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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

June 25, 2012

State of North Dakota, Plaintiff-Appellee, vs. Alois Vetter, Defendant-Appellant.	District Court No.09-2011-cr-0937 Supreme Court No. 2012-0015

APPEAL FROM DISTRICT COURT, COUNTY OF CASS, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN E McCULLOUGH PRESIDING

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

[¶ 4] On March 15, 2011 Alois Vetter was charged with aggravated assault and reckless endangerment, both C felonies, in Cass County North Dakota for an incident that was alleged to have occurred on February 18, 2011. On April 12, 2011 the Cass County State's Attorney's Office filed an amended information in this case. The amended information alleged that a dangerous weapon was used in the commission of the aggravated assault and included language to add a 2 year minimum mandatory sentence to that charge. On October 18, 2011 a 3 day jury trial commenced. The Defense made appropriate under N.D.R. Crim P. 29 for acquittal at both the close of the State's and Defense's case. (T. at 345, 416). On October 20, 2011 the Jury returned a verdict on both counts and made a separate finding that a dangerous weapon was used in commission of the aggravated assault.

[¶ 5]On October 31, the Defense filed a motion for new trial and acquittal, alleging among other things, that being charged with both aggravated assault and reckless endangerment for the same conduct constituted double jeopardy. On November 1 and November 3, 2011 the Defense filed supplements to its motion for new trial and acquittal.

[¶ 6]On January 10, 2012, the court held a combined motion hearing and sentencing hearing. The court denied all defense motions with the exception of the double jeopardy claim. For this claim the court found that reckless endangerment was essentially an inchoate version of aggravated assault. (T. of Sentencing at 20).

The court declined to sentence on the reckless endangerment conviction. (T. of Sentencing at 21).

[¶ 7]Vetter was sentenced to three years first to serve 2 years, with the balance suspended for two years of supervised probation on count 1. The court explained that the 2 year sentenced was imposed because it was the mandatory minimum in this case. (T. of Sentencing at 47).

[¶ 8] Immediately after sentencing the Defense filed its notice of appeal.

STATEMENT OF THE FACTS

[¶ 9] In July of 2010 Brian Hemphill moved into a duplex located at 613 2nd Ave West in West Fargo North Dakota. (T. at 273-274). The duplex was owned by the Defendant, Alois Vetter. (T. at 407). Hemphill moved into the duplex with his girlfriend, Jennifer McFarling, and her three children. (T. at 274.) Only Hemphill name appeared on the lease. (T. at 283). By all accounts, the landlord tenant relationship between Hemphill and Vetter was not a smooth one. Hemphill had been late on paying rent on several occasions. In January of 2011, Vetter served Hemphill with a 3-day notice to vacate for non-payment of rent. (T. at 359-360). Hemphill did not pay rent or vacate the premises. (T. at 360). Shortly before the scheduled court hearing Hemphill did pay the rent and the case was dropped. (T. at 365). In February Hemphill failed to pay rent again, Vetter again served him with a 3-day notice to vacate. (T. at 365). When Hemphill again failed to pay rent or vacate, a hearing was scheduled in district court for February 18, 2011. (T. at 367). At that hearing neither Hemphill nor McFarling appeared. (T. at

367). However, the court had the wrong paperwork so ordered a continuance. (T. at 367). At trial Hemphill explained that he had broken up with McFarling and had moved out of the duplex in February, so he had no intention of paying rent. (T. at 283). McFarling continued to live in the duplex under the lease signed by Hemphill. (T. at 284). Hemphill had moved in with his friend Aarron Knutson. (T. at 118). Both Hemphill and Vetter testified that they considered the other to be a bully. (T. at 267-268, 361-362).

