IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20090241

State of North Dakota,

Plaintiff-Appellee,

- vs -

Billy Joe Valdez Aguero,

Defendant-Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY CR. NO. 08-K-1676
THE HONORABLE LAWRENCE E. JAHNKE, PRESIDING

BRIEF

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STATEMENT OF THE ISSUES

ISSUE: **I.** Did the trial court err when it required Defendant/Appellant Aguero during the guilt phase of the trial to be shackled?

ISSUE: **II.** Did the trial court err. when it allowed over Defendant/Appellant Aguero's objection. Investigator Hoffman to comment on Mr. Aguero's right to remain silent?

ISSUE: **III.** When a co-defendant's attorney, over Defendant/Appellant Aguero's objection, calls a witness during trial and asks questions that open the door to having his client named as a participant in two murders, does that questioning also open the door to having Mr. Aguero named a participant in the murders?

ISSUE: **IV.** Did the trial court fail to properly admonish the jury during the trial?

NATURE OF THE CASE

Robert Belgarde and Damian Belgarde were murdered just west of Grand Forks, North Dakota on September 7, 2001. Their murders were investigated until August 25, 2008, when an Information was signed by the Grand Forks States Attorney charging Billy Joe Valdez Aguero with the murder and conspiracy to commit the murder of Robert Belgarde and the murder and conspiracy to commit the murder of Damian Belgarde.

A preliminary hearing for Mr. Aguero was held on January 15, 2009 and at that hearing probable cause was found that Mr. Aguero could have committed the four crimes charged.

Another individual Joseph Daniel Moncada was also charged with the murder and conspiracy to commit the murder of Robert Belgarde and murder and conspiracy to commit the murder of Damian Belgarde.

The State made a motion to for joinder of Mr. Aguero and Mr. Moncada's cases. Mr. Aguero resisted this motion. The trial court allowed joinder.

Prior to trial there were several notices served, motions made and hearings. These motions involved a jury questionnaire, a sequestration of witnesses, an exclusion of statements offered by the State and jury instructions.

On June 12, 2008 an Amended Information was filed charging Mr. Aguero with the same four offenses.

The trial began on June 15, 2009 and ended on June 25, 2009 when the jury found Mr. Aguero guilty of the murder and conspiracy to commit murder of Robert Belgarde and the murder and conspiracy to commit the murder of Damian Belgarde.

Judgment and Sentencing took place on August 7, 2009.

On August 19, the Notice of Appeal and Request for Transcript were filed. On the same date the Notice of filing the Notice of Appeal was filed.

This matter is now before the North Dakota Supreme Court.

On December 18, 2009 Mr. Aguero filed a Motion to Remand the case under 10(h) of the NDR of Appellate Procedure to correct the record. This case was then remanded to the District Court. On February 24, 2010 the District Court hearing on the remand was held. The District Court has ruled on that hearing and denied Defendant, Aguero's Motion to Amend the Record.

STATEMENT OF FACTS

On September 7, 2001 Robert Belgarde and Damian Belgarde were murdered just west of Grand Forks, North Dakota. Robert Belgarde's body was found on the road near the end of 32nd Avenue and the old buffalo farm by a group of teenagers. The teenagers were in a vehicle driven by Matt Hoveland. T.III, P.245. L.8-14.

After seeing the body of Robert Belgarde on the road one of the teenage passengers in Mr. Hoveland's car called his parents and told them about finding the body. T.III, P.247. L.19-24. Mr. Hoveland's parents then called 911 and told law enforcement about the body the teenagers had found on the road. T.III, P.248, L.18-19.

Law enforcement then sent Officers to investigate. The first law officer to answer the 911 call was Grand Forks County Deputy Sheriff Bob Thompson. Deputy Thompson found Robert Belgarde's body on the road. T.III, P.264, L.1-23. He then started investigating the area around the body. During that investigation he found Damian Belgarde's body by a fence right after that. T.III, P.265, L.9-13.

Additional law enforcement officers started arriving along with an ambulance and paramedics. T.III, P.267, L.1-2. The area around the bodies was declared a crime scene. Some of the items found at the crime scene were 9 mm bullets, 9 mm casing, a broken beer bottle, and a partially smoked cigarette. T.III, P.550 to P.563. All of these items were sent to the crime lab for examination.

No pistols were ever found that could have been used to shoot Robert Belgarde or Damian Belgarde. T.III, P. 210, L1-2. The prosecutor in his opening statement admitted he was not going to be able to establish who pulled the trigger. T.III, P.219, L7 and 8.

