LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

Tribal Court
Criminal Division

Court Mailing Address: **7500 Odawa Circle, Harbor Springs, MI 49740** Phone: **231-242-1462**

Little Traverse Bay Bands of Odawa Indians, Plaintiff, **v.** **Stacy Lynn Skippergosh,** Defendant _____/	v. Case No. **CR-103-0615** **Hon. Allie Greenleaf Maldonado**
Catherine Castagne Tribal Prosecutor Little Traverse Bay Bands of Odawa Indians 7500 Odawa Circle Harbor Springs, MI 49740 Phone: 231-242-1475 Fax: 231-242-1511	Norika L. Kida Betti (P77788) Attorney for the Defendant Michigan Indian Legal Services 814 S. Garfield Ave., Suite A Traverse City, MI 49686-2401 Phone: 231-947-0122 Fax: 231-947-3956

BACKGROUND

On June 24, 2015, the Prosecutor filed a Criminal Complaint against the Defendant, Stacy Lynn Skippergosh, charging her with one count of disorderly conduct in violation of WOTCL 9.107(L)(2)(a)(i). The Defendant pled "not guilty" and the matter was scheduled for trial on December 1, 2015.

The Court held a trial in the matter of The People of the *Little Traverse Bay Bands of Odawa Indians v. Stacy Lynn Skippergosh* as scheduled. Catherine Castagne represented the people. Norika Kida Betti appeared on behalf of the Defendant. Before the trial, the Court addressed several pretrial motions.

The Parties stipulated to the facts that the Defendant is a citizen of the Little Traverse Bay Bands of Odawa Indians and the alleged incident occurred within the boundaries of the Tribe's reservation giving the Tribal Court exclusive jurisdiction over this matter.

PRE-TRIAL MOTIONS

Defendant's Motion In Limine to Exclude Evidence of Other Acts

Motion in Limine literally means, "at the start." Parties in a case may file motions that will impact a trial immediately before trial. Those motions are called Motions In Limine. The Court allowed the Parties to file motions before the trial. The Court looked to the LTBB Constitution, LTBB Case law, Criminal Procedure Rules and other applicable and persuasive law in its analysis of the motions presented.

LTBB Criminal Procedure Rules govern criminal proceedings in the LTBB Tribal Court. LTBB Criminal Procedure Rule 1.318 (C) requires that the affirmative defense of self-defense must be raised by written motion or the defense is waived. Therefore, before a defendant may claim self-defense in a criminal trial they must file a written motion before the trial starts. Accordingly, on November 23, 2015 the Defendant filed a motion raising self-defense to the charge of disorderly conduct.

LTBB Criminal Rules of Procedure 1.406 directs the Court to use the Federal Rules of Evidence in all criminal cases. Federal Rule of Evidence 404.b(2)(A) requires that a prosecutor must provide reasonable notice before trial of his or her intent to use "other act evidence" in a criminal case. On the record, the Prosecutor explained that she was verbally made aware that the Defendant would be pleading self-defense prior to the Defendant filing her motion of self-defense. Therefore, in conformity with Federal Rule of Evidence 404.b(2)(A), in anticipation of this affirmative defense, the Prosecutor filed a Notice of Intent to Use Other Act Evidence on November 18, 2015.

On November 17, 2015, apparently aware that the Prosecutor intended to use "other act evidence," the Defense filed a Motion In Limine to Exclude Evidence of Other Acts. However, after receiving the Prosecution's actual written Notice of Intent to Use Other Act Evidence, the Defense filed a Notice of Amendment to the Motion In Limine to Exclude Evidence of Other Acts and a Motion and Brief for Assignment of a New Trial Judge due to what the Defense characterized as disclosure of inadmissible hearsay evidence causing the judge to be bias or prejudice against the Defendant.

On November 25, 2015 the Court heard oral arguments on the above referenced motions. After oral arguments on the amended Motion In Limine to Exclude Evidence of Other Acts, the Court informed the parties that the Court would be issuing a written opinion denying the Defendant's Motion to Exclude Evidence of Other Acts. The Court explained that the clear, on-point and overwhelming persuasive authority provided by *Huddleston v. United States*, 485 U.S. 681 (1988) and *People v. Vandervliet*, 444 Mich. 52 (1993) convinced the Court that the value of the evidence proposed for admission was substantially more probative and valuable than the potential danger of unfair prejudice. *See Federal Rule of Evidence 403* for a treatment of admissible versus non-admissible evidence of past acts. The Court further explained that the evidence was valuable in rebutting the Defense's assertion of self-defense as the proposed evidence offered a motive and a pattern of behavior relevant to the current charge.

