ORIGINAL - e-filed

20070090

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	Supreme Court No. 20070090
	)	
vs.	)	District Ct. No. 06-K-03574
	)	
James Peter Sabo,	)	
	)	
Defendant and Appellant.	)	
	)	

APPELLEE'S BRIEF

Appeal from the February 27, 2007 Criminal Judgment and Commitment
East Central Judicial District
the Honorable Wade L. Webb Presiding

Reid Brady, NDID #05696
Assistant State's Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorney for Plaintiff and Appellee

TABLE OF CONTENTS

[¶1] TABLE OF AUTHORITIES

[¶2] STATEMENT OF ISSUES

I. [¶3] Whether the district court appropriately denied the Defendant's motion for judgment of acquittal because there was competent evidence presented during the State's case-in-chief which could have allowed the jury to draw an inference reasonably tending to prove guilt.

II. [¶4] Whether there was competent evidence presented during the trial which could have allowed the jury to draw an inference reasonably tending to prove guilt.

III. [¶5] Whether the State's rebuttal closing argument was within the bounds of fair and reasonable criticism of the evidence and fair and reasonable argument based upon the State's theory of the case and the evidence.

[¶6] STATEMENT OF CASE

[¶7] On February 22, 2007, a jury found the Defendant guilty of the crime of Alteration of Odometer. (Appellant's Appendix "A." at 6.) The district court subsequently entered a criminal judgment and sentence on February 27, 2007. (A. at 6.) The Defendant appeals to this Court, asserting the district court erred in denying his motion for judgment of acquittal, there was not sufficient evidence to support his conviction, and the Defendant's right to a fair trial was violated by remarks made during the State's rebuttal closing argument. The State seeks affirmation of the district court judgment.

[¶8] STATEMENT OF FACTS

[¶9] By an Information dated September 18, 2006, the Defendant was charged with Alteration of Odometer in violation of N.D.C.C. § 39-21-51. (A. at 3.) The Defendant was specifically alleged to have "willfully altered the odometer for a 2004 Honda Civic, VIN #1HGEX16514L021969 ("2004 Honda") and/or offered for sale such motor vehicle knowing the odometer had been altered for the purpose of deceiving another[.]" (A. at 3.)

[¶10] A jury trial began on February 21, 2007. Four witnesses testified during the State's case-in-chief: North Dakota Highway Patrol Trooper Robert Arman; Todd Vetsch, General Manager for Lunde Auto Center; Trooper Tonya Sprecher; and Scott Miller, a technician for Corwin Honda. (Transcript of Proceeding, Volume I, February 21, 2007 "T1" at 16, lines " ll." 2-5; T1 at 52, ll. 10-13; T1 at 67, ll. 19-22; T1 at 106, ll. 20-23.)

[¶11] Trooper Arman testified the Defendant requested a vehicle inspection and Trooper Arman went to the Defendant's residence at 1221 9th Avenue North in Fargo on September 6, 2006, to conduct the inspection. (T1 at 21, ll. 19-25; T1 at 22, ll. 1-18.)

Trooper Arman indicated the Defendant presented the title to the 2004 Honda at the beginning of the inspection and the title indicated the 2004 Honda was owned by the Defendant's business "Superior Enterprises LTD" and had 26,124 miles on it at the time the Defendant acquired it. (T1 at 23, ll. 11-12; T1 at 26, ll. 4-10; T1 at 27, ll. 18-25.)

[¶12] Trooper Arman testified although his fellow officers in the Fargo Highway Patrol branch did not check mileage when doing vehicle inspections, Trooper Arman always checked mileage because of his training and experience in the Bismarck branch. (T1 at 18, ll. 10-25; T1 at 19, ll. 1-18.) Trooper Arman, accordingly, stated he asked the Defendant how many miles were on the 2004 Honda and the Defendant replied 4,963.[1] (T1 at 28, ll. 8-11.) Trooper Arman explained he looked at the odometer in the 2004 Honda and it showed 4,983. (T1 at 28, ll. 19-20; T1 at 29, ll. 12-25.) Trooper Arman indicated he told the Defendant he would not approve the inspection and would further investigate the mileage discrepancy. (T1 at 31, ll. 9-13.) Trooper Arman testified he called the Defendant later on September 6, 2006, and the Defendant indicated he was trying to sell the vehicle and the Defendant's buyer was worried. (T1 at 32, ll. 10-25.) Trooper Arman stated the Defendant never revealed the name of the buyer to Trooper Arman. (T1 at 35, ll. 22-25; T1 at 36, ll. 1-15.)