No charges were filed for the murder of Robert Belgarde and Damian Belgarde until August 25, 2008 when an information was filed charging Billy Aguero with murder and conspiracy to commit the murder of Robert Belgarde and Damian Belgarde. Joseph Daniel Moncada a co-defendant was also charge with the same crimes.

From the date of the murder September 7, 2001 to August 25, 2008 many individuals were questioned by law enforcement about the murder of Robert Belgarde and Damien Belgarde.

Shannon Clauthier was questioned five times by law enforcement, and told a different story each time. T.III, P.221-P.406. Other witnesses when questioned by law enforcement changed their stories from interview to interview. Many of the witnesses called by the State to testify at trial had criminal records and some were incarcerated at the time of the trial.

The 9 mm pistols that State claimed were used to murder Robert Belgarde and Damian Belgarde were purchased from Jesse Kalinoski by Joseph Moncada. When Mr. Moncada purchased the pistols Mr. Kalinoski also sold him special ammunition for 9 mm's. T.VI, P.896, L.2 to P.900, L.1.

The unfired shells found at the crime scene were the same type of special ammunition sold by Jesse Kalinoski to Joseph Moncada. Also the 9 mm empty shell casing at the scene matched the empty 9 mm casings that Mr. Kalinoski had from firing the 9 mm pistols prior to the sale to Mr. Moncada.

A cigarette that had NDA at the crime scene matched that of Mr. Moncada.

A broken beer bottle at the crime scene had DNA on it. Some of that DNA

couldn't exclude Mr. Aguero. The chance of it being Mr. Aguero's DNA was 1 in 66.

During the trial many of the witnesses testified about admissions made to them by Mr. Moncada and Mr. Aguero about the Belgarde murders. The following is what some of the witnesses testified at trial about these admissions made to them by Mr. Moncada or Mr. Aguero:

James Garceau testified that Mr. Moncada told him the Belgarde's owed his dealer money and when the dad started acting up he stood in back of him and got him execution style like bam TR. IV, P.481, L7-19.

Jeremiah Moncada, Joseph Monacada's brother testified that Joseph Moncada mentioned to him that we was involved in the Belgarde homicides. Then Jeremiah Moncada went on to testify Shannon Clauthier did kill somebody and a beer bottle was used T. IV, P.492, L.2-25.

Donny Smith testified that Joseph Moncada told him he knew every detail about the Belgarde homicides. T.V, P.758, L.8-19. On cross examination Mr. Smith admitted that Dickie Demery told him that Dickie Demery was at the murders and that Joseph Moncada wasn't there. Mr. Smith then said Dickie Demery said he hit Mr. Belgarde so hard in the head he couldn't believe he didn't die from the blow Tr V, P., 762, L.21-25, P.763, L. 1-9.

Manny Delgado testified that about 3 days after the murders Joseph Moncada and Billy Aguero told him that Mr. Moncada shot either the father or son and handed the gun to Billy who shot the other. He also testified that Billy hit one of the Belgarde's with a bottle and that this all occurred over money the Belgarde's owed . T.VI, P.842, L., 22-25,

P. 843, L. 1-18.

Larry Hoffman is an investigator for the Grand Forks Sheriff's Department. T. IV., P. 546, L. 16-22. On September 17, 2001 he and Sergeant Hildebrand and Detective Blazek located Billy Aguero at his mothers residence. T. IV, p. 592, L. 11-21. Mr. Aguero was asked to go with these 3 law officers to the East Grand Forks Police Department T. IV, P.59, L.4-7. At the East Grand Forks Police Department Mr. Aguero was questioned about the murders T.IV., P. 593, L. 13-25, P. 594, L.1-25, P. 595, L. 1-25, P. 596, L. 1-25, P. 597, L. 1-25, P. 598, L-1. Over Aguero's objection Investigator Hoffman then was allowed to testify about Mr. Aguero's remaining silent to a question T.IV, P. 599, L. 5-25, P. 600, L. 1-25, P. 601, L. 1-13. The questions and answers are as follows:

"Q. (By Mr. McCarthy) Investigator Hoffman, near the end of the interview did you ask Mr. Aguero if he was with Joe and met Robert and Damien on Friday night?

A. Yes.

Q. What was his response?

A. There was no response. He would not admit it or deny that he was with them." T.IV, P.601, L. 7-13.

During the trial the State after calling 27 witnesses rested. Mr. Aguero's attorney then made a Rule 29 Motion for Judgment of Acquittal. T. VII, P. 1172, L.9-11. The Court denied this Motion. T. VII, P. 1174, L7-12.