[¶ 10]Shortly after Hemphill moved into the duplex, Garner Gallant moved into the adjoining unit. (T. at 274). Garner and Hemphill were friends. (T. at 274). Vetter also served Gallant with notices to vacate on several occasions. (T. at 365). Vetter had observed behavior at Gallant's unit that he believed was consistent with drug dealing activity. (T. at 364). Vetter reported this behavior to West Fargo police however nothing was done. (T. at 364). Eventually Vetter's belief was confirmed when he was contacted by law enforcement to provide them with a key to Gallant's unit. (T. at 363). Law enforcement requested the key to assist them in executing a search warrant for drugs and associated items. (T. at 363). In executing the warrant law enforcement found contraband, drug paraphernalia, drug production and drug distribution. (T. at 366 and 369, Defense exhibit 8.) Law enforcement also discovered that Gallant had been using extension cords to steal electricity from Vetter. (T. at 366). Because of these violations, Vetter served Gallant with a notice to evict based on his illegal activities. (T. at 366).

[¶ 11]On February 18, 2001, Vetter drove by the duplex at see if McFarling was moving out. (T. at 368). Vetter observed McFarling apparently loading items in her vehicle in an effort to vacate the premises. (T. at 368). Vetter also observed Gallant with McFarling. (T. at 368). Vetter testified that McFarling saw Vetter because she stopped and looked at Vetter. (T. at 368). Vetter then returned home and notified the police of Gallant's whereabouts. (T. at 369). At that time police were still looking for Gallant to arrest him on drug charges. (T. at 369). At around 7:00 pm that night, Vetter again drove past the duplex to see if McFarling had completed her move. (T. at 369). Vetter was surprised to observe many more cars at the duplex than there should have been. (T. at 369). Vetter assumed they were having a party. (T. at 369). Vetter then ran some additional errands including checking to see if rent had been paid on the unit in question. (T. at 369). No rent had been paid on that unit. (T. at 369).

[¶ 12]On his way home, around 7 pm, Vetter decided to drive by the unit again. (T. at 370). According to Hemphill, he "kept hearing someone drive by." (T. at 263). According to Hemphill's testimony, Hemphill was told that Vetter was "driving by a lot." (T. at 263). Hemphill testified that he then went out into the street to confront Vetter. (T. at 265-267, 287). Hemphill testified that he "was tired of being bullied" by Vetter. (T. at 267). While approaching the unit in question, Vetter witnessed a man (Hemphill) suddenly come out and stand in the middle of the road. (T. at 370). At the same time another man came out and stood next to him with what appeared to be a red toolbox under his arm. (T. at 370). The man

with what appeared to be a toolbox quickly walked to the rear of Vetter's vehicle. (T. at 371). Vetter testified that he was concerned that this man was attempting to get behind his vehicle for some unknown purpose. (T. at 371).Vetter, upon seeing an individual (Hemphill) in the middle of the road, slowed his vehicle in order to be cautious. (T. at 371). Hemphill testified that Vetter brought his vehicle to stop short of hitting Hemphill. (T. 266). Vetter testified that Hemphill approached his vehicle and dropped his hands on the hood of the vehicle and laid his shoulder into the car. (T. at 371). Vetter testified that the roads were very narrow and he was unable to turn, even though he tried to get around the person blocking the street. (T. at 372). Vetter testified that he was extremely scared being in what he believed to be a drug area with an unknown person behind his vehicle and another person purposely blocking his car. (T. at 373). According to Hemphill's testimony, Vetter yelled to him to get out of the way. (T. at 267). However, Hemphill refused to get out of the middle of the road and continued blocking the vehicle. (T. at 267). According to Hemphill, Vetter then "bumped [Hemphill] in the chest." (T. at 267). When asked why he didn't voluntarily get out of the way of the vehicle at that point, Hemphill testified that he "didn't want to be bullied by him anymore" and that he was "taking a stand at that point." (T. at 287). According to the State's eye-witnesses, Brian Hemphill, Aaron Knutson and Jennifer McFarling, Vetter's vehicle bumped Hemphill at a slow rate of speed several times. (T. at 121, 268, 299). However, every time Hemphill refused to get out of the roadway. (T. at 112, 268-269, 299). According to Aaron Knutson, Hemphill was trying to hold on to

