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IN THE SUPREME COURT

STATE OF NORTH DAKOTA 20050134

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20050134
)	
vs.)	District Court No: 09-04-K-3816
)	
Mario Fontonez Stevenson,)	
)	
Defendant/Appellant.)	
)	

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STATE OF NORTH DAKOTA

Brief of Defendant/Appellant Mario Fontonez Stevenson

**Appeal from Criminal Judgment and Commitment entered
April 6, 2005, in District Court, County of Cass,
State of North Dakota, The Honorable Cynthia Rothe-Seeger**

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Table of contents

Table of contents	i
Table of authorities	ii
Statement of issue	1
Statement of the case	1
Statement of the facts	1
Argument	
The Evidence was Insufficient to sustain the Conviction	4
Conclusion	7

Table of authorities

Cases

<i>State v. Igou</i> , 2005 ND 16, 691 N.W.2d 213	4
<i>State v. Knowels</i> , 2003 ND 180, 671 N.W.2d 816	5
<i>State v. Plentychief</i> , 464 N.W.2d 373 (ND 1990)	6
<i>State v. Wilson</i> , 2004 ND 51, 676 N.W.2d 98	4

Rules

N.D.R.Crim. P. 29(a)	4
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Statutes

N.D.Cent. Code §12.1-17-04	1
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Statement of The Issue

Whether the evidence was sufficient to sustain the conviction?

Statement of the case

This is an appeal by Mario Fontonez Stevenson from the Criminal Judgment and Commitment entered by the Honorable Cynthia Rothe-Seeger, East Central Judicial District Court on April 6, 2005. (Appendix 5; Docket No. 40).¹ Appellant Mario Fontonez Stevenson (hereinafter Mr. Stevenson) was charged with Terrorizing pursuant to **N.D.Cent. Code §12.1-17-04**, as a Class C Felony, by Information dated September 29, 2004. (App. 4; D1). The case was tried to a jury of twelve on April 5 and 6, 2005. (Transcript of proceedings). The jury returned a verdict of guilty. (D38). Sentencing occurred on April 6, 2005. The Court sentenced Mr. Stevenson to two years in the custody of the North Dakota Department of Corrections and Rehabilitation, first to serve eighteen months in prison, and the balance suspended for a period of two years of supervised probation. (App. 5&10).

Statement of the facts²

Kimberly J. Stevenson and Mr. Stevenson were married in 2002 and separated in 2003. They were divorced in April of 2004. They have two children,

¹

In the brief, the Docket will be abbreviated D, the Appendix App, and the Transcript T.

²

The record appears to support the proposition that the facts are not so much disputed by the parties, but the parties certainly have a different interpretation of the facts.

Chance is four and Kimaria is two. (T65). She had not had any contact with Mr. Stevenson after the divorce was final.

On September 28, 2004, Ms. Stevenson was at her home at 2416 18th Street South, Apartment 201, Fargo, North Dakota. She lives in a second floor apartment in a secure building. (T22-23). She was in her living room watching TV with her boyfriend, Mark. (T65-66). They heard a noise on the front porch. They found a pop can on the porch later. At first, Ms. Stevenson thought it was a friend of Mark's who has come in through the porch in the past. She got up and looked out the window, and saw it was Mr. Stevenson. (T66). The window was open, so she looked out the window and said, "What do you want?" He responded, but she could not hear what he said. She went out the door onto the porch. (T66). (What she called a porch is actually a second-level balcony, above a garden level apartment (T75)). She told Mark to stay in the house because she did not want a conflict between them. (T67).

Mr. Stevenson said, "I want you to know I am still here." She asked him, "Well, what do you mean by that?" Mr. Stevenson then repeated his first statement a couple of times. Then he said, "Your time is coming," and Ms. Stevenson said, "Well, what do you mean?" and he said, "You will die." (T67). He was very calm, and not yelling or screaming. He did not make any threatening gestures. (T76). She asked him to repeat what he said, and he said it again, saying, "You will die." (T67). He never used the word "kill". (T73). At that point she asked Mark to come onto the porch. Mark asked Mr. Stevenson what he was doing there, and Mr. Stevenson told him to go back into the house. (T68). Ms. Stevenson said to Mr.