The jury found Mr. Aguero guilty of all four charges. After Mr. Aguero was sentenced and judgment entered he appealed to the North Dakota Supreme Court. This

matter is now before the North Dakota Supreme Court.

ARGUMENT

ISSUE 1. Did the trial court err when it required Defendant/Appellant Aguero during the guilt phase of the trial to be shackled?

The following are statements in three different transcripts about Mr. Aguero being shackled during trial.

1) Transcript of Motions Hearing and Pretrial Conference dated March 19, 2009.

P. 14, L.18-25."Okay, we had the other motion or two to address. On March 2nd, Mr. Martin filed a Motion regarding jury selection procedure, courtroom security and demeanor during trial.

On March 11th the State filed a Brief in Opposition to individual voir dire examination, voiced no objection to the Defendant's request for the Defendants to appear in what I'll refer to as street attire, and nonvisible restraints during trial." P.20, L.16-17. "For the record, we'll grant the Defendant's Motion for street attire and nonvisible restraints."

2) Final Pretrial Conference dated Monday June 15, 2009. P. 12, L.5-14.

Next, Your Honor, I notice that the defendants today are not wearing leg restraints. I know that Mr. Martin's request was, you know, for non visible restrains and we would request given the courtroom, I believe in Judge Kleven's courtroom tables are set up where there is wood around the table, for safety purposes and the number of witnesses we would request the defendants wear leg restraints during the trial.

THE COURT: that was my understanding. Maybe there was a disconnect but

there will be leg restrains."

3) T. III, P.174, L.18 to P.177, L.5. "MR. MARTIN: Thank you, Your Honor. Your Honor, the last thing I have then for the record, I know the Court had previously ruled with respect to my request that my client appear without restraints during the course of the proceeding. I don't make a habit of coming back to court's rulings. I want to make sure I have this preserved for my record. I hope that the Court understands that, Your Honor.

The case cite that I gave the court in my filing on this point is In the Interest of RWS, 2007, North Dakota 37, 728 Northwest 2d 326. That has all the applicable authorities cited with respect to the impact on the presumption of innocence that having a defendant appear in restraints causes that type of event.

To that, Your Honor, I would add I guess I can give the Court a real time factual basis, if you will. My client has appeared in numerous proceedings before the court, pretrial hearings, preliminary hearings, there's never been any difficulty with him whatsoever.

The last two days during jury selection he appeared without restraints. There were no security concerns or issues during that time. I know that the Court had indicated that you didn't think they would be looking at the person's ankles or feet. That may or may not be true. I can't really say what would draw a juror's attention but I do want to rest on that case for the purposes of preserving my record.

I would also note for the record that we tried to manufacture barriers using file boxes, basically as Lego blocks, but I don't know if it's going to be enough. I sat in every

single jury seat last night, yesterday afternoon, to see where the angle would be on this and those last two seats, I think, would still have an angle at the under side of the table.

So if the Court is going to deny my request for removal of restraints, could I ask the Court to add two more seats on the end and shift the jury down two chairs.

THE COURT: Well, two people would be sitting on the floor basically.

MR. MARTIN: I understand that.

THE COURT: Your clients are in pretrial confinement.

MR. MARTIN: Yes, Your Honor.

THE COURT: We have bent over backwards the last couple days. They could be in hand shackles as well. From my point of view and from what I can see of counsel's bench, the view of their feet is properly obstructed. So your comments are made. They will remain shackles.

MR. MARTIN: Thank you, Your Honor. I was just trying to preserve my record.

THE COURT: I understand, Mr. Martin. Thank you.

MR. DUSEK: Your Honor, if I may.

THE COURT: Yes.

MR. DUSEK: I am going to preserve the record for that. In addition to what he said, if you read the Grand Forks Herald today, they did make mention a lot of the fact what was said in court yesterday even the WD-40 remark and I would like to place that on the record in addition to that for Mr. Billy Aguero and ask, re-ask the Court to either have an admonition to the jurors or something or have the leg restraints removed because of that."

At the February 24, 2010 hearing on remand to the District Court there was testimony about jurors being able to see Mr. Aguero in shackles during the guilt phase of the trial and seeing him in the courthouse halls when the court wasn't in session.

The Supreme Court of North Dakota's position on Defendant's appearing in Court free from physical restraints is set out in the Interest of R.W.S., 2007 ND 37, 728 N.W.2d 326.

