgment of criminal conviction in the District Court of Grand Forks County. On March 24, 2006, the Defendant was charged with Carrying Loaded Firearm in Vehicle arising from an incident on the 23rd day of March, 2006, in which the Defendant was carrying a loaded silver titan semi-automatic handgun in his motor vehicle without license or privilege to do so. (Appellant's App. at 6). On March 24, 2006, the Defendant was also charged with two counts of Terrorizing and one count of Aggravated Assault. A trial was held February 13 – 15, 2007, and the Defendant was subsequently convicted of Carrying Loaded Firearm in Vehicle and was found not guilty on the two counts of Terrorizing and one count of Aggravated Assault. (Appellant's App. at 8-9). Defendant appeals the Carrying Loaded Firearm in Vehicle conviction.

[¶2] Defendant filed a Motion for a New Trial on March 2, 2007. (Appellee's App. 1-8). Inadvertently, the Court did not notice that the Defendant requested oral arguments on the motion and issued a Memorandum Decision and Order Denying Motion for New Trial on April 3, 2007. (Appellant's App. at 10-15). The Court then issued an Order Vacating Memorandum Decision and Order Denying Motion for New Trial. (Appellee's App. 9-10). A motion hearing was then had on April 12, 2007. (Appellant's App. 48-68). On April 13, 2007, the Court issued its Memorandum Decision and Order Denying Motion for a New Trial. (Appellant's App. at 16 – 22). On May 14, 2007, a notice of appeal was filed and docketed with the District Court in Grand Forks County. (Appellant's App. at 5).

STATEMENT OF THE FACTS

[¶3] A trial was held February 13 – 15, 2007. At the close of the evidence, counsel met with the Judge, outside the presence of the jury, to discuss the proposed jury instructions. The Defendant submitted two affirmative defenses; justification and excuse. (Appellant's App. at 25). The State objected to jury instructions on self-defense, excuse, mistake of law and justification for the Carrying Loaded Firearm in Vehicle offense as it is a strict liability offense. (Appellant's App. at 38). A discussion was had and both sides presented arguments. (Appellant's App. 38-46). The court ruled that self-defense and excuse were not applicable to the charge of Carrying Loaded Firearm in Vehicle. (Appellant's App. 44-46). The Defendant filed a Motion for a New Trial on March 2, 2007. (Appellee's App. 1-8). After motions and oral arguments, the Court ruled that "this case is not one of those rare cases that would support an affirmative defense to the strict liability crime of Carrying Loaded Firearm in Vehicle. Therefore, this Court's denial of the Defendants requested instruction on necessity, justification and excuse and the Court's instruction given to the jury on excuse not being applicable to the offense of Carrying Loaded Firearm in Vehicle was not error." (Appellant's App. 21-22).

STANDARD OF REVIEW

[¶4] We review a trial court's jury instructions under the "clearly erroneous" standard. State v. Eldred, 1997 ND 112, ¶33, 564 N.W.2d 283 (citing State v.Huber, 555 N.W.2d 791, 793 (N.D.1996)). "Upon an appeal from a verdict or judgment, the North Dakota Supreme Court may review any intermediate Order or ruling which involves the merits or which may have affected the verdict or judgment adversely to the Appellant." State v. Rasmusssen, 524 N.W.2d 843, 845 (N.D1994).

ARGUMENT

I. THE COURT PROPERLY HELD THAT THE AFFIRMATIVE DEFENSE OF NECESSITY, JUSTIFICATION AND EXCUSE WAS NOT APPLICABLE TO THE STRICT LIABILITY OFFENSE OF CARRYING LOADED FIREARM IN VEHICLE.

[¶5] In the case at hand, Defendant argues that the trial court erred in not allowing a jury instruction on the affirmative defenses of justification and excuse for the per se crime of Carrying Loaded Firearm in Vehicle.

