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Criminal Law - Self-Defense - Jury Instructions Given on Subjective Standard of Reasonableness in Self-Defense Do Not Require a Specific Instruction on Battered Woman Syndrome

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CRIMINAL LAW — SELF-DEFENSE — JURY INSTRUCTIONS GIVEN ON SUBJECTIVE STANDARD OF REASONABLENESS IN SELF-DEFENSE DO NOT REQUIRE A SPECIFIC INSTRUCTION ON BATTERED WOMAN SYNDROME

Janice Leidholm was charged with murder for the stabbing death of her husband, Chester Leidholm.[1] Janice and Chester had attended a gun club party where they both consumed large amounts of alcohol.[2] On the return trip home, an argument developed between Janice and Chester.[3] After they arrived at home, the arguing did not stop; Chester was shouting and Janice was crying.[4] Chester began shoving Janice and pushed her to the ground.[5] Each time Janice attempted to get up, Chester pushed her down again.[6] When Chester had fallen asleep, Janice went to the kitchen, got a butcher knife, returned to the bedroom, and stabbed Chester.[7] According to testimony, the Leidholm marriage was filled with a mixture of alcohol abuse, moments of kindness, and moments of violence.[8] At trial Janice Leidholm offered jury

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1. State v. Leidholm, 334 N.W.2d 811 (N.D. 1983). The Leidholm stabbing took place in the early morning hours of August 7, 1981, at the Leidholm farmhouse near Washburn, North Dakota. *Id.* at 813.

2. *Id.* A breathalyzer test administered to Janice Leidholm shortly after the stabbing, at approximately 3:30 a.m., showed her blood-alcohol content was .17 of 1%. The analysis of a blood sample from Chester Liedholm showed his blood-alcohol content was .23 of 1%. *Id.* at 813-14 n.1.

3. *Id.* at 814.

4. *Id.*

5. *Id.*

6. *Id.* At one point in the fighting, Janice tried to telephone Dave Vollan, a deputy sheriff of McLean County; but Chester prevented her from using the phone by shoving her and pushing her down. *Id.*

7. *Id.* Within a matter of minutes Chester died from shock and loss of blood. *Id.*

8. *Id.* at 813. Voluminous testimony was elicited from the children, particularly the four daughters, concerning the severe and frequent beatings over the years. Testimony disclosed that various efforts that had been made to deal with these beatings including a visit to Janice's brother to get away from Chester for a while; asking Chester's brother, Lloyd Leidholm, to talk to Chester about the beatings; attempts to convince Chester to see a marriage counselor; talks with Deputy Vollan; running away from the farm to Judge Lundberg's home; attempted suicide; talks to Janice's

instructions on self-defense based upon the battered woman syndrome theory.[9] The trial court refused to include the proposed instructions in its charge to the jury.[10] The trial court found Janice Leidholm guilty of manslaughter and sentenced her to five years imprisonment in the State Penitentiary with three years of the sentence suspended.[11] Leidholm appealed alleging several errors.[12] The controlling issue was whether the trial court correctly instructed the jury on self-defense.[13] The North Dakota Supreme Court *held* that the trial court had incorrectly instructed the jury on self-defense by using the objective standard of reasonableness.[14] The court also *held* that if an instruction is modeled after the law of self-defense that it adopted in *Leidholm*, which uses the subjective standard of reasonableness, the trial court need not include a specific instruction on battered woman syndrome in its charge to the jury.[15] *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983).

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sister-in-law about the abuse; other attempts to leave; and attempts by the children to prevent or stop the beatings. Brief for Appellant at 10-11, State v. Leidholm, 334 N.W.2d 811 (N.D. 1983).

9. 334 N.W.2d at 819. Leidholm offered the following proposed instruction on battered woman syndrome:

> A condition known or described by certain witnesses as the 'battered wife syndrome' if shown by the evidence to have existed in the accused at the time she allegedly committed the crime charged, is not of itself a defense. However, as a general rule, whether an accused was assaulted by the victim of the homicide prior to the commission of a fatal act by the accused may have relevance in determining the issue of self-defense.
>
> Whenever the actual existence of any particular purpose, motive or intent is a necessary element to the commission of any particular species or degree of crime, you may take into consideration evidence that the accused was or had been assaulted by the victim in determining the purpose, motive or intent with which the act was committed.
>
> Thus, in the crime of murder of which the accused is charged in this case, specific intent is a necessary element of the crime. So, evidence the accused acted or failed to act while suffering the condition known as the 'battered wife syndrome' may be considered by the jury in determining whether or not the accused acted in self defense. The weight to be given the evidence on that question, and the significance to attach to it in relation to all the other evidence in the case, are for you the jury to determine.

