

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

20080008
20080011

Plaintiff and Appellee,

VS.

Thomas Rivet and Louis Lugert,

Defendants and Appellants.

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Supreme Court No.
20080008
20080011

STATE OF NORTH DAKOTA

District Ct. No.
07-K-00696
07-K-00706

APPELLEE'S BRIEF

Appeal from the December 10, 2007 Criminal Judgment and Commitment
East Central Judicial District
the Honorable Steven L. Marquart Presiding

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[¶3] STATEMENT OF ISSUES

- [¶4] I. Whether the prosecutor properly impeached Defendant Rivet by contrasting Rivet's direct examination testimony with Rivet's post-Miranda statements given previously to Sergeant Nelson
- [¶5] II. Whether the prosecutor was within the bounds of fair and reasonable criticism of the evidence and fair and reasonable argument when he contended Kelly Miller's direct examination testimony was more credible than her cross-examination testimony.
- [¶6] III. Whether there was sufficient evidence from which a reasonable jury could have concluded beyond a reasonable doubt that the Defendants were guilty

[¶7] STATEMENT OF CASE

[¶8] On September 28, 2007, a jury found Defendant Rivet guilty of attempted murder and robbery and Defendant Lugert guilty of accomplice to attempted murder and accomplice to robbery. (Transcript of Jury Trial (“T”) at 561-563.) The district court entered criminal judgments against the Defendants on December 10, 2007. (Defendants’ Appendix (“A”) at 10-12, 71-77.) The Defendants appeal to this Court, asserting they were denied a fair trial due to prosecutorial misconduct and there was not sufficient evidence to support their convictions. The State seeks affirmation of the district court judgments.

[¶9] STATEMENT OF FACTS

[¶10] By an Information, Defendant Rivet was charged with attempted murder and robbery. The State alleged that Defendant Rivet attempted to kill William C. Bluedog by stabbing him with a knife and that he inflicted bodily injury on Bluedog by stabbing him while committing a theft. (A at 6.) Defendant Lugert was charged through an Amended Information with accomplice to attempted murder and accomplice to robbery. (A at 69.) The State alleged that Defendant Lugert induced or aided another to intentionally attempt to kill Bluedog and that Defendant Lugert induced or aided another to intentionally rob Bluedog. (A. at 69.)

[¶11] A jury trial began on September 25, 2007. Bluedog explained that on February 16, 2007, he had been drinking at a bar with his roommate Michael Lundquist. (T at 229, lines (“ll.”) 5-11; T at 260, ll. 7-10.) Shortly after 2:00 a.m., Bluedog and Lundquist returned to their apartment building at 2610 15th Street South in Fargo. (T at 229, ll. 15-20.) While walking up the stairs inside the building, Bluedog and Lundquist met Defendant Rivet and Defendant Lugert. (T at 230, ll. 4-6.) After becoming acquainted, Lundquist invited the

Defendants to come to Bluedog and Lundquist's apartment. (T at 231, ll. 13-20.) The Defendants indicated that they first needed to go to another apartment. (T at 231, ll. 22-25.) The Defendants left and Bluedog and Lundquist went to their own apartment. (T at 232, ll. 1-2.)

[¶12] About fifteen to twenty minutes later, the Defendants went to Bluedog and Lundquist's apartment and were invited in. (T at 232, ll. 3-17.) Kelly Miller, who had an "off and on" dating relationship with Defendant Rivet, also went to Bluedog and Lundquist's apartment. (T at 232, ll. 7-10; T at 322, ll. 20-25; T at 323, ll. 1-3.) A while later, everyone indicated they wanted to go to Wal-Mart. (T at 234, ll. 16-22.) Bluedog subsequently decided to stay home. (T at 234, ll. 22-25; T at 235, ll. 237, ll. 1-3.)

[¶13] After going to Wal-Mart, the Defendants returned, without Lundquist, to Bluedog and Lundquist's apartment. (T at 239, ll. 2-4.) Bluedog asked about Lundquist's whereabouts and the Defendants indicated that Lundquist was passed out in the car. (T at 239, ll. 20-22.) Bluedog sat down in a chair and invited the Defendants to get drinks for themselves from the kitchen. (T at 240, ll. 6-7; T at 241, ll. 5-9.) Defendant Lugert walked to the kitchen. (T at 241, ll. 9-11.)

[¶14] Defendant Lugert then approached Bluedog from behind and began choking Bluedog. (T at 242, ll. 2-22.) Bluedog initially thought Defendant Lugert was joking around. (T at 242, ll. 24-25.) Bluedog could not breathe and became lightheaded. (T at 243, ll. 2-13.) Defendant Lugert told Bluedog to "[j]ust pass out" or "relax" or something to that effect. (T at 243, ll. 9-12.)