the front end of the vehicle when he slipped and the vehicle ran over Hemphill. (T. at 122). According to Hemphill, as he was being bumped, he had his phone in his hand and was attempting to call 911. (T. at 269). Hemphill testified that he couldn't figure out how to unlock his phone so he called to Aaron Knutson to call 911. (T. at 270). Hemphill testified that calling out to Aaron Knutson was the last thing he remembered. (T. at 270). According to Jennifer McFarling's testimony Vetter's vehicle pushed Hemphill back about 60-70 feet before Hemphill fell. (T. at 300). According to the investigating officer Vetter pushed Hemphill 86 feet prior to running over Hemphill. (T. at 175). According to Vetter, as he attempted to get around the person blocking the road, he accidently knocked the vehicle out of gear. (T. at 373). Vetter testified that he looked down to re-engage the gear and when he looked up the person was gone. (T. at 373). The state's eye witnesses testified that after Hemphill fell, Vetter's vehicle traveled over Hemphill's body.(T. at 122-123, 270, 300-301). Vetter testified that he believed he only pushed Hemphill about 8 Feet. Vetter stated that when he saw the person was no longer in front of his vehicle he "stepped on the gas and tore out of there." (T. at 375). Vetter explained that when the person blocking the road was no longer in front of his vehicle "it was a relief, I am now out of trap, see, because I felt I was trapped." (T. at 374). Vetter explained that Hemphill must have been caught under the vehicle and was dragged approximately 60 feet to come to his final position. The medical records are consistent with Vetter's account. They show that there were abrasions on Hemphill's body and clothing. (State's exhibit #2). (No

abrasions would have occurred under the facts supplied by the State's witnesses.)After the incident Vetter returned to his home and called the police. (T. at 375). Hemphill sustained serious injuries as a result of the incident. (T. at 271).

[¶ 13]In an interview with law enforcement shortly after the incident, Hemphill told law enforcement he had not been drinking alcohol that night. (T. at 229). However, the medical records showed that Hemphill had a BAC of .11. (T. at 261).

JURISDICTIONAL STATEMENT

[¶ 14] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI, § 8, N.D.C.C. §§ 27-05-06 (4), and 40-18-19. This Court has jurisdiction over this appeal under N.D. Const. art. VI, § 6, N.D.C.C. §§ 29-28-06 (1), and 29-28-06 (2). This appeal is timely under N.D.R.App.P. 26 and N.D.R. App. P. 4(b)(1).

LAW AND ARGUMENT

I. A vehicle should not be considered a "dangerous weapon" within the meaning laid out in N.D.C.C. 12.1-01-04(6).

[¶ 15] In the case at hand Vetter was convicted by the jury of Aggravated Assault under N.D.C.C. 12.1-17-02(1). That section states:

> A person is guilty of a class C felony . . . if that person: 1. willfully causes serious bodily injury to another human being

Id. Furthermore, the jury found that Vetter used a "dangerous weapon" while committing the aggravated assault. The jury considered Vetter's vehicle to be the "dangerous weapon." There was no testimony of any other weapon involved in the

incident what so ever. N.D.C.C. 12.1-01-04(6) defines “dangerous weapon” it reads,

> "Dangerous weapon" means, but is not limited to, any switchblade or gravity knife, machete, scimitar, stiletto, sword, or dagger; any billy, blackjack, sap, bludgeon, cudgel, metal knuckles, or sand club; any slungshot; any bow and arrow, crossbow, or spear; any weapon which will expel, or is readily capable of expelling, a projectile by the action of a spring, compressed air, or compressed gas including any such weapon, loaded or unloaded, commonly referred to as a BB gun, air rifle, or CO2 gun; and any projector of a bomb or any object containing or capable of producing and emitting any noxious liquid, gas, or substance.

Id.

[¶ 16]Because Vetter was convicted of aggravated assault with a deadly weapon he was sentenced pursuant to N.D.C.C. 12.1-32-02.1. That section reads as follows:

> Mandatory prison terms for armed offenders.
> 1. Notwithstanding any other provision of this title, a term of imprisonment must be imposed upon an offender and served without benefit of parole when, in the course of committing an offense, the offender inflicts or attempts to inflict bodily injury upon another, threatens or menaces another with imminent bodily injury with a dangerous weapon, explosive, destructive device, or firearm, or possesses or has within immediate reach and control a dangerous weapon, explosive, destructive device, or firearm while in the course of committing an offense under subsection 1, 2, or, except for the simple possession of marijuana, 6 of section 19-03.1-23. This requirement applies only when possession of a dangerous weapon, explosive, destructive device, or firearm has been charged and admitted or found to be true in the manner provided by law, and must be imposed as follows:
>
> a. If the offense for which the offender is convicted is a class A or class B felony, the court shall impose a minimum sentence of four years' imprisonment.
> b. If the offense for which the offender is convicted is a class C felony, the court shall impose a minimum sentence of two years' imprisonment.