[¶6] N.D.C.C. §62.1-02-10 is a strict liability offense with no mens rea required. "N.D.C.C. §12.1-02-02(2) provides [i]f a statute or regulation thereunder defining a crime does not specify any culpability, the culpability that is required is willfully, the Supreme Court has held N.D.C.C. §12.1-02-02(2) applies only to Title 12.1, and the willful culpability level will not be read into other chapters unless the Legislature has specifically so stated. State v. Holte, 2001 ND 133, ¶8, 631 N.W.2d 595 (citing State v. Glass, 2000 ND 212, ¶17, 620 N.W.2d 146; State v. Eldred, 1997 ND 112, ¶31, 564 N.W.2d 283).

[¶7] Justification and excuse should only be available as a defense in very rare cases when the offense is a strict liability offense. In Buchholz, the court stated that a mistake of law defense is generally precluded because the offense does not contain a culpability requirement. State v. Buchholz, 2006 ND 227, ¶12, 723 N.W.2d 534 (citing State v. Eldred, 1997 ND 112, ¶¶29-31, 564 N.W.2d 283)). Only in very rare cases have we said than an affirmative defense may be applied when the offense is a strict liability offense. Id. (citing State v. Rasmussen, 524 N.W.2d 843, 846 (N.D.1994)).

[¶8] Although strict liability does not always preclude affirmative defenses, unreasonably held beliefs preclude affirmative defenses for a strict liability offense. City

of Bismarck, v. Lembke, 540 N.W.2d 155,158 (N.D.1995). In Lembke, the North Dakota Supreme Court refused to allow an affirmative defense of justification or excuse to the strict liability crime of driving under suspension. The Defendant alleged that he was forced to drive under suspension because an officer instructed him to leave the scene. Id. However, the trial court refused to allow an instruction on justification or excuse because the Defendant was given ample opportunity to explain to law enforcement that his license was suspended and to clarify with law enforcement how he was supposed to leave the scene. Id. The Defendant's belief that he was coerced to drive was unreasonable and therefore affirmative defenses were properly precluded. Id.

[¶9] The Supreme Court also contrasted the facts in Lembke from Rasmussen. In Rasmussen, affirmative defenses were properly admitted in a strict liability offense where a Defendant had been charged with driving under suspension after he had driven a vehicle to seek shelter from cold and stormy weather. Rasmussen at 843. The Court held that affirmative defenses may be permitted in cases where public policy factors would dictate such defenses, such as a case involving life-threatening forces of nature. Id.

[¶10] In State v. Morrell, 2006 ND 234, 725 N.W.2d 588, the Defendant was charged with Carrying Loaded Firearm in Vehicle. Morrell's statement of the facts states as follows:

> "they were having an outing near the Little Heart Bottoms recreational area south of Mandan, North Dakota and Morrell decided to go to bed after all parties had consumed alcohol. Morrell retreated to his camper that he was using as his residence at the time. A request by another female for sex was rebuffed by Morrell. She became angry. Her anger

was intensified by alcohol consumption. She threw a glass of whiskey in his face. Morrell demanded that she leave. She picked up a shovel and came toward the door of the vehicle. She stated that she was going to go and get a gun and return. Morrell loaded his gun after he had gotten into the vehicle. He told her that he had a gun and told her again to leave. The female left the area and went to the Morton County Sheriff's Office to report the incident. Deputies responded to the area. They confronted Morrell. He showed the gun to the deputies. He was arrested and charged with the offense of Carrying Loaded Firearm in Vehicle."

[¶11] At trial, Morrell requested a jury instruction on the defense of excuse, which the district court refused to give. Morrell appealed and the Supreme Court summarily affirmed the trial courts ruling. Morrell at 234.

[¶12] In the case at hand, the Defendant argues that it was reasonable for him to bring a handgun with him in his car in what he believed to be a life threatening situation. The Defendant then proceeds to argue "facts" to attempt to support this argument without any citations to the record. Rule 28 of the North Dakota Rules of Appellate Procedure states that "the argument must contain appellants contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." N.D.R.App.P. Rule 28(b)(7).