After making the parties aware on the record of how the Court intended to rule, the Court offered to entertain a motion to stay the trial pending appeal of the Court's ruling by the Defendant. The

Defendant made the Motion to Stay the Trial on the record stating affirmatively that the Defendant intended to appeal. The Prosecutor responded to the Motion to Stay the Trial by expressing concern about the considerable effort and delay already expended on this matter. Consequently, before the Court could rule in writing, the Prosecution withdrew the Notice of Intent to Use Other Act Evidence on the record. **THEREFORE, THE COURT FINDS THAT BECAUSE THE PROSECUTION WITHDREW THE NOTICE OF INTENT TO USE OTHER ACT EVIDENCE, NO ORDER OF THE COURT IS NECESSARY ON THIS MOTION.** However, if the Prosecutor had not withdrawn her motion, the Court would have ruled the evidence as admissible.

Denial of Motion for Assignment of a New Trial Judge

On November 23, 2015, the Defendant also filed a Motion and Brief for Assignment of a new Trial Judge. As stated above, the Defendant mistakenly believes the evidence of prior bad acts was inadmissible in this case. Therefore, the Defendant argued that since the trier of fact in this bench trial is the judge, and the judge reviewed what the Defendant believes to be inadmissible evidence, the Defendant is entitled to another judge who has not reviewed the evidence in question.

The Defendant is not entitled to another judge for two reasons. First, if the Court had to rule on the admissibility of the evidence, the evidence would have been admissible. Second, even if the evidence was inadmissible, no law, case or court rule would require the judge to recuse herself triggering reassignment to another judge.

The Defendant argues that if the evidence in question is inadmissible then relevant law supports recusal in this case. The Defendant cites to her right to confront her accusers under the Indian Civil Rights Act, 25 USC Section 1302 (a) and the LTBB Constitution, Article 2, paragraph 6 as support for her contention that she is entitled to another judge. She maintains that if this case were in front of a jury and the jury had seen the documents she believes to be inadmissible, she would be entitled to a mistrial. However, she fails to cite any specific rule or law in direct support of her argument.

The Defendant's logic is fatally flawed for three reasons. First, as stated above, if the Court had to rule on the admissibility of the evidence in question, the evidence would have been admissible. Second, even if the evidence should have been deemed inadmissible, the judge did not become bias or prejudiced against the Defendant by reviewing the evidence. Third, the difference between having a jury versus a judge as the trier of fact is that a judge can hear inadmissible evidence without drawing inappropriate inferences and conclusions.

A broad range of authority, including LTBB Judicial Court Conduct Rules, US Supreme Court and LTBB Civil Rules of Procedure support that a judge reviewing inadmissible evidence is not automatically mandated to recuse themselves. **THE COURT FINDS** that the controlling rule in this matter is LTBB Judicial Court Conduct Rule 5.203 (C), Disqualification. The relevant part of the rule reads as follows:

> "A member of the Judiciary must disqualify himself or herself if the Judiciary member:
>
> (1) has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts..."

Reviewing the evidence at issue did not create a personal bias or prejudice concerning the Defendant on the part of the Court. The Defendant does not assert any particular reason that she believes the Court is bias or prejudice against her. Instead, she alleges that exposure to the evidence at issue would automatically cause any court to be bias or prejudice against her, but offers no persuasive authority to bolster this blanket assertion. The Court disagrees.

The Court often has to review evidence to determine admissibility. If the Defendant's contention were correct, then any time a judge held a bench trial and was asked to make a determination regarding the admissibility of evidence and ruled in the negative, the judge would automatically be disqualified. This would be an absurd result causing massive delay. Indeed, some cases might never reach conclusion under this regime. Therefore, this Court must reject the Defendant's proposed rule.

Another reason to reject such a rule is that it would allow parties to forum shop. Any judge could be forced to recuse themselves simply by offering prejudicial evidence for a hearsay ruling. This could happen at any point in the proceeding if a party did not feel like the case was going their way. Moreover, it could happen multiple times. Such an ill-conceived rule would cause massive delay and strain on an already stretched system past its breaking point and therefore must be rejected.

The fact that judges often hear evidence against defendants in multiple cases over the course of years further supports rejecting the Defendant's argument. If the Defendant's proposition held, it would be difficult for a judge to oversee a trial on any defendant twice. If a judge heard evidence against a defendant in a past case where the defendant was acquitted, and if later an unrelated case came before the same judge, the judge would be automatically disqualified from hearing the case unless the evidence from the first case was deemed admissible in the new case. This is not what happens in the real world. Judges see the same defendants multiple times over the course of years and it is expected that they treat each case as a separate matter requiring the prosecutor to prove guilt beyond a reasonable doubt. This case is no different except that the evidence the judge considered was never used at trial, but would have been admissible if offered into evidence.

Therefore, **THE COURT FINDS** that even if the evidence in question were inadmissible, review of said evidence did not create a personal bias or prejudice against the Defendant and therefore recusal is not required. Furthermore, because the Prosecution withdrew her request for the evidence to be admitted into the record, the Court will not consider the evidence in rendering a decision on the Defendant's innocence or guilt.