Id.

Leidholm's counsel indicated that an instruction almost identical to this was given in United States v. Ironshield, No. C1-81-40 (D.N.D. 1982) and United States v. Starr, No. C1-79-33 (D.N.D. 1981). 334 N.W.2d at 819 n.7.

For a definition of battered woman syndrome see *infra* note 19.

10. 334 N.W.2d at 819. In its statement of the law of self-defense, the trial court instructed the jury, "The circumstances under which she acted must have been such as to produce in the mind of reasonably prudent persons, regardless of their sex, similarly situated, the reasonable belief that the other person was then about to kill her or do serious bodily harm to her." *Id.* at 818.

11. *Id.* at 813.

12. *Id.* Leidholm raised seven issues on appeal. See *infra* note 25 for a list of the issues raised on appeal. Because of the particular disposition of the case, however, the court did not find it necessary to answer all of them. *Id.* at 814.

13. *Id.*

14. *Id.* at 818. The court concluded that the trial court's instruction improperly stated the law and was reversible error requiring a new trial. *Id.* at 819.

15. *Id.* at 820. The court stated that the correct statement of the law to be applied in a case of self-defense is:

> [A] defendant's conduct is not to be judged by what a reasonably cautious person

Generally, one who is not the aggressor in an encounter is justified in using a reasonable amount of force against his aggressor when he reasonably believes that he is in immediate danger of unlawful bodily harm and that the use of such force is necessary to protect himself from this danger.[16] While the traditional self-defense doctrine focuses on a single, sudden episode of attack and defense,[17] the battered wife setting presents a series of attacks, sometimes over quite a number of years.[18] Knowledge of this history helps the jury understand why a defendant felt fear of unlawful bodily harm in a situation that would not appear threatening to a reasonable person seeing only the immediate circumstances.[19]

> might or might not do or consider necessary to do under like circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to protect himself from apprehended death or great bodily injury.

Id. at 818 (quoting State v. Hazlett, 16 N.D. 426, 441, 113 N.W. 374, 380 (1907)).

16. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 53, at 391 (1972) (citing MODEL PENAL CODE § 3.04 comment (Tent. Draft No. 8, 1958); Beale, *Retreat from a Murderous Assault,* 16 HARV. L. REV. 567 (1903); Beale, *Homicide in Self-Defense,* 3 COLUM. L. REV. 526 (1903); Perkins, *Self-Defense Re-examined,* 1 U.C.L.A. L. REV. 133 (1954)). The principles of self-defense as a justification for the torts of assault and battery are very similar to those governing self-defense as a justification in the criminal law. *See* PROSSER, TORTS § 19 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS §§ 63, 65, 67 (1965).

17. *See, e.g.*, People v. Williams, 240 Ill. 633, 640, 88 N.E. 1053, 1056 (1909). In *Williams* the defendant was convicted of murder. The trial court's instructions on self-defense required that the apparent danger should be such danger that was apparent to the jurors from the evidence at the time, and not such danger that might have been apparent to the plaintiff at the time of the incident. *Id.* The Illinois Supreme Court held that a man threatened with danger must judge from appearances the actual state of things. *Id. See also* State v. Potter, 295 N.C. 126,____, 244 S.E. 2d 397, 408 (1978). In *Potter* the North Carolina Supreme Court held that a killing is excused as being in self-defense if, from the circumstances as they appeared at that time, the defendant believes it is necessary to shoot in order to save himself from death or great bodily harm. *Id.*

18. Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why,* 34 STAN. L. REV. 615, 619 (1982) (citing to R. PERKINS, CRIMINAL LAW 993, 1014 (1969); People v. Bush, 84 Cal. App. 3d 294, 302-04, 148 Cal. Rptr. 430, 435-37 (1st Dist. 1978) (evidence of the decedent's prior threats was necessary); State v. Wanrow, 88 Wash. 2d 221, 233-36, 559 P.2d 548, 555-56 (1977) (limiting the jury's consideration of surrounding acts to those at or immediately before the killing constituted reversible error). In some instances criminal law accepts determinist accounts of behavior and, on these occasions, holds external forces responsible for people's conduct. Note, *supra,* at 615. Between the two extremes of full responsibility and no responsibility "is conduct where the actor is strongly influenced by external forces, yet retains some choice in how to respond. . . ." *Id.* This is known as partially determined conduct. *Id.* The traditional self-defense doctrine inadequately accounts for partially determined conduct, such as the conduct involved in battered wife cases. *Id.* at 616.