Id. After application of N.D.C.C. 12.1-32-02.1 the court sentenced Vetter to the 2 years required under that statute.

[¶ 17]The Supreme Court of North Dakota's "standard of review for interpreting a criminal statute is well-established." State v. Trevino, 2011 ND 232, ¶20, 807 N.W.2d 211.

> Construction of a criminal statute is a question of law, fully reviewable by [the Supreme Court]. [The Supreme Court's] primary goal in interpreting statutes is to ascertain the Legislature's intentions. In ascertaining legislative intent, [the Supreme Court] first look[s] to the statutory language and give[s] the language its plain, ordinary and commonly understood meaning. [The Supreme Court] interpret[s] statutes to give meaning and effect to every word, phrase, and sentence, and do[es] not accept construction which would render part of the statute mere surplusage. When a statute's language is ambiguous because it is susceptible to differing but rational meanings, [the Supreme Court] may consider extrinsic aids, including legislative history, along with the language of the statute, to ascertain the Legislature's intent. [The Supreme Court] construe[s] ambiguous criminal statutes against the government and in favor of the defendant.

State v. Buchholz, 2005 ND 30, ¶ 6, 692 N.W.2d 105 (quoting State v. Laib, 2002 ND 95, ¶ 13, 644 N.W.2d 878.

A. The plain language of N.D.C.C. 12.1-01-04(6) clearly indicates a vehicle is not meant to be included under that statute.

[¶ 18]Taking the statute in question at face value, it mentions a multitude of what appear to handheld weapons. Moreover, the listed items are all meant to be used as a weapon for their primary purpose. Obviously a vehicle is neither a handheld weapon nor an item intended to be used as a weapon for its primary purpose.

1. Prior Supreme Court cases.

[¶ 19]A review of prior Supreme Court decisions indicates that the issue of whether a vehicle can be considered a "dangerous weapon" is a matter of first impression in North Dakota. However, there are several cases addressing the application of N.D.C.C. 12.1-01-04(6). In State v. Bauer, the Supreme Court held that a "buck knife" could be considered a dangerous weapon under the definition in 12.1-01-04(6). State v. Bauer, 2010 ND 109, 783 N.W.2d 21. In that case the Defense conceded that under the circumstances the knife in questions was a dangerous weapon.

[¶ 20]In State v. Clinkscales, the Supreme Court held that a BB gun that resembled a 9mm pistol is appropriately considered a dangerous weapon under N.D.C.C. 12.1-01-04(6). State v. Clinkscales, 536 N.W.2d 611 (N.D. 1995). Clinkscales is generally inapplicable to the current question as BB gun is specifically listed in N.D.C.C. 12.1-01-04(6).

[¶ 21]In State v. Schweitzer, the Supreme Court agreed with the determination of the trial court that a .22 caliber tear gas revolver qualified as a dangerous weapon under N.D.C.C. 12.1-01-04(6). State v. Schweitzer, 510 N.W.2d 612, 614 (N.D. 1994). In Schweitzer the Supreme Court agreed with the trial court's reasoning that the tear gas revolver was "readily capable of expelling . . . compressed gas . . . or is any object capable of producing and emitting any noxious liquid, gas, or substance." Id. The weapon in Schweitzer clearly fell squarely under the definition of dangerous weapon in N.D.C.C. 12.1-01-04(6).

2. Plain language of N.D.C.C. 12.1-01-04(6) .

[¶ 22]In general the prior cases addressing the applicability of N.D.C.C. 12.1-01-04(6) to a motor vehicle are not instructive. The next step is to look at the statute and give the words of the statute their "plain, ordinary and commonly understood meaning." State v. Laib, 2002 ND 95, ¶ 13, 644 N.W.2d 878.