Stevenson, "Tell him what you just told me." Mr. Stevenson said. "She will die. Her time is coming, and I will get an H-I-T if I need to." (T68). She assumed he was spelling hit, not using an acronym. (T 73). Mr. Stevenson did not elaborate any further on what he said. (T45).

Ms. Stevenson then went back into the house and whispered to Mark that she was calling the police. (T68). She then called 911.

Ms. Stevenson said she was "curious" when she first saw Mr. Stevenson that night. She said she felt "scared" for herself and her children after Mr. Stevenson made the statements he did. (T69). She felt that Mr. Stevenson posed a risk to her and her children. (T70).

When Ms. Stevenson was on the phone calling 911, Mark came in to the apartment and told her that he was going to try to follow Mr. Stevenson. Mark described her as being "pretty frantic," "a little shaky" and "kind of stressed." She did not want Mark to go after Mr. Stevenson, but he put his shoes on and left. (T20). Ms. Stevenson told him to be careful because she did not want any kind of a confrontation. (T70). This did worry her and make her heart beat faster. (T77). However, no weapon was seen in Mr. Stevenson's possession. (T40). Mark would not have followed Mr. Stevenson had he seen a weapon. (T41). She and Mark talked back and forth on their cell phones, and she relayed location updates to the dispatch. (T70). The police arrived and questioned her about the incident. (T70). One police officer testified to his observations of Ms. Stevenson: "She was very shaken up. She was nervous. I mean, you could see it in her arms. When she talked to me, she was like holding her hands like this (indicating) very, very terrified."

(T54). The police arrested Mr. Stevenson. He had other outstanding warrants at the time. (T71-72).

During the incident, Mr. Stevenson never tried to climb onto the balcony. A friend had climbed over the balcony on a previous occasion. (T75). It is relatively easy to get on the balcony. (T26).

Argument

The evidence was insufficient to sustain the conviction.

Trial Counsel for Mr. Stevenson made a Motion for a Judgment of Acquittal pursuant to **N.D.R.Crim. P. 29(a)** at the close of the State's case. (T80-82). The facts are largely uncontested. The issue was whether what occurred constituted the crime of terrorizing.

This Court discussed the legal issue of the sufficiency of the evidence in **State v. Igou, 2005 ND 16, 691 N.W.2d 213**. Mr. Stevenson preserved this issue on appeal when he made his Motion for a Judgment of Acquittal pursuant to **N.D.R.Crim. P. 29(a)** at the close of the State's case. **Id. at ¶4**. In **Igou**, this Court stated the standard of review as follows:

[¶5] Our standard of review is well established for cases in which a defendant challenges the sufficiency of the evidence to support a criminal conviction. A defendant bears the burden of showing the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt. **State v. Wilson, 2004 ND 51, ¶ 6, 676 N.W.2d 98**. On appeal, this Court merely reviews the record to determine if there is competent evidence that allowed the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. **Id.** A conviction rests upon insufficient evidence only when no rational factfinder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor.

***State v. Knowels*, 2003 ND 180, ¶ 6, 671 N.W.2d 816.**

Based upon this standard, Mr. Stevenson believes that the State did not prove that he committed the crime of terrorizing.

The Information was read to the jury in pertinent part as follows:

That on or about the above-stated date, the defendant, Mario Fontonez Stevenson, with intent to place Kimberly J. Stevenson in fear for that human being's or another's safety, or in reckless disregard of the risk of causing such terror, the defendant threatened to commit any crime of violence or act dangerous to human life by threatening to ***kill her or put a hit on her***, occurring in Fargo, Cass County, North Dakota, against the peace and dignity of the State of North Dakota, dated September 29, 2004.