> [¶10] This is a case of first impression for our Court, as we have not previously addressed the right of either adult defendants or juveniles to appear in court free from physical restraints. When deciding a question of the violation of a federal constitutional right, we look to federal courts for guidance. See City of Bismarck, v. Materi, 177 N.W.2d 530, 538 (N.D. 1970).
>
> [¶11] The United States Supreme Court has recently stated that there is near consensus agreement that during a trial's guilt phase, "a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum." Deck v. Missouri, 544 U.S. 622, 628 (2005); see ABA Standards for Criminal Justice: Discovery and Trial by Jury 15-3.2, pp. 188-91 (3d ed. 1996).
>
> [¶12] In Deck, the United States Supreme Court addressed "whether shackling a convicted offender during the penalty phase of a capital case violates the Federal Constitution." 544 U.S. at 624. The Court held "that the Constitution forbids the

use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest' – such as the interest in courtroom security – specific to the defendant on trial." Id. (quoting Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986) (emphasis omitted)); see also Illinois v. Allen. 397 U.S. 337, 343-44 (1970) (holding restraints may be used when necessary to maintain dignity, order, and decorum in the courtroom). In so holding, the United States Supreme Court examined the reasons that motivate the guilt phase constitutional rule and determined they apply with similar force at the penalty phase, even though "shackles do not undermine the jury's effort to apply that presumption" of innocence because the defendant has been convicted. Deck. 544 U.S. at 632.

[¶13] In Deck, the United States Supreme Court reviewed the considerations that militate against the routine use of visible physical restraints during a criminal trial. Id at 630-31. The Court identified three fundamental legal principles: (1) "the criminal process presumes that the defendant is innocent until proved guilty," and visible physical restraints undermine that presumption, suggesting "to the jury that the justice system itself sees a need to separate a defendant from the community at large;" (2) "the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel, "and"[s]hackles can interfere with the accused's ability to communicate with his lawyer," and (3) "judges must seek to maintain a judicial process that is a dignified process . . . which includes the respectful treatment of defendants, reflects the importance of the matter at issue,

guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment." Id. (citations omitted).

[¶14] The United States Supreme Court applied these principles and concluded that the latter two considerations, securing a meaningful defense and maintaining dignified proceedings, militate against the routine use of visible physical restraints during the penalty phase of a criminal trial. Id. at 632. The Court also concluded that although the jury was not deciding between guilt and innocence, it was deciding between life and death, an equally important decision. Id.

The trial court required Mr. Aguero to wear visible shackles during trial. Therefore the above three quotes from the transcripts should be examined to see what they say about the state interests for courtroom security, escape prevention and courtroom decorum.

(1) The transcript of Motion's Hearing and Pretrial Conference contains no statement as to why visible shackles are required for courtroom security. According to this conference Mr. Aguero could wear street attire and nonvisible restraints:

(2) The final Pretrial Conference says Aguero will wear leg restraints but says nothing about why visible leg restraints are necessary for courtroom security, escape prevention or courtroom decorum;

(3) T. III says that during the two days of jury selection, Mr. Aguero wasn't shackled. No good reason was given why the Court wanted Mr. Aguero shackled during the guilt phase of the trial or why the court said he could be hand shackled as well.

There is nothing in this transcript quote about why visible shackles are necessary for courtroom security, escape prevention or courtroom decorum. The only reason given in this quote as to why shackles can be used is that the trial judge, from the bench can't see Aguero's feet at counsels table.

The above three quotes fail to consider any of the following three fundamental legal principles in Deck.

(1) "the criminal process presumes that the defendant is innocent until proved guilty," and visible physical restraints undermine that presumption, suggesting "to the jury that the justice system itself sees a need to separate a defendant from the community at large;"

(2) "the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel, "and"[s]hackles can interfere with the accused's ability to communicate with his lawyer," and

(3) "judges must seek to maintain a judicial process that is a dignified process . . . which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence. and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment." Id. (citations omitted)

The United States Constitution does not allow a Defendant to have restraints visible to a jury during the guilt phase of his trial unless such restraints are necessary for physical security, escape or courtroom decorum. In this case there is no showing that visible restraints during the guilt phase of the trial were necessary. The fact that Mr.

Aguero was required by the trial court to wear physical restraints during the guilt phase of the trial is an error of constitutional dimensions and entitles Mr. Aguero to a new trial.

ISSUE II. Did the trial court err, when it allowed over Defendant/Appellant Aguero's objection, Investigatory Hoffman to comment on Mr. Aguero's right to remain silent?