19. Note, *supra* note 18, at 619. A history of the accused's past beatings or an understanding of battered woman syndrome will aid the jury in determining the reasonableness of the accused's acts. "Battered woman syndrome" is defined as follows:

> [T]he "battered woman syndrome" is a term used to describe the stages of a battering relationship and the effects of each stage on an abused woman. Dr. Lenore E. Walker, a pioneer psychologist in the study of battered women, has identified the three stages of a battering relationship as: (1) a tension building stage in which minor incidents of verbal and physical abuse occur; (2) a violent battering stage in which the woman is often seriously injured; and (3) a compassionate stage in which the man begs forgiveness, swears his love, and promises never to strike the woman again. Dr. Walker has found that the repetition of this pattern causes the woman to develop certain learned reactions. The first stage becomes a red flag, warning a woman that a severe beating will soon follow. The suppressed fear experienced by the woman in the

In determining whether the defendant had reasonable grounds to believe serious bodily harm was imminent, the Supreme Court of Washington in *State v. Wanrow*[20] held that the jury instruction first given, which ordered the jury to consider only the circumstances occurring at or immediately before the killing, was erroneous.[21] Instead, the court found that the jury is entitled to consider all the circumstances surrounding the incident.[22]

In *People v. Bush*[23] the California Court of Appeals similarly determined that in a murder prosecution, when evidence existed that indicated the deceased made threats of death or great bodily harm against the defendant, an instruction on the law of the effect of prior threats was necessary and, if not covered, a correct instruction on the subject should have been given.[24]

State v. Leidholm raised several issues on appeal.[25] The North

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first stage may be so disconcerting that she may subconsciously welcome the second stage in order to return to the peaceful third stage. The repeated disappointments resulting from the batterer's false promises of reform in the third stage cause the woman to develop a "learned helplessness," i.e., the woman believes hers is an inevitable fate and she can do nothing to alter her situation.

Note, *Battered Woman Syndrome: Admissibility of Expert Testimony for the Defense,* 47 MO. L. REV. 835, 839 (1982) (citing L. WALKER, THE BATTERED WOMAN 56, 56-70 (1979)).

Dr. Walker indicates that many battered women are able to keep the relationship in the first stages for years. Women who have been battered over a period of time realize that the first stage's minor batterings will escalate. When the tension reaches a certain level it triggers the more serious beatings of the second stage. Because the cycle is repeated, the battered woman learns to recognize this pattern of escalation and the level at which her spouse loses control. *Id.* at 839 n.29.

20. 88 Wash. 2d 221, 559 P.2d 548 (1977). In *Wanrow* Yvonne Wanrow shot and killed William Wesler in defense of her children against sexual or physical abuse. State v. Wanrow, 88 Wash. 2d 221, ____, 559 P.2d 548, 551 (1977). William Wesler was known to have assaulted Yvonne Wanrow's niece and nephew. *Id.* at ____, 559 P.2d at 550. For a discussion of women's self-defense cases see E. Bochnak, WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE (1981).

21. 88 Wash. 2d at ____, 559 P.2d at 556. The court in *Wanrow* recognized that a narrow time restriction wrongfully limits the jury's consideration of the event. *See id.* A victim's conduct prior to the homicide is relevant in explaining the reasonableness of the defendant's actions. *Id.*

22. *Id.* The court emphasized that it was important that the jury be able to consider Wanrow's knowledge of the victim's past violent acts and reputation for violence. *Id.* at ____, 559 P.2d at 557.

23. 84 Cal. App. 3d 294, 148 Cal. Rptr. 430 (Cal. Ct. App. 1978). In *Bush* defendant Alice Bush stabbed and killed her husband, Gary Bush, during a fight. People v. Bush, 84 Cal. App. 3d 294, 298, 148 Cal. Rptr. 430, 432 (Cal. Ct. App. 1978). Testimony revealed that Gary Bush had a history of beating his wife. *Id.* at 299-300, 148 Cal. Rptr. at 433.

