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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

City of Jamestown, Appellee, vs. Holden Kastet, Appellant.	**SUPREME COURT NO. 20210170** Crim. No. 47-2021-CR-100017 **Oral Argument Requested**

ON APPEAL FROM THE JUNE 2, 2021 CRIMINAL JUDGMENT AND JUNE 4, 2021 CORRECTED CRIMINAL JUDGMENT OF THE DISTRICT COURT
STUTSMAN COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
HONORABLE TROY LEFEVRE PRESIDING

APPELLANT'S BRIEF

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[¶1] A defendant is entitled to a jury instruction on a defense if there is evidence that creates a reasonable doubt about an element of the charged defense. Consent is a defense to the charge of simple assault. The district court erred by denying Defendant's requested consent as a defense instruction.

[¶2] A defendant is entitled to a jury instruction on a defense if there is evidence that creates a reasonable doubt about an element of the charged defense. Self-defense is a defense to the charge of simple assault. The district court erred by denying Defendant's requested self-defense instruction.

STATEMENT OF THE CASE

[¶3] The Defendant, Holden Kastet ("Mr. Kastet") appeals from a Criminal Judgment and Corrected Criminal Judgment, entered following a jury verdict finding him guilty of the offense of simple assault. *See* Appendix ("App.") at 31-32. In his pretrial memorandum, Mr. Kastet specifically requested jury instructions on the defenses of consent and self-defense. App. at 8-10. Evidence at trial supported the requests. The district court denied the requested instructions. App. at 38-49. During deliberations, the jury twice returned with questions regarding consent. Transcript ("Tr.") at 183, line(s) ("l.) 22-24; Tr. at 187, l. 3-6. In each instance, the district court denied renewed requests for the instructions, instead telling the jury to rely on the instructions already provided. Tr. at 184, l. 6-16; Tr. at 187, l. 10-21. The jury returned a verdict of guilty. Tr. at 191, l. 17-18. Mr. Kastet timely appealed to this Court. App. at 35-37. Oral argument will aid the Court in resolving the trial court error.

STATEMENT OF THE FACTS

[¶4] By Criminal Complaint dated December 18, 2020, the City of Jamestown alleged that on November 25, 2020, Mr. Kastet committed Simple Assault in violation of the Code of the City of Jamestown § 22-1(1). App. at 7. The Complaint alleged Mr. Kastet willfully caused bodily injury to another human being, specifying: "the Defendant did hit N.F. in the face, causing injury." *Id.* Evidence at trial showed in the months preceding the altercation, the complainant, Nicholas Fuchs ("Fuchs") slept with Mr. Kastet's girlfriend. Tr. at 104, l. 12-20; Tr. at 105, l. 2-3. Fuchs's philandering ultimately culminated in a physical altercation between Mr. Kastet and Fuchs at IDK bar in Jamestown, and a simple assault charge against Mr. Kastet.

[¶5] Trial evidence included argumentative Facebook messages exchanged between Fuchs and Mr. Kastet in the days preceding the altercation. Tr. at 97, l. 12-21; Tr. at 98, l. 7-10. The trial court also admitted video recordings from IDK. Tr. at 38, l. 15-23. Prosecution witness James Ova testified he was in a group at the bar, including Mr. Kastet, when Fuchs approached. Tr. at 47, l. 22-25. Ova testified that Fuchs began a conversation with Mr. Kastet, saying "[O]kay. Let's go." Tr. at 48, l. 15. Ova testified Fuchs provoked Mr. Kastet to engage in a fight. Tr. at 60, l. 7-11; *see also* Tr. at 61, l. 9-11 (noting the district court's comment, "He testified that he believed the Defendant was provoked by the alleged victim.").

[¶6] Prosecution witness Dustin Mittleider ("Off. Mittleider"), a Jamestown police officer, testified about his investigation of the incident. *See generally* Tr. at 81-91. According to Off. Mittleider, portions of the statements of Mr. Kastet and Fuchs were inconsistent with his investigation. For example, Mr. Kastet reported he had not driven

the night of the incident, but the video showed otherwise. Tr. at 78, l. 15-19. In another example, Fuchs claimed Mr. Kastet approached him inside the bar, but the video showed Fuchs approached and initiated the contact. Tr. at 84, l. 19-25; Tr. at 85, l. 1-8. Fuchs also reported he was smoking outside when approached by Mr. Kastet, but the video showed he was not smoking. Tr. at 85, l. 16-18. Officer Mittleider testified his interviews of Mr. Kastet and James Ova were consistent—both reporting that Fuchs "made statements about wanting to go outside and settle this." Tr. at 87, l. 14-17.