On September 17, 2001 Investigator Hoffman, Detective Rich and Detective Blazek talked to Mr. Aguero at his parents home in East Grand Forks, Minnesota. T. IV., P.592, L.18-21. During that talk they got Mr. Aguero to go with them to the East Grand Forks Police Department for an interview. T. IV., P.593, L.4-5. Sgt. Hildebrand reads Mr. Aguero his Miranda Rights. T. IV., P593, L.11-12. After such a reading, Mr. Aguero would be in a custodial situation and he would have reason to believe he was under arrest. Since Miranda Rights begin "you have a right to remain silent and anything you say can be used against you" an individual after he has been read his rights would believe he could decide not to answer a questions and his silence wouldn't be used against him.

At the end of the questioning of Mr. Aguero at the East Grand Forks Police Station, Mr. Aguero remained silent when asked a question by Investigator Hoffman. T. IV., P. 599, L.21. During the trial Investigator Hoffman was asked to comment on Mr. Aguero's remaining silent to the questions. Before Investigator Hoffman could answer, Mr. Aguero's attorney objected to Investigator Hoffman's being able to comment on Mr. Aguero's silence. This objection was over ruled by the trial judge. T. IV., P.599, l.22 to The following questions and answers were then given regarding Mr. Aguero's silence. T. IV, P.601, L.7-13.

Q. (By Mr. McCarthy) Investigator Hoffman, near the end of the interview did you ask Mr. Aguero if he was with Joe and met Robert and Damien on Friday night?

A. Yes.

Q. What was his response?

A. There was no response. He would not admit it or deny that he was with them.

A Defendant's right to remain silent is set out below in the 5th Amendment to the United States Constitution, Article 1 § 12 of the North Dakota Constitution and North Dakota Statute 29-21-11.

ARTICLE 5

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or navel forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. (EMPHASIS ADDED)

NORTH DAKOTA CONSTITUTION

DECLARATION OF RIGHTS

ARTICLE I, § 12

Section 12. In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with

counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. (EMPHASIS ADDED)

29-21-11. Defendant witness in own behalf. In the trial of a criminal action or proceeding before any court or magistrate of this state, whether prosecuted by information, indictment, complaint, or otherwise, the defendant, at the defendant's own request and not otherwise, must be deemed a competent witness, but the defendant's neglect or refusal to testify does not create or raise any presumption of guilt against the defendant. Nor may such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place.

In City of Williston v. Hegsted, 1997 ND 56, 562 N.W.2d 91 what can and can't be discussed in court about a Defendant's silence is discussed.

> [¶9] A prosecutor's use of a defendant's post-arrest silence after receiving Miranda warnings to impeach the defendant's exculpatory story, told for the first time at trial, violates the defendant's right to due process. Doyle v. Ohio, 426 U.S. 610, 611, 96 S.Ct. 2240, 2241, 49 L.Ed.2d 91, 94 (1976). After a person has been arrested and given the Miranda warnings, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." 426 U.S. at 618, 96 S.Ct. At 2245, 49 L.Ed.2d at 98. See also Wainwright v. Greenfield, 474 U.S. 284, 289-95, 106 S.Ct. 634, 637-41, 88 L.Ed2d 623, 629-32 (1986) (prosecutor's use, in closing argument, of the defendant's post-arrest silence as evidence of

sanity violated his right to due process); Fields v. Leapley, 30 F.3d 986, 990 (8th Cir. 1994) (prosecutor's use, in closing argument, of the defendant's silence after receiving Miranda warnings was a Doyle violation).

[§10] Because Hegstad's testimony he said to McNamee, "You set me up," was an exculpatory version of events Hegstad claimed to have told the police at the time of arrest, the prosecution was entitled to contradict it with a comment about silence. However, the prosecutor's reference to Hegstad's silence after he had received his Miranda warnings, "or more generally to [Hegstad's] failure to come forward with his version of events at any time before trial . . . crossed the Doyle line." Brecht v. Abrahamson, 507 U.S. 619, 629-30, 113 S.Ct. 1710, 1717, 123 L.Ed2d 353, 367-68 (1993). When the prosecutor argued to the jury Hegstad "didn't tell anybody–not the hospital person, not the other police officer, nobody–until today," the prosecuting attorney clearly used Hegstad's post-arrest silence after receiving Miranda warnings to impeach his exculpatory story, in violation of Doyle v. Ohio. The City bears the burden of proving that a Doyle error was harmless beyond a reasonable doubt. Brecht, 113 S.Ct. At 1717.

The prosecutor's comment in Hegstad, about the Defendant's right to remain silent after the Miranda warning was given, crossed the Doyle line. In the case now before the court, Mr. Aguero believes Investigator Hoffman's comment about Aguero's silence crossed the Doyle line and allowed the State to use Mr. Aguero's silence to convict him.