[¶13] Trooper Arman further testified he went with Trooper Sprecher back to the Defendant's residence on September 7, 2006. (T1 at 33, ll. 15-17.) Trooper Arman indicated the Defendant asserted the previous owner probably made a mistake on the certificate of title and there were only 4,983 miles on the 2004 Honda. (T1 at 34, ll. 1-17.)

---

[1]Trooper Arman appeared to be off by 20 miles because the odometer photo showed 4,983 miles.

[¶14] Todd Vetsch testified he had been general manager at Lunde Auto Center for three years and his job duties involved appraising as many as approximately 200 vehicles per month. (T1 at 52, ll. 14-18; T1 at 54, ll. 2-4.) Vetsch testified he held another position at Lunde for approximately eight years and worked at his father's auto dealership prior to that and both positions included appraising vehicles. (T1 at 52, ll. 19-25; T1 at 53, ll. 1-8.)

[¶15] Vetsch further testified mileage is a factor which plays a part in determining the value of used vehicles, including those with salvage titles. (T1 at 54, ll. 9-19.) Vetsch indicated a "rule of thumb" to use when placing a value on a vehicle is for every 10,000 miles on the vehicle, the value would decrease by $1,000.00. (T1 at 55. ll. 1-2.) Vetsch, accordingly, testified if there were two Hondas both manufactured in 2004, both having salvage titles, and the only difference being one had less than 5,000 miles and one had more than 26,000 miles, the difference in value would be approximately $2,000.00. (T1 at 54, ll. 20-25; T1 at 55, ll. 1-3.)

[¶16] Trooper Tonya Sprecher testified she had inspected hundreds of vehicles and had never checked the mileage on a vehicle because it was neither standard practice nor on the inspection form. (T1 at 69, ll. 16-19; T1 at 71, ll. 1-12.) Trooper Sprecher indicated the Defendant had been in the business of selling used cars for more than eleven years and had a place of business in Fargo. (T1 at 73, ll. 1-10; T1 at 67, ll. 23-24.) Trooper Sprecher testified she obtained a photograph of the odometer reading on the 2004 Honda taken at the time the Defendant purchased the vehicle and it showed 26,124 miles. (T1 at 75, ll. 16-25; T1 at 76, ll. 1-4; T1 at 77, ll. 16-18.)

[¶17] Trooper Sprecher testified she went with Trooper Arman to the Defendant's residence the day after the inspection. (T1 at 78, ll. 14-16.) Trooper Sprecher indicated the

Defendant asserted there was probably a clerical error on the mileage portion of the title and suggested the mileage recorded on the title was from a reading of the trip odometer with the decimal point added in the wrong place. (T1 at 80, ll. 9-12.) Trooper Sprecher stated she tested the feasibility of the Defendant's assertion and discovered the odometer read "trip A" and "trip B" when the trip mode of the odometer was displayed. (T1 at 80, ll. 13-25; T1 at 81, ll. 19-25.)

[¶18] Trooper Sprecher further testified she returned to the Defendant's residence a few days later and seized the 2004 Honda. (T1 at 83, ll. 1-3.) Trooper Sprecher stated the Defendant then conceded there were more than 26,000 miles on the 2004 Honda but asserted his buyer did not care because eventually the odometer reading in the 2004 Honda would get to 26,000 miles. (T1 at 87, ll. 3-15.) Trooper Sprecher testified the Defendant never revealed the identity of his buyer. (T1 at 82, ll. 4-8.)

[¶19] Scott Miller testified he had been working as a technician for Corwin Honda for approximately three years and had been a technician since 1986. (T1 at 106, ll. 24-25; T1 at 107, ll. 1-4.) Miller indicated the central processing unit within the instrument cluster of any Honda from 2004 retains the mileage for the vehicle. (T1 at 111, ll. 10-19.) Miller further stated if a person took a low mileage instrument cluster, perhaps from a totaled vehicle, and put it in a Honda Civic from 2004 with high mileage, the odometer in the vehicle would then show the low mileage. (T1 at 116, ll. 2-7.)

