

IN THE SUPREME COURT OF NORTH DAKOTA
FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT

JAN 14 2015

RODNEY CHISHOLM,)	STATE OF NORTH DAKOTA
)	
Petitioner/Appellant,)	
)	Supreme Court No. 20150099
vs.)	
)	District Court No.
STATE OF NORTH DAKOTA,)	18-2013-CV-01281
)	
Respondent/Appellee.)	
)	

PETITION FOR REHEARING

Appeal from the Order Denying Application for Post-Conviction Relief entered on March 12, 2015, by the Grand Forks Court District Court, Northeast Judicial District, State of North Dakota, the Honorable Lawrence Jahnke presiding.

Rodney R. Chisholm, *Pro-se*
(N.D.P.S. # 37327)
P.O. Box 5521
Bismarck, ND 58506

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¶ [3] STATEMENT OF THE ISSUES

¶ [4] The State withheld evidence at the evidentiary hearing.

¶ [5] The appellant received ineffective assistance of counsel on the lesser-included process.

¶ [6] Issue-1. At the hearing, my attorney objected to an interactive television hearing. Due to a post verdict recorded phone call I made from County jail to my sister, the State alleges I had knowledge of the lessers, Appellee brief-Doc.# 79, ¶¶ 6,8. This call put great weight in this court's decision. I described this call as "taken out of context", Hearing Trans. Pg.-33 Line10. If it had not been edited, the call reveals itself. I had later phone conversations that nullify my knowledge of the waiver process. My attorney asked for the availability of these phone calls to the Deputy who retrieved them, but the State could not produce them-Hearing Transcripts Pg.-50, Lines 7-16. This violates N.D.R.Ev. 106-Recorded Messages. Rule 106 "embodies a standard of fairness", with the order of proof, to alleviate "the misleading impression created by taking matters out of context". *State v. Gibbs*, 2009 ND 44, 763 N.W.2d 430. The State's failure to comply with disclosure, violated the two N.D.R.Crim.P. 16 motions filed, and the Due Process Doctrine of the Fourteenth Amendment in the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed.2d 215(1963) "where the evidence is material either to guilt or to punishment".

¶ [7] I also presented a 'list' of violent acts committed by my brother, which I knew of. The State did not receive this list at the hearing, Appellee Brief, ¶ 5. In not receiving this list, the court violated N.D.Sup.Ct.Admin.R. 52, §2(E). This list was available at the trial, but the State objected 30 times to these specific instances, even misapplying N.D.R.Evid. 404(b). This court has ruled 'specific instances' were allowable, if more current. *State v. Chisholm*, 2012 ND 147, 818 N.W.2d 707, *EXHIBIT #1*, Pgs.1-3, proving my trial and direct appeal counsel Steve Light(Light), was ineffective for not submitting them at trial. Neither court has ruled on my more current violent acts issue.

[¶ 8] Additionally, at the end of the hearing, the court violated N.D.Sup.Ct. Admin.R. 52, §2(D), as I was to introduce more crucial evidence, I requested a private interaction with counsel, the court left the room and did not return, also violating N.D.C.C. §28-32-35-Procedure at hearing. “A person is denied due process of a fair hearing when the defects in the hearing process might lead to a denial of justice” and “Opportunity to be heard is a fundamental requirement of Due Process Doctrine of the Fourteenth Amendment”. *State v. Ehli*, 2003 ND 133, 667 N. W.2d 635.

[¶ 9] Issue-2. Light was ineffective in not explaining the ramifications of requesting lesser-included instructions. This prejudiced my trial outcome. His lack of knowledge was shown during trial, proving his ineffectiveness. Special jury instructions are mandatory in a homicide trial when evidence of self-defense is present. These instructional errors were on two separate sets of instructions, both omitted. By law, the court must instruct them. I shall explain each omission separately.

[¶ 10] The Sixth Amendment of the United States Constitution, U.S. Const. Amend. VI, applied though the Fourteenth Amendment to the States, U.S. Const. Amend. XIV, and N.D. Const. Art. 1, §12 guarantee criminal defendants effective assistance of counsel as in the Supreme Court’s decision in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed.2d 674 (1984).