ISSUE III. When a co-defendant's attorney, over Defendant/Appellant

Aguero's objection, calls a witness during trial and asks questions that open the door to having his client named as a participant in two murders, does that questioning also open the door to having Mr. Aguero named a participant in the murders?

At trial there was a discussion at the bench because Mr. Moncada's attorney wanted to call Brandy Clauthier as a witness. T.VII, P.1184, L.21-22. Mr. Aguero's attorney didn't want Brandy Clauthier to testify and objected. T.VII, P.1184, L.13-20. The State's position on Brandy Clauthier's testifying was she could testify as long as the same limitation apply to her as applied to other witnesses. T.VII, P.1185. L.3-4. At the conclusion of this conference the trial judge decided to allow Brandy Clauthier to testify. P.1185. L.4-5.

When Brandy Clauthier testified Mr. Moncada's attorney asked her Q. Okay. What was th extent of his involvement? What did he tell you that he had done? T.VII. P. 1187, L.4-5. Brandy Clauthier's response to these questions was: A. Shannon came over to my house one night. We had been drinking. He starts going off about how him and a couple of guys killed the Belgardes. T. VII, P. 1187, L-6-8 Apparently Mr. Moncada's attorney believed that because of the trial judges prior rulings on this type of testimony the names of the other two people would remain unknown to the jury.

The following ruling by the trial judge allowed the names of the other two people to be known by the jury " THE COURT: Normally I would not have allowed it. If Clauthier wants to implicate himself, fine. He did, but he's identified he had the two other unknown people and I think the jury has a right to know now who the other two

were but I would drop it like a hot potato after they are identified. T. VII. P. 1193, L.1-6.

Mr. Aguero's attorney's final objection to Brandy Clauthier testify: MR. DUSEK: That's why I objected to her testifying the whole time. T. VII, P. 1194. L.24-25.

Only Mr. Moncada's attorney wanted to have Brandy Clauthier testify and it was his question that opened the door to allowing the State to ask if Mr. Moncada was one of the two people who killed the Belgardes.

At trial Mr. Aguero's attorney followed all of the procedure required by the trial court and did or said nothing to open up the door to allow the State to ask if Mr. Aguero was one of the unknown people who killed the Belgardes. Therefore, it was error for the trial judge to allow the State to ask a question that would allow Mr. Aguero's name to be included in an answer to the unknown persons who killed the Belgardes.

In this case the trial judge made an evidentiary ruling to protect the Defendants from prejudicial testimony. The fact this ruling was made clearly shows the trial judge believed such testimony would be prejudicial to both of the Defendants. Then during the trial the court admitted the testimony against both Defendants over Mr. Aguero's objection. THE COURT: Normally I would not have allowed it. If Clauthier wants to implicate himself, fine. He did, but he's identified he had the two other unknown people and I think the jury has a right to know now who the other two were but I would drop it like a hot potato after they are identified. T. VII, P. 1193, L.1-6 and THE COURT: You have to realize, gentleman, these rulings were initiated at your request to protect your clients on these co-conspirator statements. But now your defense –. T.VII, P. 1194, L.20-23.

In this case Brandy Clauthier was testifying as to what Shannon Clauthier had told her. Admission of this type of evidence is discussed in the State v. Norman 507 N.W.2d 522 (N.D. 1993). "This proposed evidence constitutes a classic case of hearsay testimony that is inadmissible. See Rules 801 and 802, N.D.R.Ev.

In the case now before the Court the testimony as to what Shannon Clauthier told his cousin, Brandy Clauthier is classic hearsay and should not have been introduced into evidence against Mr. Aguero through the testimony of Brandy Clauthier, Mr. Moncada's witness.

ISSUE IV. Did the trial court fail to properly admonish the jury during the trial?

After a jury is selected the trial courts must admonish the jury. Such an admonishment is found in T.III, P.193, L7 to P. 195, L22. The final 6 lines of that admonition P.195, L.17 to 22 are:

"Usually before a recess I will not repeat this entire admonition to you. I may simply say remember the admonition to you. I may simply say remember the admonition. I am talking basically about not discussing, not allowing contact with anyone else during a recess or adjournment. If I forget to make the admonition, it's still in effect."

After the above admonition there were 17 recesses. At the first recess T. III, P. 380, L.11-15 the following was said:

"THE COURT: Jury like to take a little break or do you want to press on. Chit chat amongst yourselves. Stretch break maybe. Five? Okay.

(Court in recess at 4:04 p.m.)

(Court in session at 4:25 p.m.)"

The second recess the following was said: T.IV, P.477, L.2-5.

"THE COURT: All right. We will go ahead and recess until 10:30.

(Court in recess at 10:15 a.m.)

