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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 REPLY BRIEF

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LAW AND ARGUMENT

[¶1] The trial court denied requested instructions for consent and self-defense—both true defenses provided by statute. Even though it is exclusively the province of the Legislature to define crimes, provide defenses, and establish penalties, the prosecution asks this Court to ignore statute, pronouncing "public policy" contrary to the code. *See State ex rel. City of Minot v. Gronna*, 59 N.W.2d 514, 529, 532 (N.D. 1953) (defining the legislative role and its exclusive province); *see also* Brief of Plaintiff/Appellee ("State's Brief") at ¶¶ 16, 18, 23 (urging this Court to adopt public policies contrary to existing statute).

[¶2] Urging the Court to abolish North Dakota's statutory consent defense, the prosecution asks the Court to consider: 1.) "policy considerations;" 2.) laws from other states; and 3.) cases from other states applying the other states' laws. State's Brief at ¶ 19. Urging this Court to deny Mr. Kastet his statutory right of self-defense, the prosecution asks this Court to modify the law: 1.) imposing a new requirement prohibiting self-defense unless the "victim" strikes first; 2.) removing the jury from the role of factfinder; and 3.) replacing the Court's standard of review to evaluate contested facts against instead of in favor of a defendant, *Id.* at ¶¶ 12, 20, and 22.

[¶3] The dubious merits of the prosecution arguments are for the Legislature, not the Court. The prosecution asks the Court to upend longstanding law. In *State v. Peltier*, 21 N.D. 188, 129 N.W. 451, 452 (1910), this Court said:

> The Legislature has seen fit to limit the functions of the court and those of the jury in criminal actions. They are distinct and separate. In charging the jury the court must only instruct as to the law of the case (section 9985, Rev. Codes 1905), and the jury are the exclusive judges of all questions of fact (section 10,026, Rev. Codes 1905), and the judge in

> instructing the jury must not invade the province of that arm of the court by expressing an opinion upon the facts, or giving intimations as to the guilt of the defendant, neither must he directly or indirectly weigh the evidence or any part of it . . . . Further discussion of this question is unnecessary . . . .

(emphasis added). In addition to longstanding recognition of the fact-finding role of jurors, this Court recently reiterated policymaking is for lawmakers, not the Court:

> We have stated on numerous occasions that public policy is declared by the Legislature's action, and that the Legislature is much better suited than the courts to identify or set public policy in this state.

Potts v. City of Devils Lake, 2021 ND 2, ¶ 15, 953 N.W.2d 648 (citations omitted); *see also id.* at ¶ 30 ("In my view, only a principle that declines all invitations to create public policy exceptions is faithful to the judicial role.") (Tufte, J., concurring). This Court should reject the prosecution's requests to make policy exceptions to statute and to usurp the jury's fact-finding role.

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

[¶4] Public policy in North Dakota is declared by the North Dakota Legislature—not the laws of other states or cases interpreting those laws. *Potts*, 2021 ND 2 at ¶ 15. "[I]t is for the Legislature to weigh conflicting public policy arguments and to enact accordingly." *Ficek v. Morken*, 2004 ND 158, ¶ 36, 685 N.W.2d 98 (VandeWalle, C.J., concurring specially); *see also, State v. Johnson*, 2021 ND 161, ¶ 11 (declining to create, through judicial action, an exception to North Dakota's terrorizing statute).

[¶5] North Dakota's public policy provides that consent is a defense:

> 1. When conduct is an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury by all persons injured or threatened by the conduct is a defense if:

> a. Neither the injury inflicted nor the injury threatened is such as to jeopardize life or seriously impair health;
>
> b. The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport; or
>
> c. The conduct and the injury are reasonably foreseeable hazards of an occupation or profession or of medical or scientific experimentation conducted by recognized methods, and the persons subjected to such conduct or injury, having been made aware of the risks involved, consent to the performance of the conduct or the infliction of the injury.

. . . .

N.D.C.C. § 12.1-17-08. The prosecution says "this Court should reject application of consent as a defense . . . in assault cases which violate the public peace." State's Brief at 18. The plain language of N.D.C.C. § 12.1-17-08 does not provide the requested exception, and this Court is the improper forum for the prosecution's request. *Johnson,* 2021 ND 161 at ¶ 11. This Court should "reject [the] invitation to create, through judicial action," the requested exception. *Id.; see also State v. Schumaier,* 1999 ND 239, ¶ 15, 603 N.W.2d 882 (self-defense applies irrespective of whether the offense is against the public peace).

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

[¶6] The prosecution argues Mr. Kastet is not entitled to his lawful right of self-defense because: 1.) his belief of imminent injury "is unreasonable;" 2.) he was not struck first; and 3.) he "engaged in mutual combat, or was the initial aggressor, and was not resisting force clearly excessive under the circumstances." State's Brief at ¶¶ 20, 23. Each argument fails.