[¶ 11] Light did not propose a ‘justification’ or ‘excuse’ instruction; see *Chisholm*, 18-10-K-01273, Doc.-#50, even though evidence of self-defense was presented, Tr. Trans. Pages 514-564 (*excuse example*; “Don’s transferred the pistol from pick-up to pick-up for 20 years”, Pg. 551-Lines 12-13). “A defendant is entitled to an instruction based on a legal defense if there if there is evidence presented at trial to support that defense”. *State v. Thiel*, 411 N.W.2d 66 (1987); *State v. Hazlet*, 16 ND 426 (1907). Excuse is a bracketed instruction. Without an excuse instruction, NDJI-Criminal-K-3.80, a lesser can not be introduced. This proves that Light did not understand the

process of lessers, which led to his inability to explain it to me. “At the very least, trial counsel has a duty to investigate the law further in the face of unclear information” *Armstrong v. Kemna*, 534 F.3d 857(8th Cir.2008).

[¶ 12] In *State v. Leidholm*, 334 N.W.2d 811(ND1983), this court stated the following, “The first sentence of N.D.C.C. §12.1-05-03[self-defense], in combination with N.D.C.C. §12.1-05-08[excuse], contains the kernel statement of self-defense”. Also, “Conduct which constitutes self-defense may either be ‘justified’ or ‘excused’”. This second phrase was stated 11 times through the review. Obviously, excuse is a key element of self-defense. Appeal reviews are to help explain the application of law. Since justification and excuse are key elements of self-defense, and factoring in Light did not submit these instructions, proves he did not understand the defense, therefore ineffective.

[¶ 13] The court charged the jury on self-defense, *EXHIBIT #2* Tr. Trans. P. 786 Lines 24-25. The judge followed this by giving a justification instruction, but no excuse. In *State v. Allery*, 322 N.W.2d 228(ND 1982), the court states “While the judge is initially responsible to correctly instruct the jury on the law of the case, the attorneys have the professional responsibility to request or object to specific instructions of points of law resulting from testimony or on developments during trial; this primary responsibility cannot be shifted to the judge, but should be shared by both the prosecution and the defense” N.D.R.Crim.P. 30. This became Light’s responsibility to request an excuse instruction. Light was asked if he wanted to submit any additional instructions, Tr. Trans. P. 791. He again proved his ineffectiveness when he failed to submit any further instructions. This is not about a judge’s refusal to charge the jury on an essential element; it is a lack of a request, an omission.

[¶ 14] With the jury to decide whether I acted in self-defense or not, the first section of an excuse instruction relieves the defendant of specific intent, thus finding a defendant nonculpable. The remaining bracket of this instruction would determine if the defendant acted reasonable or unreasonable, again relieving the intent. If found unreasonable, the jury would hold the defendant to a state of either recklessness N.D.C.C.

§12.1-16-02, or negligence N.D.C.C. §12.1-16-03. Excuse was too vital of an element to omit. The decision in *State v. Clark*, 1997 ND 199, 570 N.W.2d 195, ¶¶ 10,11, *EXHIBIT #4*, explains the giving of manslaughter very well.

¶ 15] Intent is a crucial element of the offense charged N.D.C.C. §12.1-16-01, stating a defendant ‘intentionally’ or ‘knowingly’ caused the death of a human being. With the omission of an excuse instruction, this creates a misleading or an inadequacy for the jury to process the information they receive. Intent is a crucial element of murder, and recklessness is a crucial element of manslaughter. To make a reckless act out of an intentional murder, the excuse instruction must be given.

¶ 16] This is an obvious error to omit the instruction of excuse. As held in *State v. White*, 390 N.W.2d 43(ND1986), “We will reverse a criminal conviction if the jury instructions as a whole are erroneous, the error relates to a subject central to the case, and it affects the substantial rights of the accused”. I hereby give notice to this court that the omission of the excuse instruction is a Due Process violation, violating both the Fourteenth Amendment’s requirement that the jury instructions match the evidence presented, and in the United States Supreme Court’s decision in *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed.2d 39 (1979).