[¶13] The record does reflect the trial Courts rationale for precluding jury instructions on justification and excuse.

"The Defendants claimed belief that he was compelled to carry a loaded firearm in his vehicle to protect himself from life-threatening

circumstances is unreasonable. The Defendant testified that the initial confrontation was by telephone between him and Rodney Hulst. Mr. Hulst had called and wanted $690 to repair a trailer damaged by the Defendant. The Defendant testified that Mr. Hulst very angrily said he wanted his money now and slammed the phone down. The Defendant also testified that there were a total of 5 or 6 calls right after the initial call and that he quit answering the telephone because he believed the calls were from Mr. Hulst. There were no threats of bodily harm by Mr. Hulst, just that he wanted his money now. The testimony of the various witnesses reflected that a significant period of time, 45 minutes to one hour, passed from the initial telephone confrontation between Rodney Hulst and the Defendant to the time Defendant left his shop with the loaded gun and during which time the Defendant was in his locked shop, had a cell phone and had an opportunity to call law enforcement if he believed his life was threatened. Defendant testified that as he exited his shop and got in his car which was parked directly in front of his shop overhead door, he was talking on his cell phone to either a friend or his son. Additionally, the testimony was that Defendant did not answer his door of his shop when law enforcement knocked on his door shortly after the telephone calls even though the person knocking on the door identified himself as a police officer. Defendant testified he was scared and thought it was Mr. Hulst and William Mutchen, the persons who he was afraid of. Later, when

Defendant left his shop in his vehicle with the loaded firearm, the Defendant did not drive to the police or sheriff's office and he did not call law enforcement or direct his friend or his son, who he testified he was talking to on his cell phone at the time he exited his shop, to call law enforcement. Under the facts of this case, the Defendant's belief that he was compelled to carry a loaded firearm in his vehicle is unreasonable and the affirmative defense of necessity, justification or excuse is not applicable." (Appellant's App. at 20-22).

[¶14] The Supreme Court has "made it clear that an unreasonably held belief precludes the affirmative defense of excuse for a strict liability offense. Compulsion as an affirmative defense of excuse under N.D.C.C. §12.1-05-10, exists only if the circumstances ...would render a person of reasonable firmness incapable of resisting the pressure." City of Bismarck v. Lembke, 540 N.W.2d 155, 158 (N.D.1995), (citing State v. Nygaard, 447 N.W.2d 267 (N.D.1989)).

[¶15] In the present case, the Defendant received a phone call from an individual angrily demanding to be paid for a trailer and then hung up on the Defendant. (Appellant's App. at 5) The individual did not even threaten to do bodily harm. Id. The Defendant had many alternatives available to him other than carrying a loaded firearm in his vehicle. (Appellant's App. 19-22). It is unreasonable to conclude that the Defendant was forced or compelled to carry a loaded gun in his vehicle under the circumstances of this case.

[¶16] Additionally, public policy factors would not support an affirmative defense in this case. The Rasmussen Court addressed "whether we should recognize any defenses

to a strict liability traffic offense, we must determine whether the public interest in efficient enforcement of the traffic law is outweighed by other public interest which are protected by the defenses claimed." Rassmussen at 845. "The privilege of self-defense rests upon the need to allow a person to protect himself or herself or another from real or perceived harm when there is no time to resort to the law for protection. The rationale of the defenses of coercion and necessity is that for reasons of social policy it is better to allow the Defendant to violate the criminal law (a lesser evil) to avoid death or great bodily harm (a greater evil)." Id. (citing Hall, General Principles of Criminal Law 425-426 (2d ed. 1960); La Fave & Scott, Criminal Law secs. 49, 50 (1972)).

[¶17] In the case at bar, we should then look at whether the public interest in preventing citizens from carrying loaded weapons in their vehicles is outweighed by the defenses claimed in this instance.