24. *Id.* at 305, 148 Cal. Rptr. at 436-37. The court in *Bush* relied on the earlier case of *People v. Moore*, which stated that in a prosecution for homicide, when self-defense was relied upon, refusal to give the defendant's requested instructions regarding the effect of prior threats, combined with the giving of the prosecution's requested instructions which negatively stated the law of self-defense, favoring the prosecution, was error. *Id. See* People v. Moore, 43 Cal. 2d 517, 526, 275 P.2d 485, 491-92 (1954).

25. 334 N.W. 2d 811, 814 (N.D. 1983). In *Leidholm* the issues raised on appeal were:

> 1. Whether the trial court correctly instructed the jury on self-defense;
> 2. Whether the court should adopt a special self-defense instruction on battered woman syndrome;
> 3. Whether defendant had a duty to retreat;
> 4. Whether it was error for the trial court to instruct the jury that manslaughter is a lesser included offense of murder;
> 5. Whether the trial court erred in refusing to grant a change of venue;
> 6. Whether the trial court erred when it denied Leidholm's motion for judgment

Dakota Supreme Court, however, did not find it necessary to address all the issues.[26] The first and controlling issue was whether the trial court correctly instructed the jury on self-defense.[27] Before directly addressing this issue, however, the court explained the basic operation of the law of self-defense as set forth in chapter 12.1-05 of the North Dakota Century Code.[28]

The court stated that conduct which constitutes self-defense may be either justified or excused.[29] The court noted that a person who believes the force he uses is necessary to prevent imminent

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of acquittal at the close of the State's case;

7. Whether the jury selection process denied the defendant a fair trial;

State v. Leidholm, 334 N.W.2d 811, 814-23 (N.D. 1983).

26. *Id.* at 814. The court stated that because of the particular disposition of the case it was not necessary to answer every issue. *Id.* The court addressed the issues necessary to ensure proper disposition of the case on remand. *Id.* at 819.

27. *Id.* at 814.

28. *Id.* North Dakota's criminal code is the product of a massive revision that began in 1971 and culminated in 1973 with the legislative enactment of Senate Bill No. 2045. *Id. See* S.B. 2045, 43d. Leg. Sess. (1973). Most of its provisions are substantially modeled after the Proposed New Federal Criminal Code, which comprises the Final Report of the National Commission on Reform of Federal Criminal Laws (1971) and is supplemented by three volumes of the Working Papers of the National Commission on the Reform of Federal Criminal Laws (1970-71), which in turn relies heavily on the American Law Institute Model Penal Code. 334 N.W.2d at 814.

29. 334 N.W.2d at 814. Section 12.1-05-03 of the North Dakota Century Code states:

> A person is justified in using force upon another person to defend himself against danger of imminent unlawful bodily injury, sexual assault, or detention by such other person, except that:
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> 1. A person is not justified in using force for the purpose of resisting arrest, execution of process, or other performance of duty by a public servant under color of law, but excessive force may be resisted.
> 2. A person is not justified in using force if:
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> a. He intentionally provokes unlawful action by another person to cause bodily injury or death to such other persons; or
>
> b. He has entered into a mutual combat with another person or is the initial aggressor unless he is resisting force which is clearly excessive in the circumstances. A person's use of defensive force after he withdraws from an encounter and indicates to the other person that he has done so is justified if the latter nevertheless continues or menaces unlawful action.

N.D. CENT. CODE § 12.1-05-03 (1976).

Section 12.1-05-08 of the North Dakota Century Code states:

> A person's conduct is excused if he believes that the facts are such that his conduct is necessary and appropriate for any of the purposes which would establish a justification or excuse under this chapter, even though his belief is mistaken. However, if his belief is negligently or recklessly held, it is not an excuse in a prosecution for an offense for which negligence or recklessness, as the case may be, suffices to establish culpability. Excuse under this section is a defense or affirmative defense according to which type of defense would be established had the facts been as the person believed them to be.

N.D. CENT. CODE § 12.1-05-08 (1976).