[¶ 23]The Statute in question consists of 2 parts. The main focus of the statute is a list of what is to be considered a "dangerous weapon". It lists first an assortment of bladed weapons: switchblade, gravity knife, machete, scimitar, stiletto, sword and dagger. N.D.C.C. 12.1-01-04(6). Then the statute goes on to list an assortment of striking weapons: billy, blackjack, bludgeon, cudgel, metal knuckles and sand club. Id. Then the statute goes on to list an assortment of projectile weapons: slungshot, bow and arrow, crossbow, spear, or any weapon which will expel a projectile including a BB gun, air rifle, CO2 gun, and projector of a bomb. Id. The statute then also includes an object containing or capable of producing and emitting and noxious gas or substance. Id. Several times in the statute the Legislature included the modifier "any" before a listing of a weapon, for example: "any billy". Clearly the Legislature would include such modifiers to keep from being penned into technical arguments about the merits of a certain brand or modification of an obvious weapon.

[¶ 24]So, what do the items in the "list section" have in common? The plain meaning of the "list section" of the statute is clear; a "dangerous weapon" is first and foremost a weapon.

[¶ 25]In understanding the intent of N.D.C.C. 12.1-01-04(6) it is very important to look at what is not included in the statute. For example: rather than list an assortment of bladed weapons, why wouldn't the Legislature just say "any knife" or "any blade". Clearly, that would be the first inclination. "Knife" is an exceedingly common word; its use would be clear in the statute. However, rather than use "knife" the Legislature purposely avoids using the overarching term "knife" they similarly avoid "blade" another common, clear term. Rather than simply define all "knives" as dangerous weapons, they clearly delineate a group of knives which are more menacing and which have being a weapon as their primary purpose in most circumstances. Clearly the Legislature had reason to not define all knives in that manner. Had it done so, a ridiculous result would follow. Every time a person sat down at a restaurant, the business would be supplying them with a "dangerous weapon" to eat their meal. The Legislature wanted to clearly define "dangerous weapon" without making every object with potential to harm a "dangerous weapon" by definition. The Legislature follows a similar approach in defining the other categories of weapons in N.D.C.C. 12.1-01-04(6).

[¶ 26]Furthermore, the Legislature does not include any reference to the usage of the item described as a dangerous weapon. For example, it would have been very simple to define a dangerous weapon as "something used to inflict an injury on a person". Defining an object by the purpose for which it is used is another common convention in the English language. However, the Legislature chose to define "dangerous weapon" by the objects innate character rather than the

purpose for which it is used. So, under the statute a sword is a "dangerous weapon" whether it is being used in an attack or as a decoration. To interpret the statute to infer that something is a "dangerous weapon" by the purpose for which it is used falls way outside the scope of the statute itself.

3. Every word in the statute must be given meaning

[¶ 27]The counter argument to the above argument is that the other section of the statute overrides the rest. The other section of the statute is the 5 little words, "but is not limited to". According to the State, the fact that those words are included in the statute, makes the world of "dangerous weapons" unlimited. Indeed the plain language of the statute "'dangerous weapon' means but is not limited to . . ." seems to support the State's position at first blush. However, to give ultimate weight to the phrase "but is not limited to" would destroy the statute completely. Essentially, under that interpretation the statute might as well read, "A dangerous weapon is absolutely anything in the world." "[The Supreme Court] interpret[s] statutes to give meaning and effect to every word, phrase, and sentence, and do[es] not accept construction which would render part of the statute mere surplusage." State v. Buchholz, 2005 ND 30, ¶ 6, 692 N.W.2d 105 (quoting State v. Laib, 2002 ND 95, ¶ 13, 644 N.W.2d 878.

[¶ 28]If the phrase "but is not limited to" allows a vehicle to be considered a dangerous weapon under N.D.C.C. 12.1-01-04(6) absolutely anything else could be considered a dangerous weapon as well. This would relegate the entire list section of the statute to mere surplusage.