The Defendant's brief suggests that this ruling will not assuage her concerns. She writes, "Judges, as factfinders, are not immune to the human characteristics that once you hear something, you cannot un-hear it." Courts, including the US Supreme Court, have considered this issue as it relates to the federal rules of evidence before. When applying the federal rules of evidence to judges and juries, courts have uniformly determined that judges can hear inadmissible evidence without drawing inappropriate inferences and conclusions. See, e.g., *Gentile v. State Bar*, 501 U.S. 1030, 1077 (1991) (Rehnquist, C.J., dissenting in part) ("[T]rial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it."); *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (per curiam) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore . .

. . It is equally routine for them to instruct juries that no adverse inference may be drawn from a defendant's failure to testify . . . presum[ably] they follow their own instructions when they are acting as factfinders."); *State v. Garcia*, 397 P.2d 214, 216 (Ariz. 1964) (holding that in criminal cases, as in civil cases, the court will not consider improper admission of evidence as error on appeal from a bench trial "because of the presumption that the trial judge disregarded all inadmissible evidence in reaching his decision"); *Peterson v. State*, 61 N.W.2d 263, 265 (Neb. 1953) ("The rule which this court applies in reviewing a finding of a trial court, in either a civil or a criminal case, . . . is that it is presumed that improper evidence taken under objection was given no weight in reaching the final conclusion unless the contrary appears." (quoting *Birmingham v. State*, 279 N.W. 15, 17 (Wis. 1938)); *Commonwealth v. Davis*, 421 A.2d 179, 183 n.6 (Pa. 1980) ("A judge, as factfinder, is presumed to disregard inadmissible evidence and consider only competent evidence."); *Commonwealth v. Glover*, 405 A.2d 945, 947 (Pa. Super. Ct. 1979) (per curiam) (concluding that a judge "must be presumed to be able to disregard inflammatory evidence"). Courts across the country have found that unlike juries, judges can hear inadmissible evidence without contaminating their ability to rule without prejudice. **This Court also FINDS** that judges can hear inadmissible evidence without contaminating their ability to rule without prejudice.

While the overwhelming case law disputes the Defendants contention, LTBB Rules of Civil Procedure contradicts the Defendant's assertion as well. The LTBB Rules of Civil Procedure clearly and unambiguously conclude that judges can disregard inadmissible and inflammatory evidence. LTBB Rule of Civil Procedure XIX states the following, "In an action tried to a jury, excluded evidence may, upon request, be included in the record for purposes of appeal and excluded oral testimony shall be put into evidence by means of an offer of proof made out of the hearing of the jury. **In an action tried only to the Court, the judge may receive such excluded testimony into the record.**" (*Emphasis added.*) LTBB Rules of Civil Procedure clearly contemplate that in a bench trial a judge may receive excluded testimony into the record and still render a final judgment on the case without inappropriate bias or prejudice. Therefore, this Court must agree. **THE COURT RULES that the Defendant is not entitled to another judge for two reasons. First, if the Court had to rule on the admissibility of the evidence, the evidence would have been admissible. Second, even if the evidence was inadmissible, no law, case or court rule would require the judge to recuse herself triggering reassignment to another judge because review of inadmissible evidence does not automatically create bias or prejudice in the trier of fact.**

TRIAL

The Defendant, Stacy Lynn Skippergosh, pled "not guilty" to one count of disorderly conduct. Disorderly conduct is a violation of WOTCL 9.107(L)(2)(a)(i). It is the Prosecutor's burden to prove the Defendant's guilt beyond a reasonable doubt.

The Prosecution proved beyond a reasonable doubt that the Defendant intentionally, knowingly or recklessly engaged in fighting, or provoked a fight and is therefore the Defendant is guilty of Disorderly Conduct, WOTCL 9.107(L)(2)(a)(i). The Prosecution put forward the following eight witnesses:

1. the alleged Victim;
2. , an employee of Odawa Casino Resort who has worked in Surveillance Department for over two years;

3. , manager of High Gear Sports in Petoskey;
4. , sister to Angela Adkins;
5. – Beverage Shift Manager at Odawa Casino Resort for about three years;
6. – Assistant Medical Supervisor and Assistant Security Supervisor of the 3rd shift security team;
7. – LTBB Tribal Police officer for approximately 8 years; and
8. – LTBB Police – Chief Investigating Officer at the time of the incident.