[¶7] Fuchs testified that he had a "blurry memory of it." Tr. at 99, l. 8. His lack of recollection was confirmed by the testimony of Off. Mittleider, who reported "he didn't remember a whole lot about the incident." Tr. at 80, l. 8-9. Fuchs also minimized his invitation to fight outside claiming lack of recollection. *See* Tr. at 99, l. 21 ("I don't remember much of any conversation."); *id.* at 100, l. 2 (noting Fuchs does not recall saying anything to Mr. Kastet).

[¶8] Defense witness Casey Washburn testified Fuchs approached the group, and was aggressive in his tone and demeanor toward Mr. Kastet. Tr. at 119, l. 23; Tr. at 120, l. 16-19. When recalled to testify, James Ova testified that Fuchs approached the group and confronted Mr. Kastet saying, "[L]et's go outside and fight. And settle this." Tr. at 126, l. 16-23. Ova further testified that Fuchs told Mr. Kastet, "I'm not going to call the cops. I'm going to kick your ass." Tr. at 127, l. 21-25. Mr. Kastet testified he was at the bar when Fuchs approached, "shrugged me in the back," and said "we're going to go outside and settle this right now. We're going to get this over with. We're going to fight." Tr. at 131, l. 5; Tr. at 132, l. 2-4. Mr. Kastet testified that he told Fuchs he did not want to fight because he did not want trouble with authorities. Tr. at 134, l.

1-3. Fuchs responded, "I will not call the cops. I'm going to kick your ass and we're going to be done with this." Tr. at 134, l. 3-5. Mr. Kastet testified, "It was absolutely agreed upon to fight." Tr. at 135, l. 4.

[¶9] Outside, after Fuchs threatened to "kick [his] ass," Mr. Kastet testified:

> I basically felt at that point I was either going to get hit or I needed to get hit. I mean, I'm obviously standing there up against him. He has a few inches on me. I'm feeling pretty intimidated at that point. Just as size-wise I did not feel that I wanted to get punched first.

Tr., at 134, l. 7-13. Mr. Kastet acknowledged Fuchs had not hit him, and had not "balled up" his fists, but "I definitely felt he was puffing [his] chest and roostering or whatever you want to call it. He was definitely trying to intimidate me outside, yes." Tr. at 140, l. 18-20. James Ova described the less than five-second fight which followed: 1.) Mr. Kastet head-butted and instantly hit Fuchs two or three times; 2.) the two fell to the ground; and 3.) Mr. Kastet hit Fuchs one or two more times. Tr. at 53, l. 5-6; Tr. at 54, 7-22. Ova reported telling Mr. Kastet "he's done," at which point Mr. Kastet "stopped and we left." Tr. at 55, l. 10-11.

[¶10] At the beginning of trial, counsel reminded the court of Mr. Kastet's requested self-defense and consent instructions. Tr. at 18, l. 11-12. In concluding his opening statement, defense counsel told the jury the City would be unable to prove the offense elements because "Fuchs consented and/or Mr. Kastet acted in self-defense." Tr. at 37, l. 4-6. Prior to instructing the jury, Mr. Kastet renewed the request for self-defense and consent instructions; substantial discussion followed. App. at 38-48. The district court opined "parties in North Dakota cannot engage in mutual combat . . ." unless it a sanctioned martial arts or boxing match. App. at 41-42. Denying the requested

instruction, the court cited an ALR article and cases from Maryland, New Mexico, California, the District of Columbia, and Mississippi, and said, "[T]he overwhelming consensus throughout the country" holds "consent to being struck is irrelevant in a trial for simple assault." App. 44-45.

[¶11] Addressing the request for a self-defense instruction, counsel for Mr. Kastet outlined the trial testimony, including Mr. Kastet's belief that he would have to act first or Fuchs would assault him, along with substantial evidence that Fuchs provoked the fight. App. 46, l. 3-9. Commenting on having watched a video of the incident, the trial court said, "At what point could your client have simply turned around and walked away." App. 46, l. 20-21. Rather than offering additional instructions regarding self-defense after provocation, or the reasonableness of the use of self-defense, the trial court denied the defense altogether, finding "self-defense instructions are [not] appropriate." App. 47, l. 20-22.