4. Synthesizing the two sections of the statute.

[¶ 29]There is a way to synthesize the list section of the statute with the "but not limited to" section of the statute that gives meaning to both. Clearly the list section alone is not sufficient to define "dangerous weapon". For example, even though it includes a number of bladed weapons it certainly does not include a "Khopesh." A "Kopesh" is an agent Egyptian sword-like weapon shaped like a sickle. http://en.wikipedia.org/wiki/Khopesh. If the "but not limited to" section of the statute were not present, a defendant could claim that an attack made with a "Khopesh" did not qualify one made with a dangerous weapon. This is obviously exactly why that phrase was included in the statute.

[¶ 30]To give meaning to both sections of the statute, the interpretation must be that the list demonstrates the types of items that the Legislature meant to include as dangerous weapons: hand-held items that have a primary purpose of inflicting damage in some way. And the "but not limited to" section expands that to any like items that have a distinct name or some characteristic that puts them in the same category even if they are not one of the named items. In order to uphold the standards of statutory construction, this is the only interpretation that can be made.

5. Ambiguity in Statutory Construction should be resolved in favor of the Defendant.

[¶ 31]Even if the Court rejects the argument that N.D.C.C. 12.1-01-04(6) should be interpreted as the Defense suggests, the fact remains that the statute can

be fairly interpreted in that manner. Should the Court decide that the proper reading is to give deference to phrase "but is not limited to" that would suffice going forward. But at the time of this case, the statute could be fairly interpreted either way, resulting in an ambiguity. A statutes language is ambiguous when it is susceptible to differing but rational meanings. *See generally* State v. Laib, 2002 ND 95, ¶ 13, 644 N.W.2d 878. [The Supreme Court] construe[s] ambiguous criminal statutes against the government and in favor of the defendant. Id. In this case the statute in question should be interpreted to favor Vetter.

6. Legislative Intent

[¶ 32]As previously stated, the Supreme Court's main objective in interpreting statute is to ascertain the legislative intent.

> When a statute's language is ambiguous because it is susceptible to differing but rational meanings, [the Supreme Court] may consider extrinsic aids, including legislative history, along with the language of the statute, to ascertain the Legislature's intent. [The Supreme Court] construe[s] ambiguous criminal statutes against the government and in favor of the defendant.

State v. Buchholz, 2005 ND 30, ¶ 6, 692 N.W.2d 105.

[¶ 33]The legislative history of N.D.C.C. 12.1-01-04(6) is relatively minimal. The Legislature adopted the definition of "dangerous weapon" originally in 1973. This occurred when the old criminal code, section 12, was essentially revamped and replaced with our current criminal section N.D.C.C. 12.1. The original definition was somewhat different from the current one. It read,

> "Dangerous weapon" means any switch blade or gravity knife, machete, scimitar, stiletto, sword, or dagger; any billy, blackjack, sap, bludgeon,

> cudgel, metal knuckles or sand club; any slungshot; and any projector of a bomb or any object containing or capable of producing and emitting any noxious liquid, gas, or substance.

N.D.C.C. 12.1-01-04(6) (1973). A review of the floor notes indicate that there was no discussion or emphasis put on the definition of "Dangerous weapon" during that session.

[¶ 34]The following legislative session in 1975 saw the one and only amendment to the definition. That year the Legislature amended the definition to the way it currently reads. The floor notes for that session also do not mention the "dangerous weapon" definition in anyway; and as such, are unhelpful.

[¶ 35]However, the amendment itself can cast light on the intent of the Legislature. In 1975 the Legislature added the words, "but is not limited to". The Legislature also added a section covering new weapons:

> "any bow and arrow, crossbow, or spear; any weapon which will expel, or is readily capable of expelling, a projectile byt eh action of a spring, compressed air, or compressed gas including any such weapon, loaded or unloaded, commonly referred to as a b.b. gun, air rifle, or CO2 gun"

N.D.C.C. 12.1-01-04(6) (1975). From this amendment there are two things that are apparent. The first is that the Legislature was not content to simply rest on the language, "but is not limited to". In the 1975 amendment the Legislature added the words "not limited to" but also added a whole additional section of items it felt should be included in the statute. If the Legislature intended for "but is not limited to" to be carte blanch for the State to select anything it wanted as a "dangerous weapon" there would be no reason to add guns, spears and bows to the list.