[¶15] Bluedog became worried, got up, and grabbed for a knife on a nearby table. (T at 243, ll. 12-22.) Defendant Rivet approached, grabbed Bluedog's arm, and took the knife

from Bluedog. (T at 244, ll. 2-5.) Defendant Rivet then stabbed Bluedog with the knife. (T at 245, ll. 23-25; T at 246, l. 1.) Defendant Lugert kicked Bluedog in the head. (T at 245, l. 25; T at 246, ll. 1-4.) Bluedog passed out. (T at 246, ll. 6-8.) Bluedog went in and out of consciousness. (T at 246, ll. 11-13.) At one point, Bluedog heard rustling in his apartment and a voice indicate "he's still breathing, what should we do?" (T at 246, ll. 16-20.) Bluedog later realized his hands had been tied with a cord and he heard what he believed to be persons searching through a closet inside the apartment. (T at 247, ll. 7-13; T at 249, ll. 5-12.)

[¶16] When Bluedog stopped hearing movement within the apartment and believed the Defendants had left, he managed to free his hands. (T at 249, ll. 19-25; T at 250, ll. 1-4.) Bluedog noticed his computer was missing. (T at 277, ll. 23-25; T at 278, ll. 1-10.) Bluedog got two steak knives from his kitchen, left the apartment, and ran for help. (T at 250, ll. 6-14.) Bluedog went to the apartment of Tiffany Snyder, a woman he knew. (T at 250, ll. 23-25; T at 251, ll. 1-2.) Bluedog told Snyder that he had been stabbed and robbed and to call 9-1-1. (T at 252, ll. 6-8.)

[¶17] After leaving Snyder's apartment, Bluedog looked outside and saw a maroon car backed up to the apartment building door. (T at 252, ll. 15-19.) Bluedog went back to Snyder's apartment and again told her to call 9-1-1. (T at 253, ll. 10-11.) When Bluedog returned to where he had looked outside, the maroon car was gone. (T at 253, ll. 14-19.) Bluedog saw the Defendants outside. (T at 253, ll. 19-20.) Bluedog swore at the Defendants and began chasing them. (T at 254, ll. 11-15.) Bluedog chased the Defendants a short distance and then headed back to his apartment building. (T at 254, ll. 18-25; T at 255, ll. 1-12.)

[¶18] Once inside the building, Bluedog saw Lundquist. (T at 255, ll. 15-20.) After talking briefly with Lundquist, Bluedog went back outside. (T at 256, ll. 1-10.) By that time,

law enforcement and other emergency personnel had arrived. (T at 256, ll. 10-25.) Bluedog was taken to a hospital. (T at 257, ll. 7-8.) Dr. Brian Dees examined Bluedog and discovered nine stab wounds. (T at 56, ll. 24-25; T at 57, ll. 1-3.) Bluedog's wounds included two lacerations to his liver, a laceration to his right kidney, and a laceration to an artery between ribs on his left side. (T at 58, ll. 3-8.) At least one of the wounds was life-threatening. (T at 58, ll. 9-12.) Bluedog had lost two liters of blood into his chest. (T at 61, l. 24.) Dr. Dees successfully operated on Bluedog and Bluedog was released from the hospital after five days. (T at 63, ll. 21-25; T at 64, l. 1.)

[¶19] Fargo Police Sergeant Jason Nelson investigated the case. (T at 71, ll. 14-22.) In the area of the dining room and living room of Bluedog and Lundquist's apartment, Sergeant Nelson saw a large pool of blood which was smeared and appeared to have a handprint and shoeprints within it. (T at 78, ll. 3-14.) There was also an overturned chair and an internet cable which appeared to have blood on it. (T at 78, ll. 13-14; T at 143, ll. 8-13.) Sergeant Nelson subsequently identified the Defendants as suspects. (T at 72, ll. 17-25; T at 73, l. 1.)

[¶20] On the evening of February 16, 2007, Sergeant Nelson found Defendant Rivet riding in a maroon car owned and being driven by Miller. (T at 96, ll. 24-25; T at 97, ll. 1-11.) The back of the driver's seat and clothing found in the car appeared to have blood spots on them. (T at 98, ll. 13-25; T at 99, ll. 1-9.) Defendant Rivet was arrested and advised of the Miranda warning. (T at 103, ll. 11-13.)