[¶20] After Miller testified, the State rested. (T1 at 127, l. 11.) The Defendant moved for a judgment of acquittal. (T1 at 128, ll. 6-7.) The district court noted intent is a factor often proven by circumstantial evidence and weight and credibility are issues for the trier of fact. (T1 at 131-32.) Viewing the evidence in the light most favorable to the State,

the district court denied the Defendant's motion. (T1 at 131-32.)

[¶21] During his case, the Defendant first called William Smith. (T1 at 135, ll. 3-4.) Smith testified he worked primarily as an auto-body mechanic for the Defendant. (T1 at 136, ll. 9-22.) Smith indicated he performed auto-body work on the 2004 Honda. (T1 at 138-141.) Smith testified there were miscellaneous items on the 2004 Honda needing repair and Smith knew some of the miscellaneous items but did not know every miscellaneous item needing repair. (T1 at 144, ll. 10-15.) Smith said he did not perform the miscellaneous repairs and did not know who did. (T1 at 143, ll. 6-10.) Smith asserted the Defendant contacted him shortly after the 2004 Honda was moved from the lot in about September of 2006 and inquired whether the instrument cluster in the 2004 Honda had been replaced and Smith told the Defendant, "we didn't replace it." (T1 at 145, ll. 3-6; T1 at 146, ll. 2-9.)

[¶22] The Defendant next called Michael Morton. (Transcript of Proceeding, Volume II, February 22, 2007 "T2" at 4, l. 17.) Morton testified he was a friend of the Defendant's, had a set of keys to the Defendant's shop, and assisted with minor repairs on vehicles owned by the Defendant. (T2 at 17, ll. 11-25; T2 at 18, ll. 1-15; T2 at 25, ll. 3-4.) Morton said he noticed the 2004 Honda at the Defendant's shop and, subsequently, agreed with the Defendant to buy it for $14.500.00. (T2 at 7; T2 at 24, ll. 5-8.) Morton claimed he agreed to buy the 2004 Honda even though he did not know the mileage on it. (T2 at 24, ll. 9-11.) Morton asserted there was a crack in the instrument cluster of the 2004 Honda so he replaced it with an instrument cluster from a nonrepairable car of the Defendant's and was uncertain whether the replacement instrument cluster worked. (T2 at 21, ll. 18-21; T2 at 22, ll. 19-25; T2 at 23, ll. 1-15.) Morton asserted he did this without the Defendant's knowledge. (T2 at 9, ll. 1-6.)

[¶23] Morton further asserted the Defendant told Morton on about September 11, 2006, the Highway Patrol would not issue a certificate of inspection because there was a discrepancy between the mileage on the odometer and the mileage on the title. (T2 at 18, ll. 22-25; T2 at 19, ll. 1-2.) Morton said he also learned the 2004 Honda had been seized and the Defendant had been charged with a crime relating to the mileage on the 2004 Honda, but Morton never contacted the Highway Patrol. (T2 at 19, ll. 7-25; T2 at 20, ll. 1-6.) Morton admitted he had prior convictions for burglary, possession of stolen property, and sale of stolen property. (T2 at 25. ll. 12-24.)

[¶24] The Defendant himself then testified. (T2 at 26, l. 25.) The Defendant stated he paid $2,020.00 for the 2004 Honda. including fees. (T2 at 44, ll. 1-4.) The Defendant admitted he was trying to sell the 2004 Honda and had offered it for sale. (T2 at 45, ll. 5-18.) The Defendant asserted Morton had agreed to buy the 2004 Honda for $14,500.00, and at the time the Defendant did not know how many miles were on the 2004 Honda or what additional repairs it needed. (T2 at 55.) The Defendant admitted he possessed the 2004 Honda at his place in Fargo and he conducted all his business out of his home office in Fargo. (T2 at 44, ll. 15-23.)

[¶25] The Defendant said he contacted Smith during the inspection on September 6, 2006, and Smith told him there was nothing replaced on the dash of the 2004 Honda. (T2 at 33, ll. 5-13.) The Defendant asserted he contacted Corwin Chrysler immediately after the inspection and was told the mileage on the Honda was kept in the main computer. (T2 at 31, ll. 4-8.)