[¶7] First, the reasonableness of Mr. Kastet's belief of imminent injury is a factual question, not a legal one. *State v. Falconer*, 2007 ND 89, ¶ 16, 732 N.W.2d 703. Like Mr. Kastet, witness Ova specifically stated the complainant wanted to fight, and the complainant told Mr. Kastet "I'm going to kick your ass." Tr. at 60, l. 7-11; Tr. at 127, l. 21-25. While the prosecution wishes to cast Mr. Kastet as "the initial aggressor," State's Brief at ¶ 20, the trial court commented before the jury in open court that witness Ova "testified that he believed the Defendant was provoked by the alleged victim." Tr. at 61, l. 9-11. Perhaps most importantly, 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. Urging this Court to disregard the opinion of testifying witnesses and credit her own, the prosecutor requests Court usurpation of the jury's function. But:

> [a]s stated earlier, the critical issue which a jury must decide in a case involving a claim of self-defense is whether or not the accused's belief that force is necessary to protect himself against imminent unlawful harm was reasonable.

State v. Leidholm, 334 N.W.2d 811, 816 (N.D. 1983) (emphasis added). "[T]he finder of fact must view the circumstances attending an accused's use of force from the standpoint of the accused," including the "subjective impressions" of the accused. *Id.* at 818. While the prosecution argues Mr. Kastet's belief was not reasonable, that argument must be directed to a properly-instructed jury, not the Court.

[¶8] Secondly, as this Court has explicitly recognized, nothing in North Dakota law limits self-defense to those who are struck first. *State v. Thiel*, 411 N.W.2d 66, 67

(N.D. 1987). As a matter of policy, the Legislature could so limit self-defense. They have not. Regardless of the deleterious consequences of such a policy (i.e., a diminutive victim must await a hefty assailant's blow before using reasonable force to prevent it; a victim must await the impact of the bullet of pointed gun before acting; etc.), the policy arguments are not for this Court. *Johnson*, 2021 ND 161 at ¶ 11.

[¶9] Third, the prosecution improperly argues Mr. Kastet is not entitled to a self-defense instruction because he was the initial aggressor or engaged in mutual combat. State's Brief at ¶ 20. But the prosecution fails to properly distinguish justification from excuse, and ignores the predicate factual determination rests with the jury. A person is not justified in using self-defense if he provokes unlawful action, is the initial aggressor, or entered into mutual combat, unless he is resisting clearly excessive force. N.D.C.C. § 12.1-05-03. While the prosecution argues Mr. Kastet was the initial aggressor, evidence and comments of the trial court showed "the Defendant was provoked by the alleged victim." Tr. at 61, l. 9-11. Whether Mr. Kastet was the aggressor, and whether he was resisting excessive force, are questions for a properly-instructed jury. *See State v. Falconer*, 2007 ND 89, ¶¶ 16, 22, 732 N.W.2d 703 (whether force is excessive or reasonable is a jury question; sufficiency of evidence supporting a question of law is a jury determination).

[¶10] The right of self-defense is "well-established," "inalienable" and "perhaps even majestic." *Potts v. City of Devils Lake*, 2021 ND 2 at ¶ 28 (Tufte, J., concurring) (citing N.D.Const. art. I, § 1). At trial, the prosecution had ample opportunity to request instructions on the reasonableness of Mr. Kastet's belief, extent of the use of force after provocation, determination of primary aggressor, etcetera. The prosecution's desire to

transform the courts into a legislature and jury is contrary to precedent. *Johnson*, 2021 ND 161 at ¶ 11; *see also Thiel*, 411 N.W.2d at 70 (it is impermissible and tantamount to a directed verdict for judges to screen evidence supporting a defense and then decline to instruct on the defense) (citation omitted).

CONCLUSION

[¶11] The Legislature provides consent and self-defense are defenses to the charge of simple assault. The prosecution's request for this Court to create contrary law is misplaced. Ample evidence at trial supported both defenses. The trial court erred by denying appropriate instructions. This Court should reverse and remand for a new trial.

Respectfully submitted September 9, 2021.

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CERTIFICATE OF COMPLIANCE

Under Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief, including this Certificate, complies with the page limitation and consists of 10 pages.

Dated this 9th day of September, 2021.

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CITY OF JAMESTOWN, APPELLEE, vs. Holden Thomas Kastet, APPELLANT.	**SUPREME COURT NO. 20210170** Criminal No. 47-2021-CR-00017

CERTIFICATE OF ELECTRONIC SERVICE

[¶1] I hereby certify that on September 9, 2021, the following documents:

Appellant's Reply Brief

were e-mailed to the address below and are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail:

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