(Court in session at 10:30 a.m.)"

At the third recess the following was said T. IV, P.510, L.19-22.

"(Court in recess at 11:30 a.m.)

(State's Exhibits 2 through 98 with marked for identification during noon recess.)

(Court in session at 1:15 p.m.)"

At the fourth recess the following was said T. IV., P.565, L.18-22.

"THE COURT: I was going to wait until ten minutes but that's fine. We will stand in recess for 15.

MR. MCCARTHY: Thanks, Judge.

(Court in recess at 2:30 p.m.)

(Court in session at 2:55 p.m.)"

At the fifth recess the following was said T.IV, P. 638, L.16-25.

"THE COURT: We will stand in adjournment for the evening. Just admonish the jury once again please do not discuss the case with any family members or friends and please avoid any exposure to media, television, radio or newspapers that may be covering or reporting what's transpired in the courtroom.

Do you have any questions this evening? Nine o'clock sound good in the morning? Okay. I would expect you get here by 8:30, quarter to nine. Okay.

(Jurors left the courtroom at 5:00 p.m.)"

At the sixth recess the following was said T. V, .P. 753, L.14-18.

"THE COURT: Okay. You may be excused. Probably an appropriate time to take lunch. By my watch it's 10 to 12:00. 1:15? That sufficient time?

(Court in recess at 11:50 a.m.)

(Court in session at 1:10 p.m.)"

At the seventh recess the following was said T.V., P.813, L.4-7.

"THE COURT: Thank you, Mr. Martin. Let's go ahead and break.

(Court in recess at 2:35 p.m.)

(Court in session at 3:10 p.m.)"

At the eighth recess the following was said T.VI., P.891, L.3-5.

"THE COURT: Sure. Let's go ahead and 10:30ish.

(Court in recess at 10:10 a.m.)

(Court in session at 10:30 a.m.)"

At the ninth recess the following was said T. VI., P.916, L.9-12.

"THE COURT: That's two hours. Come back maybe around one o-clock and we will shoot for 1:15 take off.

(Court in recess at 11:15 a.m.)

(Court in session at 1:15 p.m.)"

At the tenth recess the following was said T. VI., P.966, L.12-15.

"MR . MARTIN: Sure.

THE COURT: About 15 minutes then. 3 o'clock.

(Court in recess at 2:37 p.m.)

(Court in session at 3:00 p.m.)"

At the eleventh recess the following was said T.VI., P.1047, L. 3-5.

"THE COURT: Let go home. 8:30ish tomorrow morning. We will stand adjourned then. (Emphasis added)

(Court in recess at 5:00 p.m.)"

At the twelfth recess the following was said T. VII, P.1112. L.15-20.

"THE COURT: If the jury wants a break. Anybody want a break? Raise your hand. Let's proceed on. There is one. Okay. Lets come back in around 11:00. I apologize.

(Court in recess at 10:40 a.m.)

(Court in session at 10:56 a.m.)"

At the thirteenth recess the following was said T. VII, P.1149, L.3-6.

"THE COURT: 1:15 okay for everyone? Okay. Stand in recess until 1:15.

(Court in recess at 11:55 a.m.)

(Court in session at 1:15 p.m.)"

At the Fourteenth recess the following was said T. VII, P.1200, L. 6-11.

"THE COURT: We have another witness in route that Mr. Martin has called. He is obviously not here. He is going to be a few minutes late. Why don't we take maybe a short break, maybe ten minutes at this time.

(Court in recess at 2:30 p.m.)

(Court in session at 3:00 p.m.)"

At the Fifteenth recess the following was said T.VII., P.1221, L.10-15

"I would give you, Karen is still on the record, the admonition. Don't speak to anyone about the case. No TV. no radio, no newspaper. Just please avoid any reference to this case until your deliberations are completed. Okay. Thank you.

(Court adjourned at 3:30 p.m.)"

At the Sixteenth recess the following was said T. VIII, P. 1312, L. 24-25 P. 1313, L.1

"Thank you. We will stand in recess.

(Court in recess at of 12:10 p.m.)

(Court in session at 1:30 p.m.)"

At the seventeenth recess the following was said T. VIII, P.1359, L.22-25.

"After you retire to the deliberation room the alternates will be identified and then excused from further deliberations.

(Jurors left the courtroom at 3:00.p.m.)"

The Courts duty to admonish jurors used to be set out in NDCC 29-21-28.

29-21-28. Court must admonish jury. The jurors also. at each adjournment of the court, whether permitted to separate or required to be kept in charge of officers. must be admonished by the court that it is their duty not to converse among themselves nor with anyone else on any subject connected with the trial, nor to form or express any opinion thereon, until the case is finally submitted to them.