(App. 4; T6; emphasis added). The material events lasted a very short time. When Ms. Stevenson asked Mr. Stevenson what he wanted, Mr. Stevenson said, "I want you to know I am still here." She asked him, "Well, what do you mean by that?" Mr. Stevenson then repeated his first statement a couple of times. Then he said, "Your time is coming," and Ms. Stevenson said, "Well, what do you mean?" and he said, "You will die." (T67). He was very calm, and not yelling or screaming. He did not make any threatening gestures. (T76). She asked him to repeat what he said, and he said it again, saying, "You will die." (T67). He never used the word "kill." (T73). At that point she asked Mark to come onto the porch. Mark asked Mr. Stevenson what he was doing there, and Mr. Stevenson told him to go back into the house. (T68). Ms. Stevenson said to Mr. Stevenson, "Tell him what you just told me." Mr. Stevenson said, "She will die. Her time is coming, and I will get an H-I-T if I need to." (T68). She assumed he was spelling hit, not using an acronym. (T 73). Mr. Stevenson did not elaborate any further on what he said. (T45).

Mr. Stevenson never used the word “hit” or “kill.” The State charged him with terrorizing Ms. Stevenson by threatening to **“kill her or put a hit on her.”** The State did not present any evidence that Mr. Stevenson ever used those words. The State presented evidence that Mr. Stevenson stated “She will die. Her time is coming, and I will get an H-I-T if I need to.” (T68). He complied when he was asked to repeat what he had said. The State’s witnesses testified that he made these statements in a calm, quiet voice. He made no threatening gestures. He did not try to climb onto the balcony or enter the building. No weapon was seen nor was any reference made to any weapon. He walked away from the apartment building. (T43). Ms. Stevenson had not seen Mr. Stevenson for over year prior to this incident. (T65). **See State v. Plentychief, 464 N.W.2d 373 (ND 1990)**(Evidence insufficient to establish terrorizing circumstances). Ms. Stevenson was very concerned when Mark chose to dress and follow Mr. Stevenson. She was afraid that Mr. Stevenson would confront Mark if he knew he was being followed. Mark was gone for 15-20 minutes. This made her very nervous. The one police officer described her as being “terrified” but this was while Mark was still out following Mr. Stevenson and Ms. Stevenson did not know what was happening outside. (T54; 77-79). The most reasonable inference from the evidence was that Ms. Stevenson was more afraid of what might happen if there was a confrontation between Mark and Mr. Stevenson when Mark chose to go outside and follow Mr. Stevenson. The statements made by Mr. Stevenson can fairly be described as odd, and ambiguous at best. One must presume that the State could have introduced a recoding of the

911 call made by Ms. Stevenson to illustrate to the jury her demeanor on the telephone when she first contacted them. Given all the circumstances and the context, Mr. Stevenson believes that no rational fact finder could find him guilty of terrorizing beyond a reasonable doubt. All of the evidence taken together, including, but not limited to, the fact that the State did not prove the specific words alleged in the Information, Mr. Stevenson's calm, non-threatening demeanor, the lack of any physical gestures or actions, and the actions of Ms. Stevenson's boyfriend, by following Mr. Stevenson, which caused her real fear, all lead Mr. Stevenson to believe that the evidence was insufficient to sustain his conviction.

Conclusion

The judgment of the trial court should be reversed, and this Court should order the entry of a Judgment of Acquittal.

Respectfully submitted this 18th day of July, 2005.



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**RE: State of North Dakota, Plaintiff and Appellee vs. Mario
Fontonez Stevenson, Defendant and Appellant
Supreme Court No. 20050102
Cass County Civil No. 09-04-K-3816**

CERTIFICATE OF SERVICE BY MAIL

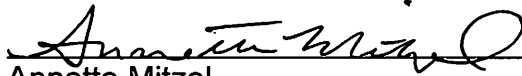
I, Annette Mitzel, do hereby certify that, on the 18th day of July, 2005,
I served the Brief of Defendant/Appellant upon the following, by placing true and
correct copies in envelopes addressed as follows:

Ms. Penny Miller
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Ms. Leah J. Viste
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and depositing the same, with postage prepaid, in the United States Mails at Fargo,
North Dakota.

Dated this 18th day of July, 2005.


Annette Mitzel

Subscribed and sworn before me this 18th day of July, 2005.


Notary Public