The court in *Leidholm* stated that the defense of justification is a determination that the actual existence of certain circumstances operates to make proper and legal what would otherwise be criminal conduct. 334 N.W.2d at 814. A defense of excuse does not make the conduct legal and proper; instead, it acknowledges the criminality of the conduct but excuses it because the actor actually believed circumstances existed that would justify his conduct when, in fact, they did not. *Id.* at 814-15.

unlawful harm is *justified* in using this force if his belief is *correct*; that is, if his belief corresponds with what actually has occurred.[30] If, however, a person *reasonably* but incorrectly believes that the force he uses is necessary to protect himself against imminent harm, his use of force is *excused.*[31] The court stated that this distinction may be superfluous since the result is the same; the person avoids punishment for his conduct.[32] Furthermore, the court stated that because a correct belief corresponds with an actual state of affairs, it will always be reasonable.[33] A reasonable belief, however, will not always be a correct belief.[34] Therefore, the issue under North Dakota's law of self-defense is not whether a person's beliefs are correct, but whether they are reasonable and thereby excused or justified.[35] The court noted, however, that before the jury can decide the issue of reasonableness, it must have a standard of reasonableness by which to measure the accused's belief.[36]

Courts have traditionally distinguished between objective and subjective standards of reasonableness.[37] An objective standard of reasonableness requires the factfinder to consider only the acts and circumstances surrounding the accused at or immediately before the time of the killing from the standpoint of a reasonable and prudent person.[38] Under the subjective standard the jury need not decide what a reasonable, prudent person believed; rather, it must

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30. 334 N.W.2d at 815. For example, self-defense may be justified when one shoots an armed burglar breaking into one's home during the night.

31. *Id.* Self-defense may be excused when one mistakenly shoots a person, thought to be a burglar, breaking into one's home during the night, when in actuality the person shot was a family member who simply forgot his house key.

32. *Id.*

33. *Id.*

34. *Id.* Thus, a person may reasonably believe what is not the case. *Id.* The court in *Leidholm* noted, as an example, that "a person may reasonably, but mistakenly, believe that a gun held by an assailant is loaded." *Id.* n. 3.

35. *Id.* at 815.

36. *Id.* at 816.

37. *Id.* A split of authority exists whether a defendant's actions should be measured against the objective or subjective standard of reasonableness. One commentator sets forth the standards as follows:

> The minority view and probably the common law rule is the subjective standard as set forth in 40 AM. JUR. 2D *Homicide* § 154 (1968). It holds that a person claiming self-defense must have honestly believed he was in imminent danger under all the circumstances as he honestly perceived them. The Model Penal Code has adopted the subjective standard. "The use of force . . . toward another person is justified when the actor believes that such force is . . . necessary for the purpose of protecting himself. . . . " MODEL PENAL CODE § 3.04(1) (1962).
>
> The majority view is that the apprehension of danger and belief of necessity must be a reasonable belief. 40 AM. JUR. 2D *Homicide* § 154 (1968). The prevalant view is that an honest but unreasonable belief concerning the necessity of self-defense merely negates malice aforethought and reduces the offense to voluntary manslaughter.

Note, *Battered Woman Syndrome: Admissibility of Expert Testimony for the Defense,* 47 MO. L. REV. 835, 843 n.50. (1982).

38. 334 N.W.2d at 817.

decide whether the circumstances surrounding the accused are sufficient to induce an honest and reasonable belief in his mind that he must use force to defend himself against imminent harm.[39]

The court noted that neither section 12.1-05-03 nor section 12.1-05-08 of the North Dakota Century Code states whether North Dakota adheres to the objective or subjective standard of reasonableness.[40] Furthermore, the legislative history of North Dakota's self-defense statutes, as well as the commentaries to the codified criminal statutes that form the basis of the North Dakota Criminal Code, give no indication of which standard a court is to apply.[41] The court, however, found guidance on this issue from previous decisions of the North Dakota Supreme Court that developed the law of self-defense prior to the adoption of chapter 12.1-05 of the North Dakota Century Code.[42] In 1907 the North Dakota Supreme Court unanimously accepted the subjective standard of reasonableness.[43] As late as 1974, the North Dakota Supreme Court confirmed that decision.[44] Thus, the court in *Leidholm* concluded that the fact finder must consider "the circumstances attending an accused's use of force from the standpoint of the accused to determine if they are sufficient to create in the accused's mind an honest and reasonable belief that the use of force is necessary to protect himself from imminent harm."[45]

The trial court, in its statement of the law on self-defense, used the reasonable and prudent person standard.[46] Therefore, the supreme court concluded that the trial court's instruction misstated the law of self-defense.[47] A correct statement of the law views the

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39. *Id.*

40. *Id.* at 817. For the text of N.D. CENT. CODE §§ 12.1-05-03 and 12.1-05-08, see *supra* note 29.