[¶26] The Defendant said he told the troopers on September 7, 2006, he had spoken with Chrysler Corwin and believed someone previously had looked at the trip odometer and,

accordingly, recorded the mileage incorrectly on the title. (T2 at 47, ll. 6-22.) The Defendant admitted he told Trooper Sprecher on September 11, 2006, his buyer did not care about the mileage discrepancy between the odometer and the title because eventually the 2004 Honda would have 26,000 miles on it. (T2 at 49, ll. 24-25; T2 at 50, ll. 1-3.) The Defendant claimed Smith found the 2004 Honda's original instrument cluster about one month later and the Defendant then figured out what had happened. (T2 at 28, ll. 9-14; T2 at 35, ll. 13-22.) The Defendant admitted he had pled guilty in April of 2003 to the crime of attempting to deface, destroy, remove, or alter a vehicle identification number. (T2 at 69, ll. 9-12.)

[¶27] After the State made its initial closing argument, the defense gave its closing. Emphasizing the testimony of the defense witnesses, Morton, Smith, and the Defendant himself, the defense contended the Defendant lacked knowledge the odometer had been altered and lacked intent to deceive. (T2 at 96-102.) In its rebuttal closing, the State concentrated largely upon the circumstances showing the Defendant had knowledge and intent to deceive and upon the defense witnesses' lack of credibility. (T2 at 103-110.)

[¶28] The jury returned a verdict of guilty. The jury was polled regarding which of two alternative types of conduct the Defendant had committed and the jurors indicated the Defendant had been found guilty for offering a motor vehicle for sale knowing the odometer or other mileage recorder had been altered with intent to deceive. (T2 at 139-140.) After the February 27, 2007, judgment was entered, the Defendant submitted his notice of appeal.

[¶29] LAW AND ARGUMENT

[¶30] The Defendant contends (1) the district court erred in denying the Defendant's motion for judgment of acquittal, (2) there was insufficient evidence to support the jury's

guilty verdict, and (3) the Defendant's right to a fair trial was unduly prejudiced by the State's closing rebuttal argument.

[¶31] **I.** **The district court appropriately denied the Defendant's motion for judgment of acquittal because there was competent evidence presented during the State's case-in-chief which could have allowed the jury to draw an inference reasonably tending to prove guilt.**

[¶32] Under N.D.R.Crim.P. 29, the court shall enter a judgment of acquittal if the evidence is not sufficient to sustain a conviction. This Court has explained:

> A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt. In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses. A verdict based on circumstantial evidence carries the same presumption of correctness as other verdicts. A conviction may be justified on circumstantial evidence alone if the circumstantial evidence has such probative force as to enable the trier of fact to find the defendant guilty beyond a reasonable doubt. Moreover, a jury may find a defendant guilty even though evidence exists which, if believed, could lead to a not guilty verdict.

State v. Bertram, 2006 ND 10, ¶ 5, 708 N.W.2d 913 (citation omitted).

[¶33] A person is guilty of alteration of odometer if the person "offer[s] for sale or sell[s] a motor vehicle knowing the odometer or other mileage recorder has been altered, for the purpose of deceiving another." N.D.C.C. § 39-21-51. In the instant case, it was uncontroverted the Defendant was trying to sell the 2004 Honda and had offered it for sale. The parties disputed whether the offeree was ever identified and whether the offeree knew the odometer had been altered. The issue, accordingly, was whether the Defendant knew the odometer had been altered for the purpose of deceiving another.

[¶34] There was competent evidence from which the jury could find beyond a

reasonable doubt the Defendant knew the odometer had been altered for the purpose of deceiving another. The Defendant had ownership, possession, and control of the 2004 Honda. The vehicle was at the Defendant's home. The Defendant had the key to the vehicle and the title. The Defendant had requested the vehicle inspection.

[¶35] The Defendant gave incredible stories to Trooper Sprecher on two occasions when he was trying to justify the mileage discrepancy. He first suggested the mileage recorded on the title was from a reading of the trip odometer with the decimal point added in the wrong place. He later asserted his buyer did not care about the mileage discrepancy because the 2004 Honda eventually would have 26,000 miles. (T1 at 80, ll. 9-12.)