[¶ 36]The second thing apparent from the amendment is that the Legislature defined weapons by the innate nature of the object, not by its use. In the amendment the Legislature includes a variety of guns "loaded or unloaded". For example the statute clearly adds unloaded b.b. gun to the list of "dangerous weapons." An unloaded b.b. gun is, by its innate nature, a dangerous weapon. However, common sense tells us that an unloaded b.b. gun is really not dangerous at all. It can appear so to those who do not know it is unloaded, but in reality it is no more capable of doing damage than a rock or stick. Only when the gun is loaded does it truly become a "dangerous weapon". But the Legislature included it in the definition anyway. This clearly shows that the Legislature intended to subject those that would arm themselves to increased penalties.

[¶ 37]The fact that Vetter happened to be in his car the night of the incident should in no way trigger the definition of dangerous weapon. The increased penalty is meant to imply that those who carry dangerous weapons must be additionally cautious. Possessing a "dangerous weapon" evidences a readiness to involve oneself in dangerous situations either as a perpetrator, or one willing to defend themselves, where a citizen without a dangerous weapon would be likely to retreat. In fact the possession of the dangerous weapon in and of itself indicates a reduced willingness to retreat. To place oneself in such a position demands increased vigilance and care, and the penalties for not utilizing such care and vigilance are appropriately increased.

[¶ 38]The purpose of the statute is not to add additional punishment to those who merely find themselves in a dangerous situation and have used any object in an assault. The statute clearly does not evidence that the Legislature intended a dangerous object to be determined by the outcome of any certain incident, but by the innate properties of the object itself.

B. Considering a vehicle to be a dangerous weapon creates a multitude of other problems.

[¶ 39]If a vehicle were considered a dangerous weapon under N.D.C.C. 12.1-01-04(6) it would open a host of other problems for the legal system in North Dakota.

1. Probation bars all probationers from possessing a "dangerous weapon".

[¶ 40]N.D.C.C. 12.1-32-07(3) provides "[t]he court shall provide as an explicit condition of every probation that the defendant may not possess a firearm, destructive device, or other dangerous weapon while the defendant is on probation.

[¶ 41]Clearly, the Legislature did not intend that no probationer could have a car. That would be absurd. The Supreme Court has "repeatedly stated that statutes must be construed to avoid absurd results and that [the Supreme Court] presume[s] the Legislature intended a just and reasonable result in enacting a statute." Blomdahl v. Blohmdahl, 2011 ND 78, ¶ 35, 796 N.W. 2d 649. *Citing* Cnty. Of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 325 (N.D. 1985).

2. <u>Individuals who commit a crime while in using or in possession of a "dangerous weapon" are subject to increased minimum mandatory penalties.</u>

[¶ 42]N.D.C.C. 12.1-32-02.1 provides for increased sentenced for "armed offenders". It provides increased mandatory minimum penalties for those found guilty of felonies under certain circumstances. (The minimum mandatory is 4 years for class A and B felonies and 2 years for C felonies.) <u>Id.</u> The statute provides that the increased minimum mandatory must be applied "when, in the course of committing an offense, the offender . . . threatens or menaces another with imminent bodily injury with a dangerous weapon . . . or possesses or has within immediate reach and control a dangerous weapon . . . while in the course of committing and offense under subsection 1 [or] 2 of subsection 19-03.1-23.

[¶ 43]Again this raises a myriad of circumstances where a defendant will be sentenced to a 2 or 4 year minimum mandatory because they used a car. This is clearly not the intention of the Legislature. Subsection 1 and 2 of N.D.C.C. 19-03.1-23 refer to manufacture and delivery of controlled substance. If "dangerous weapon" were construed to include a vehicle, the penalty section, N.D.C.C. 12.1-32-02.1, would make it a mandatory 4 years in jail to sell drugs in or near an automobile. There would be no discretion; it wouldn't matter if a defendant had no prior record. 4 years in jail would be the minimum punishment.