¶ 17] At the evidentiary hearing, waiving of the lessers was discussed, which I stated was not “done with sufficient awareness of the relevant circumstances and likely consequences” in the Supreme Court’s decision in *Brady v. United States*, 397 U.S. 742, 25 L. Ed.2d 747(1970). In the Summation Brief-Doc.# 77, ¶ 13, relying on *State v. Leidholm*, 334 N.W.2d 811(ND1983), “Moreover, any time the court instructs a jury on self-defense, it must of necessity include a special instruction on manslaughter as well as an instruction on negligent homicide. The difference between self-defense and manslaughter is the reasonableness of the accused’s belief that the use of force is necessary to prevent imminent unlawful harm. If the accused’s belief is reasonable, he will be found to have acted in self-defense. If unreasonable, he is guilty of either manslaughter or negligent homicide, depending upon whether his

belief was held recklessly or negligently, respectively”(emphasis added). Legally, I could not waive the mandatory lesser-included instruction. The district court did not rule on this issue, N.D.R.Civ.P. 52(a)(1)-Findings and Conclusions.

[¶ 18] The quote in *State v. Leidholm*, 334 N.W.2d 811(ND1983) was also presented to this court in this appeal, Appellant’s Reply Brief ¶¶ 17,19 and at the oral argument. This court also did not rule, thus compounding that error.

[¶ 19] In *State v. Wiedrich*, 460 N.W.2d 680(ND 1990), he was charged with murder. Even though he objected to lessers, which this court considers to be a waiver, the trial court submitted ‘A’ murder, manslaughter, and self-defense instructions. On review, this court stated “A trial court may request lessers over a defendant’s objection/waiver”, but lists no authority. *Wiedrich* relies on the second line from the quote in *Leidholm*, “When the court instructs on self-defense, it must instruct on manslaughter as well as negligent homicide”. This case was reversed for a new trial.

[¶ 20] In *State v. Gagnon*, 1997 ND 153, 567 N.W.2d 807, he was charged with murder. The court instructed on manslaughter and self-defense. *Gagnon* then requested a negligent homicide instruction, but the court refused to submit it. He appealed, also relying on *Leidholm*, “When the court instructs on self-defense, it must instruct on manslaughter as well as negligent homicide”. This case was reversed for a new trial, thus mirroring the decision in *Wiedrich*.

[¶ 21] In *State v. Clark*, 1997 ND 199, 570 N.W.2d 195, he was charged with murder. *Clark* objected to any lessers, like *Wiedrich*. *Clark* even made the statement “This was an intentional shooting”. The State requested lessers, which were given over the defendant’s waiver, along with self-defense. *Clark* appealed, claiming he had a right to waive the lessers. In the State’s appeal brief, *EXHIBIT #3*-Pg. 1, *Leidholm* is cited for the authority, to nullify a defendant’s right to waive the lessers. The State claims “this is established precedence”, *EXHIBIT #3*-Pg. 2. The State’s brief was then rubber stamped for this court’s final decision, *EXHIBIT #4*.

[¶ 22] This court has stated in an unrelated case, “As a matter of logic and common sense, it seems only reasonable a jury asked to consider the possibility of self-defense, should be told the full range of possibilities, including that a defendant’s honest belief in the need for self-defense, may support a conviction of a lesser included offense, if negligently or recklessly held”. It’s not only common sense, it is the law.

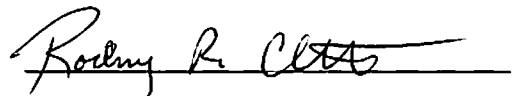
[¶ 23] This was an obvious error to not receive the mandatory lesser-included instructions. In conjunction with the omission of the excuse instruction, the jury was not allowed to determine if my actions were reasonable or unreasonable, for which I could be recklessly held N.D.C.C. §12.1-16-02, as received in *Leidholm, Wiedrich, Gagnon, and Clark*.

[¶ 24] My prejudice is ‘length of sentence’, being convicted of murder N.D.C.C. §12.1-16-01, a AA felony, and receiving 30 years imprisonment, compared to receiving a manslaughter N.D.C.C. §12.1-16-02, a Class B felony, with the maximum sentence of 10 years, *State v. Wiedrich*, 460 N.W.2d 680(ND 1990), *EXHIBIT #5* Pgs. 1-2.