[¶12] During deliberations, the jury asked to review the admitted incident videos. Tr. at 181, l. 9-10. Thereafter, following resumption of deliberations, the jury inquired of the court in writing: "In regards to the law concerning assault, is consent a determining factor." Tr. at 183, l. 22-24. Defense counsel asked the court to advise the jury "yes." Tr. at 184, l. 9. The court simply advised the jury to rely on instructions already provided. App. 29. Hours later, the jury returned another question: "Is there any law allowing consensual, physical combat?" Tr. at 187, l. 5-6. Defense counsel again requested the consent as a defense instruction. *Id.* at l. 17-18. The court declined, again instructing the jury to rely on the instructions previously provided. App. 30.

Approximately 40 minutes later, the jury returned a guilty verdict. Tr. at 191, l. 17-18. Mr. Kastet timely appealed to this Court. App. 35-37.

LAW AND ARGUMENT

[¶13] On appeal, this Court reviews instructions as a whole to determine whether they correctly and adequately advise the jury of the law. *State v. Brossart,* 2015 ND 1, ¶ 16, 858 N.W.2d 275 (citation omitted). The district court may refuse requested instructions if irrelevant or inapplicable. *Id.* But "[a] Defendant is entitled to an instruction based on a legal defense if there is evidence to support it." *State v. Thiel*, 411 N.W.2d 66, 67 (N.D. 1987) (citations omitted). In determining whether the jury should have received an instruction on a particular defense, this Court "must view the evidence in the light most favorable to the defendant." *Id.* (citations omitted). A trial court commits reversible error by failing to provide requested instructions on a legal defense if record evidence raises an issue from which the jury could infer the proffered defense. *Id.*at 69-70.

I. The district court erred by failing to provide a requested instruction on consent as a defense.

[¶14] "One who consents to an act is not wronged by it." N.D.C.C. § 31-11-05(6). Since the adoption of the criminal code in 1973, North Dakota law recognizes that when "conduct is an offense because it causes or threatens bodily injury, consent to such conduct or the infliction of such injury by all persona injured or threatened by the conduct is a defense." N.D.C.C. § 12.1-17-08. The defense exists as long as: 1.) the injury inflicted or threated does not "jeopardize life or seriously impair health;" or 2.) the conduct is a reasonably foreseeable hazard "of joint participation in a lawful athletic

contest or competitive sport;" or 3.) the injured person is aware of the risks and the conduct and injury are reasonably foreseeable hazards of an occupation, profession, or medical or scientific experiment. *Id.*

[¶15] "Due process protects an accused from conviction except upon proof beyond a reasonable doubt of every element of the offense." *State v. Olander*, 1998 ND 50, ¶ 19, 575 N.W.2d 658, 664. The prosecution must prove beyond a reasonable doubt each element of a charged offense, including "[t]he nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue." *Id.* at ¶ 20 (citing N.D.C.C. § 12.1–01–03(1)(e)). Like self-defense, N.D.C.C. § 12.1-17-08 explicitly defines consent as "a defense," and not an affirmative defense. *See Olander,* 1998 ND 50, ¶ 19 (citing *State v. White,* 390 N.W.2d 43, 45 n. 1 (N.D.1986)). Accordingly, the prosecution was required to prove beyond a reasonable doubt that Fuchs did not consent to the conduct. *Id.*; *see also State v. Starke,* 2011 ND 147, ¶ 47, 800 N.W.2d 705 (refusal to provide defense of premises instruction "is functionally identical to give a self-defense instruction" because each is "an ordinary defense" and not an affirmative defense).

[¶16] An accused is entitled to a jury instruction on a defense if there is evidence that creates a reasonable doubt about it. *State v. McIntyre,* 488 N.W.2d 612, 614 (N.D. 1992). Substantial evidence supported the requested instruction. First, prosecution witness James Ova testified Fuchs initiated the confrontation with Mr. Kastet, saying "[O]kay. Let's go." Tr. at 48, l. 15. Ova specifically testified Fuchs invited Mr. Kastet to engage in a fight. Tr. at 60, l. 7-11. Ova further testified that Fuchs approached the group and confronted Mr. Kastet saying, "[L]et's go outside and fight. And settle this."

Tr. at 126, l. 16-23. And Ova further testified that Fuchs told Mr. Kastet, "I'm not going to call the cops. I'm going to kick your ass." Tr. at 127, l. 21-25.

[¶17] Secondly, the district court confirmed Ova's testimony. The district court commented before the jury in open court that Mr. Ova "testified that he believed the Defendant was provoked by the alleged victim." Tr. at 61, l. 9-11.