The Prosecutor also admitted into evidence video of the incident and other documentation in support of her case. The witness's testimony uniformly supported the Prosecutor's case. The Court repeatedly heard credible testimony that the Defendant spoke about the alleged victim in a derogatory and racially-charged manner prior to the assault proving the necessary motive. Witnesses credibly testified that the Defendant started the physical altercation. Video of the fight also shows the Defendant causing the first physical contact in the altercation without justifiable provocation. The Defendant's cross examination of witnesses did nothing to undermine the conclusion that the Defendant intentionally, knowingly or recklessly engaged in fighting. Two pieces of evidence were particularly compelling to the Court. First, the video of the fight shows the Defendant starting and engaging in the physical altercation. Second, the testimony of proved extremely valuable to the Court because did not know either the Defendant or the alleged victim and therefore had no allegiance to either. His status as an unaffiliated bystander added to his clear and believable testimony. Thus, the Court gave his statements great weight. testified that the Defendant made racist slurs aimed at the alleged victim prior to the attack. This testimony combined with the balance of the testimony and evidence presented by the Prosecutor leads **THE COURT TO FIND beyond a reasonable doubt that the Defendant intentionally, knowingly or recklessly engaged in fighting, or provoked a fight and is therefore the Defendant is guilty of Disorderly Conduct, WOTCL 9.107(L)(2)(a)(i).**

On November 23, 2015 the Court received the Defendant's motion raising self-defense. WOTC 9.104 (B) provides that, "the use of reasonable force toward another person is justified and is an affirmative defense, if and only if: (1) the forces directed toward one who is using unlawful force, and (2) the person using such force reasonably believes the use of force is necessary for his or her protection or that of a third person." Therefore, if the Prosecutor proves the Defendant is guilty of disorderly conduct beyond a reasonable doubt, then the Defendant has the opportunity to prove that her acts were justified. However, at the conclusion of the Prosecutor's case the Defense rested without calling one witness and without requesting to put anything into evidence. **Therefore, THE COURT FINDS no support for the Defendant's assertion of self-defense.**

In court, on the record, the Defendant argued that she had no burden to establish that she acted in self-defense. Rather, she argued that the opposing party must prove that she was not acting in self-defense. The Defendant then made the bold claim that by asserting self-defense the People must prove ***beyond a reasonable doubt*** that Skippergosh did **not** act in self-defense. The Defendant made this claim regarding the standard by which the Prosecutor must prove her case with no citation to any controlling or persuasive law. After extensive research by the Court, the Court could not find one legal resource that agreed with the Defendant. Cornell Law School Legal Dictionary explains the Defendant's burden in proving an affirmative defense as follows:

"Affirmative Defense - ***A defense in which the defendant introduces evidence,*** which, if found to be credible, will negate criminal or civil liability, even if it is proven that the defendant committed the alleged acts."

Https://www.law.cornell.edu/wex/affirmative_defense. (Emphasis added.)

Case law affirms the dictionary definition of self-defense. In the US Supreme Court case of *Patterson v. New York*, 432 U. S. 197, 210 (1977), the Court laid out the following, "Proof of the nonexistence of all affirmative defenses has never been constitutionally required."

Other courts explain further. In *Gunther v. State*, 228 Md. 404 (1962), the Maryland Court of Appeals addressed this issue. In that case, the defendant asked the lower court to instruct the jury to find the defendant not guilty if the state could not prove beyond a reasonable doubt that the defendant did not act in self-defense. The lower court did not give the jury instruction and the defendant appealed. The Maryland Court of Appeals ruled against the defendant explaining as follows:

> "[W]e do not agree that the jury should have been told that it could find the defendant not guilty if, on the whole of the evidence, it had a reasonable doubt as to whether or not the defendant acted in self-defense. Apparently the defendant is contending that when a defendant pleads self-defense the State must prove beyond a reasonable doubt that the defendant did not act in defense of himself. Such is not the law. On the contrary, the defendant has the burden of producing evidence to support this affirmative defense." Cf. Bruce v. State, supra, at pp. 96-97.

Case law and legal scholarship support the common sense approach to self-defense that an affirmative defense of self-defense, or any other affirmative defense, does not present itself. While a criminal defendant may decide to offer no evidence during trial, hoping the prosecution will fail to meet its burden, this approach will not work if the defendant has an affirmative defense. **THEREFORE, THIS COURT FINDS that any defendant proposing an affirmative defense must offer proof at trial supporting the affirmative defense, meeting a preponderance of the evidence standard.**

Since the defendant in this case made no attempt to prove or support her affirmative defense of self-defense, **THE COURT FINDS the Defendant failed to show by a preponderance of the evidence that she acted in self-defense. Therefore, her affirmative defense of self-defense is rejected.**

IT IS SO ORDERED:

1/12/16
Date

Hon. Allie Greenleaf Maldonado, Chief Judge
Little Traverse Bay Bands of Odawa Indians

Certificate of Service

I certify that on this date copies of this *Order* were served upon the parties by E-Mail and/or by First-Class Mail, Personal Service, or by LTBB Internal Mail to the addresses shown.

1-13-16
Date

Tribal Court Officer