[¶36] Moreover, the Defendant was savy in the used car business, having several years of experience. The Defendant stood to gain financially from the increase in sale price based on the reduced mileage showing on the odometer. The Defendant never revealed the identity of the buyer to law enforcement.

[¶37] While the actual offeree was never identified and there is no direct evidence of the Defendant's intent, "[c]ircumstantial evidence may often be the only method of proving criminal intent." State v. Lovejoy, 464 N.W.2d 386, 389 (N.D. 1990). Given the circumstances and reviewing the evidence in the light most favorable to the State with the benefit of all inferences reasonably to be drawn in its favor, a rational fact finder could have found the Defendant guilty beyond a reasonable doubt. The district court appropriately denied the Defendant's motion for judgment of acquittal.

[¶38] **II. There was competent evidence presented during the trial which could have allowed the jury to draw an inference reasonably tending to prove guilt.**

[¶39] As with the review of a denied motion for judgment of acquittal, the standard of review in determining whether there was sufficient evidence is whether after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, a rational fact finder could find the defendant guilty beyond a reasonable doubt. See State v. Lambert, 539 N.W.2d 288, 289 n.2 (N.D. 1995). "A verdict based on circumstantial evidence carries with it the same presumption of correctness as other verdicts, and will not be disturbed on appeal unless it is unwarranted." State v. Breding, 526 N.W.2d 465, 469 (N.D. 1995).

[¶40] As previously asserted, there was sufficient evidence at the end of the State's case-in-chief to support a guilty verdict. The Defendant, however, emphasizes the testimony of himself and his other witnesses, Smith and Morton. See Appellant's Brief at 1-9 & 14.

[¶41] The Defendant, in essence, asks this Court to re-weigh the evidence and to find his witnesses credible. Determining weight and credibility are the factfinder's duties and the Defendant is not entitled to relief in this Court. The jury determined those issues and appropriately found the Defendant guilty.

[¶42] **III. The State's rebuttal closing argument was within the bounds of fair and reasonable criticism of the evidence and fair and reasonable argument based upon the State's theory of the case and the evidence.**

[¶43] The control of closing arguments is largely within the trial court's discretion and reversal on grounds the prosecutor exceeded the scope of permissible argument is not warranted unless a clear abuse of the trial court's discretion is shown. State v. Ash, 526 N.W.2d 473, 481 (N.D. 1995). To show an abuse of discretion absent a fundamental error, a defendant must demonstrate the prosecution's closing comments were improper and

prejudicial. Id. at 481-82. Closing comments are prejudicial if the prosecution steps "beyond the bounds of any fair and reasonable criticism of the evidence, or any fair and reasonable argument based upon any theory of the case that has support in the evidence." Id. at 482 (citation omitted).

[¶44] In this matter, the State's closing argument was within the bounds of fair and reasonable criticism of the evidence and reasonable argument based upon the State's theory of the case and the evidence. The Defendant's assertion the State, during its rebuttal closing argument, went well beyond the argument made by the Defendant is not accurate. The State did refer to the Defendant's offering of an exhibit regarding a class action against Honda which the Defendant did not expressly mention during his closing. (T2 at 104, ll. 20-24.) However, the brief reference to the exhibit related to the Defendant's credibility and followed the Defendant's allusion during his closing to the jury's ability to view all the exhibits during deliberations. (T2 at 98, ll. 11-12.) The State's rebuttal responded to the Defendant's arguments the Defendant lacked knowledge and intent to deceive. Because the Defendant's arguments were based upon the testimony of the defense witnesses, the State responded by attacking the credibility of those witnesses.

[¶45] The Defendant asserts the State argued the Defendant had the burden of coming forward to prove his innocense. (Appellant's Brief at 48.) The State, however, merely attacked the credibility of Morton by pointing out he waited until months after the vehicle he was going to purchase was seized and months after his long-time friend was charged with a crime before coming forward. (T2 at 109. ll. 17-24.) The Defendant has failed to show the State's closing comments were improper and prejudicial.

[¶46] CONCLUSION

[¶47] The State respectfully requests the Court affirm the district court judgment.

Respectfully submitted this _____ day of July, 2007

Reid Brady, NDID #05696
Assistant State's Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorney for Plaintiff-Appellee

[¶48] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on the 12th day of July, 2007, to: Craig E. Johnson at: cjohnson@jrmlawfirm.com

Reid A. Brady