[¶18] The legislative intent for placing regulations on the right to possess and use firearms is limited to those measures necessary for public safety. One can argue that the safety of the public would be at high risk if individuals were carrying loaded firearms in their vehicles without a legitimate purpose. Additionally, it would be of grave consequence if one would be excused or justified in carrying a loaded weapon in their vehicle because they had just been angrily spoken to over the phone and were afraid. This is especially true when that individual had other alternatives available. Therefore, public policy factors would not support an affirmative defense to carrying loaded firearm in vehicle.

[¶19] Because there is ample evidence for the courts finding that the Defendant had other alternatives and his belief was unreasonable, the district courts ruling that the affirmative defenses were not applicable were not clearly erroneous.

II. THE COURT PROPERLY REFUSED TO SUBMIT AN INAPPLICABLE INSTRUCTION TO THE JURY.

[¶20] A trial court may properly refuse to submit an inapplicable or irrelevant instruction to the jury. City of Mandan v. Willman, 439 N.W.2d 92, 94 (N.D.1989). A Defendant is entitled to a jury instruction on a legal defense if there is evidence to support it. State v. Thiel, 411 N.W.2d 66 (N.D.1987). The court, not the jury, has the responsibility to initially determine whether an issue has been adequately raised. State v. McIntyre, Jr., 488 N.W.2d 612 (N.D.1992).

[¶21] In the present case, based on the above, the trial court specifically found that the affirmative defense of necessity, justification or excuse is not applicable. (Appellants App. at 21). The trial court articulated in detail why these affirmative defenses were not applicable based upon the testimony at trial. (Appellant's App. 19-22).

[¶22] Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. State v. McIntyre, Jr., 488 N.W.2d 612, (N.D.1992) (citing State v. Mounts, 484 N.W.2d 843 (N.D.1992); State v. Marinucci, 321 N.W.2d 462 (N.D.1982)).

[¶23] The trial court specifically ruled that the affirmative defenses of justification and excuse were not applicable. Therefore, the court correctly informed the jury of the applicable law. If the trial court were to include the Defendants requested affirmative defenses it would have mislead or confused the jury.

[¶24] On page 11 of appellant's brief he states "it is submitted that the court erred in considering what was literally a last minute request by the state for an instruction that, in effect, barred defenses of excuse, justification and/or necessity." The State contends that by this statement, the Defendant is attempting to shift his burden of providing evidence to support his defenses.

[¶25] N.D.C.C. §12.1-01-03(3), provides that "an affirmative defense must be proved by the Defendant by a preponderance of evidence." It is the Defendant's responsibility to request jury instructions on any defenses and prove affirmative defenses by a preponderance of evidence. "Attorneys have the professional responsibility to request or object to specific instructions of points of law resulting from testimony or on developments during trial. State v. Allery, 322 N.W.2d 228, 232 (N.D.1982). Rule 30(b), N.D.R.Crim.P., provides that at the close of evidence or at an earlier time during the trial...any party may file proposed jury instructions. Rule 30(c), N.D.R.CrimP., provides "counsel shall designate the parts or omissions counsel considers objectionable. All proceedings connected with the taking of exceptions must be in the absence of the jurors and a reasonably sufficient time must be allowed counsel to take exceptions and to note them in the record of the proceedings."

[¶26] In this case, the Defendant submitted written jury instructions regarding the defenses of self defense, justification and excuse. (Appellant's App. at 25). The State objected to these defenses being allowed for the carrying loaded firearm in vehicle charge. (Appellant's App. at 38 & 40). The court allowed each side to present their arguments. The trial court properly complied with Rule 30. The Defendant further asserts that he should have been allowed to research his defenses prior to the court ruling.

The Defendant knew what defenses he was submitting and should have been prepared to overcome any objections to them. Defendant cannot argue that his due process rights were violated based upon his lack of preparation.

