

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	Supreme Court File No. 20190382
Plaintiff and Appellee,)	
)	Stutsman County District Court
vs.)	File No. 47-2019-CR-167
)	
Justin Keith Burow,)	
)	
Defendant and Appellant.)	
)	

APPELLANT'S BRIEF

APPEAL FROM CRIMINAL JUDGMENT DATED NOVEMBER 6, 2019

Stutsman County District Court
Southeast Judicial District
Honorable Cherie L. Clark, Presiding

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Oral Argument: The Appellant requests that the Supreme Court rule on the briefs submitted to the Court.

Transcript References:

The Jury Trial for this matter was conducted on November 5, 2019. The transcript of the jury trial is referred to as [Tr.] in this brief. [P] references page numbers and [L] references line numbers on the page.

JURISDICTION

[¶ 1] The Defendant, Justin Burow, timely appealed the criminal judgment arising out of the district court. This Court has appellate jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-06 which states:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for a new trial; or
5. An order made after judgment affecting any substantial right of the party.

STATEMENT OF THE ISSUES

- I. Whether the district court erred by denying Mr. Burow’s motion for acquittal.

STATEMENT OF CASE

[¶ 2] This is a criminal matter on direct appeal from the southeast judicial district, Stutsman County criminal judgment. This case was before the district court in State v. Burow, 47-2019-CR-167. The complaint was filed with the court on March 15, 2019 and Mr. Burow proceeded to trial. The Defendant was charged with three (3) counts of simple assault (against a correctional officer), in violation of N.D.C.C. §12.1-17-01, all class C Felonies.

[¶ 3] Mr. Burow was found guilty of one (1) count of simple assault (against a correctional officer), in violation of N.D.C.C. §12.1-17-01, a class C Felony. Mr. Burow was acquitted of the remaining two counts. The criminal judgment was entered in this case on November 6, 2019. Mr. Burow now timely appeals the criminal judgment.

He was sentenced to five years of incarceration first to serve 95 days with credit for 95 days already served. The balance of the sentence was suspended for 12 months during which time he was placed on supervised probation.

STATEMENT OF FACTS

[¶ 4] Mr. Burow was an inmate at the Stutsman County Correctional Center.

Mr. Burow was in his cell block but was unhappy because he had not been provided a phone call [Tr. P108; L2-9]. The officers determined that Mr. Burow needed to be removed from the cell, but Mr. Burow, who was laying on a top bun, refused to come down from his bed. [Tr. P95].

The other inmates in the cell were removed and approximately five officers came into the cell to be on scene [Tr. P95]. The Deputy Administrator of the facility spoke with Mr. Burow. When Mr. Burow continued to refuse to come off the bed, the Deputy Administrator directed the staff to physically remove him [Tr. P97]. Mr. Burow resisted the attempts of the officers to pull him down [Tr. P97]. R.B. testified, “Mr. Burow resisted and started fighting and put his feet on the light, started flailing around. He made contact with me with his hand, fist on the left side of the face.” [Tr. P97: L9-12]. When asked to clarify the word contact, R.B. stated, “he hit me in the side on the face and kept his hand there when he was pushing on my face” [Tr. P97: L17-19].

[¶ 5] On cross-examination R.B. agreed that Mr. Burow did not lash out at or kick the Deputy Administrator and that it was the administrator who initiated physical contact [Tr. P 110, L9-14]. R.B. agreed that when Mr. Burow’s left arm was grabbed that he tried to wedge himself into the ceiling and that he did not want to leave the bunk [Tr. P110; L15-25]. It was during this time that Mr. Burow’s hand went to R.B.’s face. R.B. agreed that Mr. Burow’s hand stayed on his face for a brief period of time and that R.B. felt pressure on his face from such [Tr. 111]. R.B. was asked if the pressure on his face was consistent with someone trying to

push themselves off. R.B. testified that he wasn't sure if the pressure was from pushing off but did agree that the pressure he felt was different than from a quick punch [Tr. P111; L10-25]. Very shortly thereafter Mr. Burow was pulled down from his bunk. He was later charged with simple assault for his hand contacting R.B.'s face.

LAW AND ARGUMENT

I. Whether the district court erred by denying Mr. Burow's motion for acquittal?

[¶ 6] The appellate standard of review regarding a claim of insufficiency of evidence is well established. In *State v. Shmeets*, 2007 ND 197, ¶8, 742 N.W.2d 513, the court stated: "When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction." *State v. Igou*, 2005 ND 16, ¶5, 691 N.W.2d 213. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilty when viewed in the light most favorable to the verdict. *Id.* "A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor". *State v. Knowles*, 2003 ND 180, ¶6, 671 N.W.2d 816.

[¶ 7] Mr. Burow was found guilty of simple assault upon a correctional officer. Mr. Burow was in his jail cell. Correctional officers were directing him to get off of the top bunk in his cell. Mr. Burow did not comply, and several correctional officers came into the cell. They continued to speak with him until the deputy administrator reached up

to grab him and directed the other officers to pull him down. Mr. Burow resisted coming down from the bed and tried bracing himself against the ceiling. The Correctional officers continued to try pulling Mr. Burow down. During that time Mr. Burow threw out his arm and it struck an officer, R.B. in the head. Very shortly thereafter Mr. Burow was pulled down from the bed.

[¶ 8] For simple assault, the state's burden of proof is satisfied if the evidence shows beyond a reasonable doubt the following essential elements:

1. On or about March 11, 2019 in Stutsman County, North Dakota the defendant Justin Burow willfully caused bodily injury to R.B. a correctional institution employee acting in an official capacity; and
2. The defendant knew that R.B. was a correctional institution employee acting in an official capacity.

[¶ 9] The state failed to prove that Mr. Burow willfully caused injury the correctional officer. Mr. Burow was in the process of being pulled off a top bunk in the jail cell. Officers were pulling on his body when he threw out his arm. There is no evidence that any resulting injury to the correctional officer was willful.

[¶ 10] The state did not meet its burden of proof and consequently, Mr. Burow's motion for acquittal should have been granted.

CONCLUSION

[¶ 11] There was insufficient evidence at trial to support a conviction in this matter. The evidence provided by the State does not show any willful act on the part of the defendant.

[¶ 12] WHEREFORE the Defendant respectfully requests the Court to reverse

the verdict and judgment of the trial court.

Dated this 10th day of March, 2020

/s/ Scott Richard Sandness

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IN THE SUPREME COURT
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State of North Dakota,)	
)	Supreme Court File No. 20190207
Plaintiff and Appellee,)	
)	Stutsman County District Court
vs.)	File No. 47-2019-CR-167
)	
Justin Keith Burow,)	
)	
Defendant and Appellant.)	
)	

CERTIFICATE OF COMPLIANCE

[¶ 1] This Appellant's Brief and Appendix complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure as it only has 8 pages.

Dated this 10th day of March, 2020.

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CERTIFICATE OF SERVICE

[¶ 1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix

And that said copies were served upon:

Joseph Nwoga, Assistant State's Attorney, attorney@stutsmancounty.gov

by electronically filing said documents via email. Also served upon:

Justin Burow
1410 11th Street SE
Jamestown, ND 58401

by placing a true and correct copy of said items in a sealed envelope with USPS.

Dated this 10th day of March, 2020.

/s/ Scott Richard Sandness
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