[¶18] Third, Officer Mittleider testified his investigation interviews of Mr. Kastet and James Ova were consistent—both reported that Fuchs "made statements about wanting to go outside and settle this." Tr. at 87, l. 14-17. Fourth, defense witness Casey Washburn testified Fuchs approached the group, and was aggressive in his tone and demeanor toward Mr. Kastet. Tr. at 119, l. 23; Tr. at 120, l. 16-19.

[¶19] Fifth, Mr. Kastet testified he was at the bar when Fuchs approached, "shrugged me in the back," and said "we're going to go outside and settle this right now. We're going to get this over with. We're going to fight." Tr. at 131, l. 5; Tr. at 132, l. 2-4. Mr. Kastet testified that he told Fuchs he did not want to fight because he did not want trouble with authorities. Tr. at 134, l. 1-3. Fuchs responded, "I will not call the cops. I'm going to kick your ass and we're going to be done with this." Tr. at 134, l. 3-5. Mr. Kastet testified, "It was absolutely agreed upon to fight." Tr. at 135, l. 4.

[¶20] Sixth, Fuchs did not dispute provoking and consenting to a fight. He testified that he had a "blurry memory of it." Tr. at 99, l. 8. His lack of recollection was confirmed by the testimony of Off. Mittleider, who reported "he didn't remember a whole lot about the incident." Tr. at 80, l. 8-9. Fuchs also minimized his invitation to fight outside claiming lack of recollection. *See* Tr. at 99, l. 21 ("I don't remember much

of any conversation."); *id.* at 100, l. 2 (noting Fuchs does not recall saying anything to Mr. Kastet).

[¶21] The North Dakota Legsilature has explictly provided consent is a defense to the charge of simple assault. N.D.C.C. § 12.1-17-08. The Legislature has not limited the defense to "sanctioned" sporting events, nor has it precluded the defense if "battery violates a public peace." *See* App. 43-44 (partially outlining the district court's rationale in denying the defense); *see also State v. Schumaier*, 1999 ND 239, ¶ 15, 603 N.W.2d 802 (whether conduct is an offense against the public is immaterial to applicablity of defense). Because the Legislature provides consent is a defense, the district court erred by relying on out-of-state authority to hold "the victim's consent to being struck is irrelevant in a trial for simple assault." App. 45, l. 11-12. Because the instructions did not adequately inform the jury of the applicable law, the absence of a proper consent instruction seriously affected "the fairness, integrity, and public reputation of our system of criminal justice." *State v. Brossart*, 2015 ND 1, ¶ 20, 858 N.W.2d 275; *Olander*, 1998 ND 50 at ¶ 28. Mr. Kastet "is entitled to a new trial with appropriate instructions." *Olander* at ¶ 28.

II. The district court erred by failing to provide a requested instruction on self-defense.

[¶22] The district court denied Mr. Kastet's request for a self-defense instruction based on the court's impression of video evidence, and the court's notion that Mr. Kastet could "have simply turned around and walked away." App. 46, l. 19-21. The trial court erred by weighing the evidence supporting self-defense. *Olander*, 1998 ND 50 at ¶ 26.

[¶23] Self-defense is codified at N.D.C.C. § 12.1-05-03, and may be either justified or excused. *State v. Leidholm*, 334 N.W.2d 811, 814 (N.D. 1983). In *Leidholm*, this Court held a person who believes force is necessary to prevent imminent unlawful harm is justified in using force if his belief is correct, while a person who reasonably but incorrectly believes force is necessary to protect himself against imminent harm is excused in using force. *Id.*at 814-15. The test is not how the trial court views video evidence, nor is the test how a person of reasonable caution might react, but instead is whether the defendant himself in good faith honestly believed force was necessary to protect himself from apprehended bodily harm. *Id.* at 815-16.

[¶24] In *Leidholm*, this Court reiterated a "factfinder determines under a claim of self-defense that the actor honestly and sincerely held the belief that use of defensive force was required." *Id.* at 816 (emphasis added). Here the jury heard ample testimony to conclude Mr. Kastet acted self-defense, and Mr. Kastet's fear of harm was unrebutted. Outside, Fuchs threatened to "kick [his] ass," and Mr. Kastet testified:

> I basically felt at that point I was either going to get hit or I needed to get hit. I mean, I'm obviously standing there up against him. He has a few inches on me. I'm feeling pretty intimidated at that point. Just as size-wise I did not feel that I wanted to get punched first.