6.11(b) of the North Dakota Rules of Court has superseded NDCC 29-21-28.

Rule 6.11. Predeliberation discussion by jurors.

(b) Criminal Case. In a criminal case, the court must prohibit the jury from engaging in predeliberation discussion. At each adjournment, the court shall admonish the jurors.

* not to converse among themselves nor with anyone else on any subject connected with the trial; and

* Not to form or express an opinion until the case is submitted to them for deliberation.

Since the trial judge in the case now before the court referred to breaks as both recesses and adjournment the question is, "whether the admonishment must be given at breaks referred to as recess or just at breaks called adjournments?"

According to the Black's Law Dictionary, Fifth Edition at page 39, adjournment is defined as:

"A putting off or postponing of business or of a session until another time or place. The act of a court, legislative body, public meeting, or officer, by which the session or assembly is dissolved, either temporarily or finally, and the business in hand dismissed from consideration, either definitely or for an interval. If the adjournment is final, it is said to be sine die. See also Recess."

In Black's Law Dictionary, Fifth Edition, at page 1141, recess is defined as:

"In the practice of the courts, a short interval or period of time during which the court suspends business, but without adjourning. The period between sessions of court. A temporary adjournment of a trial or a hearing that occurs after a trial or hearing has commenced."

From the above definition it appears there is a difference between adjournment and recess. This distinction appears to be eliminated by Black's Law Dictionary, Fifth Edition, at page 39, definition of adjourn:

"To put off; defer; recess; postpone. To postpone action of a convened court or legislative body until another time specified, or indefinitely; the latter being usually called to adjourn *sine die*. To suspend or recess during a meeting, legislature or assembly, which continues in session Suspending business for a time, delaying."

In this case there were fifteen recesses where no admonition was given. At one of these breaks the following was said:

T. III, P. 380, L.11-15 the following was said:

"THE COURT: Jury like to take a little break or do you want to press on. Chit chat amongst yourselves. Stretch break maybe. Five? Okay.

(Court in recess at 4:04 p.m.)

(Court in session at 4:25 p.m.)"

The language at the above recess indicates the jury can talk about anything they want during that recess. Such language won't prohibit a jury from engaging in predeliberation discussion. The court according to Rule 6.11(b) in a criminal case is supposed to admonish the jury at each adjournment. If an admonishment is given in only two out of seventeen adjournments is sufficient the rule is meaningless.

In the case now before the court the trial court did admonish the jury when the trial started. After that there were seventeen recesses. Only at the fifth and fifteenth recess did the trial court admonish the jury.

The jury conviction was reversed in United States v. Williams 635 F2d 744 (8th Cir. 1980) because at no time during the trial did the trial court admonish the jury. The reversal of the conviction in Williams was granted even though the defendant never objected to the trial court not admonishing the jury and there was no prejudice demonstrated becaues the trial court did admonish the jury.

In United States v. Weatherd 699 F.2d 959 (8th Cir. 1993) it was decided that it is not reversible error if the trial judge admonishes the jury more times then he forgets to admonish them.

The case now before the court is somewhere in between Williams and Weatherd because the trial judge did admonish the jury at the start of the trial and then only admonished the jury at two of the seventeen recesses.

In the case now before the court the trial judge forgot to give the admonition many more times then he gave it.

This case involves a double murder. The trial lasted almost two weeks. This case has so few admonishments to the jury it is very similar to what occurred in Williams where there were no admonishments to the jury. Even though the defense in this case never objected to the trial courts failure on fifteen occasions to admonish the jury and there is no prejudice demonstrated, Mr. Aguero's conviction like the conviction in Williams should be reversed and he be given a new trial.

It is Mr. Aguero's contention that the trial courts failure to admonish his substantial right to a fair trial.

CONCLUSION

For the above and foregoing reasons this case should be remanded to the District Court and Mr. Aguero should get a new trial.

DATED at Mandan, North Dakota, this 26 day of March, 2010.

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CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on March 26th, 2010, she served, by mail, a copy of the following:

APPELLANT'S BRIEF

by placing a true and correct copy thereof in an envelope and depositing the same, with

Jason McCarthy
Assistant State's Attorney
P.O. Box 5607
Grand Forks, ND 58206-5607

The undersigned further certifies that on March 26th, 2010, she dispatched to the Clerk, North Dakota Supreme Court, an original and seven copies of the APPELLANT'S BRIEF and emailed the same containing the full text of the Brief.

Sharon Renfrow

Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek