FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 9, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff - Appellee, vs. Bradley A. Davis, Defendant - Appellant.	)	Supreme Court No. 20090093 District Court No. 51-07-K-1802 count 2

PETITION FOR REHEARING

FROM THE CRIMINAL JUDGMENT AND COMMITMENT ENTERED ON NOVEMBER 4, 2008

CASE NO. 51-07-K-1802, Counts 2

COUNTY OF WARD

NORTHWEST JUDICIAL DISTRICT

HONORABLE DOUGLAS L. MATTSON

Josh B. Rustad
Attorney Number: 05703
Public Defender
16 East Broadway
Williston, North Dakota, 58801
Telephone: 701/ 774-0510
Facsimile: 701/ 774-0511
ATTORNEY FOR APPELLANT

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8. Appellant refers the Court to Briefs previously filed.

9. LAW AND ARGUMENT

10. I. This Court did not address the self defense element in its opinion.

11. Appellant Davis submits that the Court, in viewing the sufficiency of the evidence argument, did not give sufficient weight to the fact that the state must prove beyond a reasonable doubt that Defendant Davis did not act in self defense. In its opinion, this Court outlined the elements needed to convict Davis of the offense, those being that he

> willfully caused serious bodily injury to another human being or knowingly caused bodily injury or substantial bodily injury to another human being with a dangerous weapon or other weapon, the possession of which under the circumstances indicated an intent or readiness to inflict serious bodily injury, to-wit, the defendant caused serious bodily injury, bodily injury, or substantial bodily injury, to one Joshua Velasquez under circumstances in which the defendant assaulted Velasquez with a scythe/grass cutter. ¶ 30.

12. This Court did not include the additional element on this charge that he did not act in self defense.

13. Appellant is not asking that this Court sit as a 'thirteenth juror' to make independent determinations of credibility of witnesses or other evidentiary weight State v Barendt, 2007 ND 164,¶21, 740 N.W.2d 87. The facts this Court cited discussed witnesses seeing Davis with the garden implement, and hearing or seeing him strike Velasquez with the tool. However, this Court did not discuss the numerous witnesses called by the state who provided information regarding Appellant's self defense argument, and which go to an element of the offense. As cited in Appellants brief, "It is a well settled rule of statutory construction that criminal statutes are strictly construed in favor of the defendant and against the government." State v. Plentychief454 N.W.2d 373, 375 (N.D. 1990). The state must prove each element of the offense beyond a reasonable doubt. *Id.* Again, one of the elements needed to be proven beyond a reasonable doubt is that Davis did not act in self defense.

14. These witnesses consisted of Miranda LaFloe, Daniellea Giovanetti, Kelly Poitra, Jennifer Kaler, Monica Marcellais, Vickie Poitra, Hannah LaFloe, and Alicia Boyes. The testimony of these witnesses consisted of Mr. Velasquez fighting with multiple people, refusing to leave after being requested to do so on multiple occasions, and the aggressive demeanor of Velasquez when asked to leave. In addition Velasquez did not leave even when confronted with a gun or a lawn implement, and witnesses also described how Velasquez instigated the physical contact. Finally, Alicia Boyes testified to a previous altercation between Davis and Velasquez, where Velasquez was on top, pounding Davis head into the

concrete, and that Velasquez was physically larger than Davis by a large extent. Appellant Brief ¶ 25-29.

15. Appellant agrees with the case cited by this Court that the standard is that a criminal conviction will be reversed only if, after reviewing the evidence and all reasonable evidentiary influences in the light not favorable to the verdict no rational fact finder could have found the Defendant guilty beyond a reasonable doubt. State v. Curtis, 2008 ND 108, ¶28, 750 N.W.2d 438. However, the judgment of this Court did not discuss the additional element of self defense. This Court did not address any testimony or inferences that proved Mr. Davis did not act in self defense.

16. As cited in the brief, the self defense instruction stated that a person is justified in using force to defend himself against danger of imminent bodily injury. The conduct is to be judged by what the Defendant in good faith, honestly believed and had reasonable grounds to believe was necessary to avoid apprehended death or great bodily injury.

17. Appellant submits that the state did not meet its burden of proving beyond a reasonable doubt, that Davis was not acting in self defense. Velasquez had caused bodily injury and, combined with the previous altercation, Velasquez behavior caused the actions of Mr. Davis to avoid apprehended great bodily injury.

18. II. The process of the trial interfered with substantial justice and as such, the trials should have been severed.

19. Appellant is also requesting a rehearing on the issue of whether the trial court erred in joining the cases and in failing to sever the cases at trial. The specific issue for the

purpose of this request for a rehearing has to do with the process of the trial, wherein the court ruled it would allow Stridiron to cross examine Davis' witnesses and the evidence presented in the case. In its opinion, this Court held that the ability to cross-examine a co-defendant does not demonstrate prejudice because this would be present in any case involving co-defendants, and the rules specifically allow joint trials of co-defendants under certain circumstances, p.4 ¶8. Appellant contends that this is not a case involving those circumstances.

20. In its ruling the trial court acknowledged that this case was somewhat unique and different. We have defendants that are joined for trial. There is no conspiracy charge. These are joined for trial on separate but related charges. Appellant's Brief ¶ 24.

21. With regard to the evidence presented to the jury, specifically crime scene photos, Defendant objected and when asked for a feedback from the state, the prosecutor stated, "I don't know how you expect me to separate evidence with respect to the homicide charge. If we had two separate juries , I guess that would be possible, but we don't..." You have given cautionary instructions... But there isn't any possible way for me to present evidence with one and ignore the other. Appellant's Brief ¶ 36.

22. Appellant contends that this case is one where severance was required, as there was interference with substantial justice, and that the joinder cast doubt on the fairness of the trial. State v. Gann, 344 NW.2d 746, 750 (N.D. 1976). It was a "somewhat unique and different" "separate, but related trial", with no conspiracy charge. In addition, even the state could not separate evidence, and spoke of the ease of doing that if there were separate juries.

In this case, appellant submits that the decision to consolidate, and more importantly the refusal to sever the cases at trial was not reasonable under the circumstances. State v. Paul, 2009 ND 120, ¶ 6, 769 N.W.2d 416

23. III. The state failed to articulate a race-neutral explanation for the juror challenge.

24. With regard to the peremptory challenge of a juror being based solely on race, appellant requests a rehearing as to the specific ruling of this Court that the State articulated a race- neutral explanation for his challenge. Davis contends that there is a definite and firm conviction that a mistake was made. State v. Roth, 2008 ND 227, ¶ 6, 758 N.W.2d 686.

25. This Court identified that the reasons set forth by the state had to do with the prospective juror being a juror in a previous negligent homicide case he had prosecuted in which the jury had acquitted the Defendant, the prospective juror was reading a book, and the prospective jurors answers to questions concerning her understanding of self defense. Appellant contends that none of these constituted a clear and specific race-neutral explanation.

26. With regard to the reading of a book, the record reflects that others were reading books and passed through and the trial court was not concerned with that issue. Appellant contends that is not a race-neutral explanation, and is not one the Court considered in its ruling.

27. On the self-defense area, the record reflects that others in the jury pool asked questions regarding self defense. Her responses were clarifications, and she agreed with the

state that there are limits on self defense and justification, and that circumstances dictate the extent of self defense. The trial court did acknowledge that her answers were not antagonistic. Appellants Brief ¶ 16.

28. The final area had to do with Ms. Brown being on a previous jury that had found the Defendant not guilty. The prosecutor indicated he had no problem with a not guilty verdict, but he was concerned about th verdict in that case, without offering an explanation. Appellant's Brief ¶ 14. Defendant submits that no race-neutral explanation was offered by the state.

29. CONCLUSION

30. For all the reasons set fourth, appellant Davis is requesting a rehearing to address the issues presented.

Dated this 9th day of February, 2010.

Josh B. Rustad
Atty No. 05703
Public Defender
16 East Broadway
Williston, North Dakota, 58801
Telephone: 701/ 774-0510
Facsimile: 701/ 774-0511

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AFFIDAVIT OF SERVICE

Stephanie Vagts, being first duly sworn, deposes and says that on February 9, 2010, she served the attached **Petition for Rehearing** upon Timothy C. Wilhelm, attorney for the State of North Dakota, by sending a true and correct copy to the email address of tim.wilhelm@co.ward.nd.us and to Robert Martin, attorney for Antonio Phillip Stridiron, at the email address of rmartin@nd.gov.

Stephanie Vagts

Subscribed and sworn to before me this 9th day of February, 2010.

VERNIECE JOHNSON
Notary Public
State of North Dakota
My Commission Expires October 16, 2015

Notary Public