Tr., at 134, l. 7-13. Mr. Kastet testified further about his apprehension of imminent harm: "I definitely felt he was puffing [his] chest and roostering or whatever you want to call it. He was definitely trying to intimidate me outside, yes." Tr. at 140, l. 18-20. James Ova confirmed the existence of a reasonable basis for Mr. Kastet's apprehension, testifying Fuchs told Mr. Kastet, "I'm not going to call the cops. I'm going to kick your ass." Tr. at 127, l. 21-25.

[¶25] Mr. Kastet testified he was in fear of harm and needed to act. The district court's oral ruling implies Mr. Kastet was not entitled to a self-defense instruction because Mr. Kastet's belief conflicted with the court's impression of the video evidence, or because Mr. Kastet could have walked away. App. 46-47. But even if Mr. Kastet was mistaken in his belief, he is entitled to an instruction if he believed his conduct was necessary and appropriate for a statutory justification or excuse. *State v. Kleppe*, 2011 ND 141, ¶ 19, 800 N.W.2d 311; *see also* N.D.C.C. § 12.1-05-08.

[¶26] The circumstances of this case are strikingly similar to those in *State v. Thiel*, 411 N.W.2d 66 (N.D. 1987). In *Thiel*, a jury convicted the defendant of simple assault, and this Court reversed because the trial court denied requested jury instructions on self-defense and defense of others. *Id.* at 67. In *Thiel*, the trial court denied instructions because witnesses did not testify to hitting or assaulting the defendant or the friend the defendant was protecting. *Id.* at 68. The trial court's rejected rationale in *Thiel* seems to replicate the trial court's rationale here. The district court denied the jury the ability to resolve the question of whether Mr. Kastet acted in self-defense:

> If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible.

Thiel, 411 N.W.2d at 70 (citing *Strauss v. United States*, 376 F.3d 416, 419 (5th Cir. 1967); *see also* App. 46-47 (outlining the trial court's evaluation of the evidence in conjunction with the requested instruction).

[¶27] In *State v. Falconer*, 2007 ND 89, ¶¶ 15-17, 732 N.W.2d 703, this Court reversed the Defendant's aggravated assault conviction, concluding the district court

erred by denying the requested self-defense instruction on the basis that the defendant was the initial aggressor. Although evidence supported the district court's conclusion, "an initial aggressor is justified in using force and is entitled to a self-defense jury instruction if he is resisting force which is clearly excessive under the circumstances." *Id.* at ¶ 15. Or a defendant may be excused by acting in self-defense. *State v. Leidholm*, 334 N.W.2d at 814. Mr. Kastet testified he was in fear, intimidated, outsized, uncertain, and needed to act in his own defense. Tr., at 134, l. 7-13. In *State v. Starke*, 2011 ND 147, ¶ 20, 800 N.W.2d 705, the Court held testimony of fearfulness, uncertainty about what might happen, and declined requests to leave were sufficient to permit the jury to decide whether the use of force was justified. Failure to instruct the jury on self-defense is reversible error. *Falconer*, 2007 ND 89 at ¶ 17; *Starke*, 2011 ND 147 at ¶ 21.

[¶28] The trial court denied the requested instructions in large part based on the court's belief that the conduct breached public peace, so defenses are inapplicable. *See* App. at 44-45 ("consent is no defense when a battery violates a public peace" and "consent of the victim is no defense when it includes a breach of the public peace"); *see also* Tr. at 188, l. 7-9 (stating the ALR "was crystal clear as [consent] not being an appropriate instruction"). But this Court has long-rejected the notion that statutory defenses are inapplicable to offenses against the public. *See State v. Schumaier,* 1999 ND 239, ¶ 15, 603 N.W.2d 882 ("the district court erroneously ruled that because disorderly conduct is an offense against the public, a self-defense instruction is inappropriate"). A defendant is entitled to defense instructions, "even if the evidentiary basis for the theory is 'weak, inconsistent, or of doubtful credibility.'" *Id.* (citation omitted).

CONCLUSION

[¶29] The Legislature provides consent and self-defense are defenses to the charge of simple assault. Ample evidence at trial supported both defenses. The trial court erred by denying appropriate instructions so the factfinder could apply the law of consent and self-defense to the facts. This Court should reverse and remand for a new trial.

Respectfully submitted August 2, 2021.

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CERTIFICATE OF COMPLIANCE

Under Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 16 pages.

Dated this 2nd day of August, 2021.

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