41. 334 N.W.2d at 817.

42. *Id.*

43. *Id.* In State v. Hazlett, 16 N.D. 426, 113 N.W. 374 (1907), the North Dakota Supreme Court unanimously accepted the subjective standard of reasonableness because it believed it to be a more just standard than the objective standard. *See* State v. Hazlett, 16 N.D. 426, 443-44, 113 N.W. 374, 380-81 (1907).

44. 334 N.W.2d at 817. In State v. Jacob, 222 N.W.2d 586 (N.D. 1974), the North Dakota Supreme Court confirmed the *Hazlett* decision adhering to the subjective standard. *See* State v. Jacob, 222 N.W.2d 586, 589 (N.D. 1974).

45. 334 N.W.2d at 817-18. The practical effect of this interpretation is that an accused's actions are viewed from the standpoint of a person whose mental and physical characteristics are similar to the accused's and who sees and knows what the accused knows. *Id.* The *Leidholm* court noted that "if the accused is a timid, diminutive male, the factfinder must consider these characteristics in assessing the reasonableness of his belief. If, however, the accused is a strong, courageous, and capable female, the factfinder must consider these characteristics in judging the reasonableness of her belief." *Id.* at 818.

46. *Id.* See *supra* note 10 for the instructions on self-defense given to the jury by the trial court in *Leidholm*.

47. 334 N.W.2d at 818.

circumstances from the standpoint of the defendant alone, rather than from the standpoint of a reasonable and prudent person.[48]

The second issue raised on appeal was whether the court should adopt a special self-defense instruction on battered woman syndrome.[49] Leidholm offered a jury instruction on battered woman syndrome designed to support her claim of self-defense.[50] This instruction was designed to focus the jury's attention on victims of abusive relationships and inform the jury that it may consider evidence that the accused suffered from battered woman syndrome in determining whether she acted in self-defense.[51] The North Dakota Supreme Court concluded that nothing in the proposed instruction would add to or significantly alter a correct instruction on the law of self-defense.[52] Thus, it concluded that the trial court did not need to include a specific instruction on battered woman syndrome.[53] The court further stated that a correct instruction on self-defense would account for battered woman syndrome.[54]

Another issue raised on appeal concerned the duty to retreat.[55] The court noted that the law of self-defense limits the use of deadly force to situations when its use is necessary to protect the actor against death or serious bodily injury.[56] The duty to retreat, however, has its exceptions. One exception is that a person is not required to retreat from his dwelling, or place of work, unless the aggressor or assailant is a co-occupant of those premises.[57] Leidholm alleged that this principle violated the equal protection clause, the due process clause, and the privileges and immunities

48. *Id.* See *supra* note 15 for a correct statement of the law to be applied in a case of self-defense. The court in *Leidholm* concluded that the trial court's instruction improperly stated the law, which was reversible error. 334 N.W.2d at 819. The court then addressed other issues raised by Leidholm to ensure a proper disposition of the case. *Id.*

49. *Id.* For a definition of battered woman syndrome see *supra* note 19.

50. 334 N.W.2d at 819. See *supra* note 9 for Leidholm's proposed instruction on battered woman syndrome.

51. 334 N.W.2d at 819. Leidholm's proposed instruction correctly stated that battered woman syndrome alone is not a defense; rather, the evidence should be considered in the context of self-defense. *Id.* at 819-20 (citing State v. Kelly, 33 Wash. App. 541, ___ 655 P.2d 1202, 1203 (1982)).

52. 334 N.W.2d at 820.

53. *Id.*

54. *Id.* A correct instruction on self-defense requires the jury to use a subjective standard of reasonableness in applying the principles of self-defense to the facts of a particular case. *Id.* It also requires the jury to consider expert testimony, received in evidence, describing battered woman syndrome and the psychological effects it produces, when deciding the issue of the existence and reasonableness of the accused's belief that force was necessary to protect himself from imminent harm. *Id.* Hence, the past circumstances of the battered woman are considered under the present North Dakota self-defense standard. See *supra* note 15 for a correct statement of the law to be applied in a case of self-defense.