[¶ 44]The same is true for "threatening or menacing" another with a vehicle during the course of a felony. Perhaps a felony DUI would become an

automatic 2 year minimum mandatory if anyone witnessing the crime was concerned for their safety or the safety of others.

[¶ 45]And once again, the Court should look at the plain language of the statute. The title of the statute is "[m]andatroy prison terms for armed offenders". The plain meaning of being "armed" certainly does not include the usage of a vehicle even if that usage is for criminal purposes. Once again this highlights the fact that the Legislature did not mean to include items like vehicle under the definition of "dangerous weapon."

3. Individuals who use a "dangerous weapon" are subject to extended sentences.

[¶ 46]N.D.C.C. 12.1-32-09 provides in part:

> A court may sentence a convicted offender to an extended sentence as a dangerous special offender or a habitual offender in accordance with this section upon a finding of any one or more of the following:
> e. The offender is especially dangerous because the offender used a firearm, dangerous weapon, or destructive device in the commission of the offense or during the flight therefrom.

The effect of being sentenced as a dangerous offender essentially doubles the statutory maximum penalty for each offense. Clearly, one would hope that a court would use its discretion and not sentence a defendant as a dangerous offender simply because that defendant used a vehicle during the commission of a crime or in flight therefrom. However, if a vehicle is considered a dangerous weapon under the law, it would certainly be within a court's discretion to do so.

4. Considering a vehicle to be a "dangerous weapon" will open the flood gates to outlandish prosecutions.

[¶ 47]Finally, if prosecutors are allowed to manipulate their charging documents to include a vehicle as a dangerous weapon, the instances of doing so are bound to unduly increase. In Cass County, since the State's victory at the trial in the current case, there has already been at least 2 additional cases where a minimum mandatory 2 year sentence has been alleged in cases involving a vehicle. In both of those cases, the prosecution charged the defendants with terrorizing for driving their vehicle in a manner that caused another to be afraid. In one case the allegation is that the defendant drove the vehicle at another person. In the other case the defendant is alleged to have driven his vehicle into a house. In both cases, no one was injured in any way. *See* State v. Anderson, Cass County case no. 09-2011-cr-04170 and State v. Whiteowl, Cass County case no. 09-2012-cr-01764. Cleary, the Legislature intended the 2 year minimum mandatory to apply to cases of a much more significant nature to these. However, if the Court includes vehicle under the definition of "Dangerous weapon" these types of charges are bound to increase throughout the state.

CONCLUSION

[¶ 48]In this case the Defendant, Vetter, had attempted to lawfully evict the victim and his friends. Vetter had knowledge of drug activity in the area and had made appropriate reports to law enforcement. Vetter appropriately checked on his property the night in question and was accosted by individuals unknown to

him, in the dark in a dangerous area.

[¶ 49]Vetter grew up in North Dakota. He became and educated man, earning his master's degree from NDSU. Vetter has been successful in his life and accumulated wealth. At the age of age 74 Vetter has lived the American Dream.

[¶ 50]On the night in question Vetter used his vehicle to escape a dangerous situation. He used his vehicle as a means of escape not as a "dangerous weapon". Vetter appropriately extricated himself from a dangerous situation. To say that Vetter had a legal duty to remain in the area and "take his chances" is absurd. Vetter obviously knows how to get out of a dangerous situation; and that is exactly what he did that night. To send Vetter to prison for two years for those actions would be a travesty of justice.

[¶ 51]For the above stated reasons the Appellant requests that this Court reverse the rulings of the lower court and dismiss the action against the Defendant or remand for additional proceedings.

Dated this the 25th day of June, 2012.

___/s/_____
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CERTIFICATE OF SERVICE

[¶ 52] A copy of this document and the Appendix to Brief of Appellant in pdf format were e-filed with the North Dakota Supreme Court and served upon Birch Burdick, pursuant to Administrative Order 14 on the 6th day of June, 2012. Specifically, this document and the Appendix to Brief of Appellant were electronically filed and served as follows:

The North Dakota Supreme Court
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___/s/_____
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