[¶ 25] Due to my receiving a self-defense instruction, the mandatory language in *Leidholm*, and the ruling upheld in *Clark*, I pray that this court reverses its current decision of affirming my post-conviction denial and remand it back to the district court for a new trial with the proper jury instructions.

WORD COUNT: 1987

Rodney R. Chisholm, *Pro-se*

A handwritten signature in black ink that reads "Rodney R. Chisholm". The signature is written in a cursive style and is positioned above a horizontal line.

20150099

CERTIFICATE OF SERVICE BY MAIL

NORTH DAKOTA DEPARTMENT OF CORRECTIONS AND REHABILITATION
DIVISION OF ADULT SERVICES
SFN 50247 (04-2014)

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JAN 14 2016

FILED
JAN 14 2015

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

STATE OF NORTH DAKOTA

The undersigned, being duly sworn under penalty of perjury, deposes and says: I'm over the age of
eighteen years and on the 13th day of January, 2016.

M, I mailed the following:

7 Bound Petition For Rehearing Briefs - 1 unBound
7 Bound Appendix Briefs - 1 unBound

by placing it/them in a prepaid envelope and addressed as follows:

Supreme Court of North Dakota
600 E. Boulevard Ave.
Bismarck, N.D. 58505-0530

and depositing said envelope in the Mail, at the NDSP, PO Box 5521, Bismarck, ND 58506-5521.

AFFIANT

Rodney R. Clift
PO Box 5521
Bismarck, North Dakota 58506-5521

Subscribed and sworn to before me this 13th day of January, 2016.

Notary Public

[Signature]

My Commission Expires On

EXPIRES ON
PATRICK SCHATZ
Notary Public
State of North Dakota
My Commission Expires January 1, 2021

X

CERTIFICATE OF SERVICE BY MAIL
NORTH DAKOTA DEPARTMENT OF CORRECTIONS AND REHABILITATION
DIVISION OF ADULT SERVICES
SFN 50247 (0-1-2014)

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

The undersigned, being duly sworn under penalty of perjury, deposes and says: I'm over the age of eighteen years and on the 13th day of January, 2016.

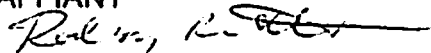
_____M, I mailed the following:

- 1- copy of Petition For Rehearing
- 1- copy of Appendix

by placing it/them in a prepaid envelope and addressed as follows:

States Attorney's Office - Grand Forks
Box 5607
Grand Forks, N.D. 58206-5607

and depositing said envelope in the Mail, at the NDSP, PO Box 5521, Bismarck, ND 58506-5521.

AFFIANT

PO Box 5521
Bismarck, North Dakota 58506-5521

Subscribed and sworn to before me this 13th day of January, 2016.

Notary Public 

My Commission Expires On 

PATRICK SCRANTZ
Notary Public
State of North Dakota
My Commission Expires January 1, 2021

CERTIFICATE OF SERVICE BY MAIL
NORTH DAKOTA DEPARTMENT OF CORRECTIONS AND REHABILITATION
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CLERK OF SUPREME COURT
JANUARY 28, 2016
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

The undersigned, being duly sworn under penalty of perjury, deposes and says: I'm over the age of eighteen years and on the 23 day of January, 2016,
M, I mailed the following:

1. Reply Letter to Supreme Court
2. Copy of C.O.S., mailed to State's Attorney
For rehearing Brief and appendix
3. Copy of Reply Letter From Counsel - Showing Receipt
to his copy of Rehearing Brief and Appendix
by placing it/them in a prepaid envelope and addressed as follows:

Supreme Court of North Dakota
Office of the Clerk -
600 E. Boulevard Ave.
Bismarck, N.D. 58506-0530

and depositing said envelope in the Mail, at the NDSP, PO Box 5521, Bismarck, ND 58506-5521.

AFFIANT
Rodney R. Blitt
PO Box 5521
Bismarck, North Dakota 58506-5521

Subscribed and sworn to before me this 25 day of January, 2016.

Notary Public

E H

My Commission Expires On
May 14, 2018

ERIC HASBY
Notary Public
State of North Dakota
My Commission Expires May 14, 2018