55. 334 N.W.2d at 820.

56. *Id.* (citing N.D. CENT CODE § 12.1-05-07 (2) (b) (1976)). The use of deadly force can only be used in self-defense when one cannot retreat from his assailant without harm to himself or others. *Id.*

57. *Id.* at 820-21 (quoting N.D. CENT. CODE § 12.1-05-07 (2) (b) (2) (1976)).

clause of the fourteenth amendment to the United States Constitution.[58] The court found no merit in this argument. The court concluded that if the facts and circumstances surrounding the accused's use of deadly force against an assailant, who is a cohabitant, are sufficient to create in his own mind an honest and reasonable belief that he cannot retreat from the assailant with safety, his use of deadly force is justified or excused.[59]

Leidholm next contended that it was error for the trial court to instruct the jury that manslaughter is a lesser included offense of murder.[60] The court stated that whether a lesser included offense instruction is appropriate depends upon the particular facts and circumstances of the case.[61] The court held that the trial judge's instruction on manslaughter was warranted in *Leidholm*.[62] The court further noted that whenever the court instructs a jury on self-defense, it must include a special instruction on manslaughter as well as negligent homicide.[63] The difference between self-defense and manslaughter is the reasonableness of the accused's belief that the force used was necessary to prevent imminent harm.[64] If the accused's belief is reasonable, he acted in self-defense.[65] If unreasonable, he is guilty of either manslaughter or negligent homicide.[66]

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58. *Id.* at 821. Leidholm argued that an individual's duty to retreat from his dwelling is dependent upon the status of the assailant, which unduly discriminates against the accused if the attacker is a cohabitant. *Id.*

59. *Id. See* N.D. CENT. CODE §§ 12.1-05-07 (2) (b), 12.1-05-08. Failure to retreat has no consequence if the defendant reasonably and honestly believed that he could not have safely retreated from his assailant. 334 N.W.2d at 821.

60. 334 N.W.2d at 821.

61. *Id.* (citing State v. Trieb, 315 N.W.2d 649, 656 (N.D. 1982)). In deciding whether a defendant is entitled to an instruction on a lesser included offense, the court in *Trieb* stated that two questions must be answered. First, does the instruction include an offense that is a lesser included offense to the charge? Second, does the evidence in the particular case create a reasonable doubt as to the greater offense and support beyond a reasonable doubt a conviction of the lesser included offense? *Trieb,* 315 N.W.2d at 656.

62. 334 N.W.2d at 821. At the time of the offense in *Leidholm,* § 12.1-16-02 of the North Dakota Century Code stated:

> A person is guilty of manslaughter, a class B felony, if he:
> 1. Recklessly causes the death of another human being; or
> 2. Causes the death of another human being under circumstances which would be murder, except that he causes the death under the influence of extreme emotional disturbance for which there is a reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of a person in his situation under the circumstances as he believes them to be. An emotional disturbance is excusable, within the meaning of this subsection, if it is occasioned by any provocation, event, or situation for which the offender was not culpably responsible.

N.D. CENT. CODE § 12.1-16-02 (1976) (amended 1983).

63. 334 N.W.2d at 821 (citing N.D. CENT. CODE § 12.1-05-08 (1976); National Commission on Reform of Federal Criminal Laws, Working Papers, Comment on Excuse 271-72 (1970)).

64. 334 N.W.2d at 821.

65. *Id.*

66. *Id.* (citing N.D. CENT. CODE § 12.1-05-08; National Commission on Reform of Federal

Leidholm further contended that the trial court erred in refusing to grant a change of venue.[67] Leidholm argued that the pretrial publicity precluded her from receiving a fair and impartial trial.[68] The North Dakota Supreme Court stated that a motion for change of venue is left to the discretion of the trial court, and this decision will be upheld unless there is evidence of abuse of discretion that is prejudicial to the defendant.[69] The court in *Leidholm* found no abuse of discretion in the trial court's denial of the motion for change of venue.[70]