[¶27] Furthermore, the trial court delivered to the parties its proposed instructions just prior to the start of the trial on February 13, 2007 advising the parties that they will be given an opportunity to object to the final instructions after all the testimony and evidence is completed and prior to the Court giving the final instructions and the attorneys' final arguments. (Appellant's App. at 17 & 53-54). At the conclusion of the testimony and evidence on February 15, 2007, the attorneys for the parties were given an opportunity to object and request additional instructions to those the Court indicated it would be giving. (Appellant's App. at 17-18).

III. THE COURT PROPERLY DENIED DEFENDANTS MOTION FOR A NEW TRIAL.

[¶28] Under Rule 33 of the North Dakota Rules of Criminal Procedure, a new trial may be granted if the interests of justice so require. N.D.R.Crim.P. 33(a).

[¶29] On appeal, a court will not set aside a trial court's denial of a motion for a new trial unless the court has abused its discretion in denying the motion. State v. Garcia, 462 N.W.2d 123, 124 (N.D. 1990). Furthermore, a motion for a new trial is committed to the sound discretion of the trial court and the judgment is conclusive unless the court abused its discretion. State v. Kringstad, 353 N.W.2d 302, 307 (N.D. 1984).

[¶30] As a basis for Defendants request for a new trial he argues that the trial court "preempted the role of the jury" and "this action in preempting the province was not only erroneous, but improper." He further argues that by the courts "barring affirmative defenses had effectively invaded – and short circuited the jury process on the

charge of loaded firearm in a vehicle." The Defendant makes these arguments without any legal authority to support them.

[¶31] Issues that have not been fully briefed and argued should not be heard on appeal. Ernst v. State, 2004 ND 152 ¶15, 683 N.W.2d 891 (citing State v. Backlund, 2003 ND 184, ¶38, 672 N.W.2d 431). Additionally where a party has failed to provide supporting argument for an issue stated in his brief, he is deemed to have waived that issue. State v. Obrigewitch, 365 N.W.2d 105, 109 (N.D. 1984).

[¶32] In accordance with Obrigewitch, the Defendant's failure to provide arguments for this issue constitutes a waiver, and therefore the State respectfully requests that this issue should not be heard on appeal.

[¶33] Alternatively, the State requests that this Court find that the trial court did not abuse its discretion in ruling that the Defendant was not entitled to a new trial or an order vacating the conviction.

[¶34] In McIntyre, the Court reversed and remanded the case concluding that the instructions on self defense and excuse did not, when read as a whole, correctly advise the jury about the law. State v. McIntyre, Jr., 488 N.W.2d 612 (N.D.1992). "These erroneous instructions are ground for reversal." Id. The McIntyre court held, the "instructions are erroneous, because the trial court, not the jury, had the responsibility to initially determine whether there was sufficient evidence to raise the issues of self defense and excuse." Id. at 612 (citing United States v. Jackson, 587 F.2d 852 (6th Cir.1978). Therefore, in our case, Defendant's argument that it was the jury's responsibility to determine whether there was sufficient evidence to raise the issues of self defense and excuse was contrary to North Dakota law.

[¶35] The Defendant cites the self defense statute under N.D.C.C. §12.1-05-03 to further his argument. However, this argument fails as well. Even by the Defendant's assertion of the facts, the Defendant was not defending against imminent unlawful harm. Moreover, carrying a loaded firearm in a vehicle does not constitute the use of force. Therefore, whether he was justified or excused to use self defense is irrelevant and inapplicable to the facts of this case. The trial court correctly ruled that self defense did not apply based upon this reasoning. (Appellant's App. at 41).

CONCLUSION

[¶36] Based on the foregoing law and conclusion, the State respectfully requests that this Court affirm the District Court's rulings and the criminal judgments in this case.

DATED this 15th day of August, 2007.

Carmell F. Mattison
Assistant State's Attorney
Grand Forks County
State of North Dakota