The final issue the court addressed was whether the trial court erred when it denied Leidholm's motion for judgment of acquittal at the close of the State's case.[71] Leidholm argued that the introduction of State's Exhibit 17, notes of Dr. Thakor, a psychiatrist, provided some evidence of insanity that rebutted the usual presumption of sanity. Thus, the trial court should have required the State to prove beyond a reasonable doubt that Leidholm was sane at the time of the alleged murder.[72] The court concluded that State's Exhibit 17 was insufficient to raise a reasonable doubt on the issue of Leidholm's sanity, and therefore the State was not required to prove Leidholm's sanity beyond a reasonable doubt.[73]

Although Leidholm raised several issues on appeal, only two will generate any significant impact. The decision that a correct statement of North Dakota's subjective standard of reasonableness

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Criminal Laws, Final Report § 608 comment (1971); National Commission on Reform of Federal Criminal Laws, Working Papers, Comment on Excuse 271 (1970)).

67. 334 N.W.2d at 821. Rule 21 (a) of the North Dakota Rules of Criminal Procedure provides that a motion for change of venue should be granted "if the court is satisfied that there exists in the county or municipality where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial." N.D.R. CRIM. P. 21 (a) (1983).

68. 334 N.W.2d at 821. In contending that excessive pretrial publicity precluded a fair trial, Leidholm referred to a local newspaper's coverage of Chester's death plus selected comments of prospective jurors during *voir dire*. *Id.*

69. *Id.* at 822.

70. *Id.* The *Leidholm* court stated that its examination of the pretrial publicity did not raise issue with the trial court's conclusions. *Id.* The court noted, however, that this does not mean that a motion for change of venue would be improper on remand, or that if made on remand, the trial court must deny it. *Id.* The court further stated that whether the recent publicity generated by the past trial or the events which led to the new trial require a change of venue is a matter for the trial court to decide anew if the issue should arise. *Id.*

71. *Id.*

72. *Id.* Leidholm argued that because the State did not offer any proof of sanity until after the defense had rested, the court should have granted the motion for judgment of acquittal. *Id.* Section 12.1-01-03 (2) (b) of the North Dakota Century Code states: "Subsection 1 does not require [the State's] negating a defense . . . by proof, unless the issue is in the case as a result of evidence sufficient to raise a reasonable doubt on the issue." N.D. CENT. CODE § 12.1-01-03 (2) (b) (1976).

73. 334 N.W.2d at 823. Leidholm further alleged that her mental capacity became an issue with the introduction of State's Exhibit 17 because it contained Dr. Thakor's diagnosis that Leidholm was suffering from a form of mental illness, and because of contained statements made by Leidholm that suggest that she was unaware of her actions when she stabbed Chester. *Id.* The court disagreed and held that the trial court did not err when it denied Leidholm's motion for judgment of acquittal. *Id.*

in self-defense is broad enough to account for battered woman syndrome eliminates a variety of concerns. Perhaps the biggest concern the court eliminated is the development of various special self-defense standards for various classes of people. It is more efficient, as well as equitable, to provide one standard that accounts for all classes, rather than to allow special standards for each classification.[74]

Also, to allow a special standard for battered women would raise the question of who should solve the problems of the battered woman. The legislature, social service agencies, and the law enforcement agencies should deal with the problem of the battered wife, not the courts.[75] The problems should be dealt with before the homicide occurs, by society involving itself earlier so the homicide may be prevented. The *Leidholm* case indicates that North Dakota's subjective self-defense standard is sufficient to account for battered women, and thus, there is no need for a special self-defense standard for battered women.[76]

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74. However, in states adhering to the objective standard of reasonableness in self-defense, thus utilizing the reasonable and prudent person standard, problems with equity develop. There may be more of a need for a special self-defense standard for battered women since the objective standard does not account for past circumstances, whereas the subjective standard, utilized in North Dakota, does. Hence, the implications of this case vary depending on each state's standard of reasonableness in its self-defense laws.

75. Note, *Does Wife Abuse Justify Homicide?* 24 WAYNE L. REV. 1705, 1726-29 (1978).

North Dakota provides thirteen statewide projects designed to help abused spouses. Appendix for Appellant at 31, *Leidholm*, 334 N.W.2d 811 (N.D. 1983). These were originally started under a grant from the Law Enforcement Assistance Administration. *Id.* The projects provide for crisis intervention through advocates. These advocates must be capable of listening without condemning either the abused or the abuser and they must have a firm belief in the strength of the abused. *Id.*

76. 334 N.W.2d at 820.