[¶21] Defendant Rivet gave voluntary statements to Sergeant Nelson after his arrest. Sergeant Nelson indicated to Defendant Rivet that he was facing a serious charge and this was an opportunity for Defendant Rivet to give his side of the story. (T at Exhibit 30.) When initially asked where he went the previous night, Defendant Rivet said he didn't know and he

was “pretty drunk.” (T at Exhibit 30.) Shortly thereafter, Defendant Rivet asserted he was drinking at a friend’s house “up north.” (T at Exhibit 30.) Defendant Rivet claimed he had been in south Fargo for a second or possibly two seconds when he dropped off a friend near the McDonald’s on South University Drive but he could not recall the friend’s name. (T at 103, ll. 14-25; T at 104, l. 1; T at Exhibit 30.) After making those statements, Defendant Rivet indicated he wished to consult with an attorney, and the interview ended. (T at Exhibit 30.)

[¶22] While in the Cass County Jail, Defendant Rivet engaged in several phone calls. During one call, Defendant Rivet inquired regarding whether Miller had a chance to clean Defendant Rivet's shoes before police seized them. (T at Exhibit 30.) When Miller indicated she had not cleaned the shoes, Defendant Rivet swore. (T at Exhibit 30.) During another call, the theory of self-defense was proposed to Defendant Rivet and Defendant Rivet laughed. (T at Exhibit 30.) At another point, Defendant Rivet indicated that he and Defendant Lugert had their statement ready to go. (T at Exhibit 30.) At another time, Defendant Rivet said to Miller, “You know me, I’m gonna lie about everything . . . that’s just what I do.” (T at Exhibit 30.)

[¶23] Defendant Rivet testified he, Defendant Lugert, and Kelly Miller went to 2610 15th Street South in Fargo to visit Sara Cisneros. (T at 391, ll. 7-25; T at 392, ll. 1-2.) In the apartment building, they met Bluedog and Lundquist who invited them to Bluedog and Lundquist’s apartment. (T at 392, ll. 16-21; T at 393, ll. 12-14.) After a while, the Defendants went to Bluedog and Lundquist’s apartment. (T at 394, ll. 9-12.) The Defendants, Bluedog, Lundquist, Miller, and Courtney Poitra decided to go to Wal-Mart, however, Bluedog ultimately did not go. (T at 396, l. 20; T at 398, ll. 18-24; T at 399, ll. 11-14.) After returning from Wal-Mart without Lundquist, the Defendants went back to Bluedog and Lundquist’s apartment. (T at 400, ll. 13-19; T at 401, ll. 4-7.)

[¶24] Defendant Rivet claimed Bluedog snapped and, while sitting in a chair, grabbed Defendant Lugert's wrist, twisted it, and forced Lugert to his knees. (T at 405, ll. 1-2; T at 406, ll. 1-12.) Defendant Rivet further claimed: Bluedog grabbed a steakknife from a nearby plate and indicated he was going to kill the Defendants; Defendant Lugert cried for help; Defendant Rivet warned Bluedog to drop his knife; Bluedog flailed and tried to stab Defendant Lugert; Defendant Rivet stepped in and twice stabbed Bluedog to "stun him;" Bluedog seemed unphased and "almost more psychotic;" Defendant Rivet was uncertain how many additional times he stabbed Bluedog but admitted he caused all of the nine stab wounds Bluedog suffered; Bluedog's chair tipped over and Bluedog fell to the ground, dropping his knife; because Bluedog was still struggling, Defendant Rivet found a cord and tied Bluedog's hands behind his back; the Defendants left the apartment to get help and tried to decide where to go; and Bluedog came out and began chasing them. (T at 407-417; T at 426; ll. 23-25; T at 439, ll. 12-16.) Defendant Rivet claimed that after running from the scene, he desired to "go back and clear [his] name" but did not because he thought he heard police dogs. (T at 419, ll. 2-6.)

[¶25] During direct-examination, Defendant Rivet acknowledged he had a discussion with Sergeant Nelson. Defendant Rivet stated that he had told Sergeant Nelson that Rivet was at McDonald's on the south side at one point during the night and that he had eaten a couple cheeseburgers there. (T at 422, ll. 17-25; T at 423, ll. 1-2.)

[¶26] On cross-examination, the Prosecutor inquired regarding Defendant Rivet's previous statements to Sergeant Nelson:

Prosecutor:	You had an opportunity to clear your name, didn't you?
Defendant Rivet:	Yes.
Prosecutor:	You were picked up by police?
Defendant Rivet:	Yes.

Prosecutor: And you were given an opportunity to give a statement, weren't you?

Defendant Rivet: Yes.

Prosecutor: Did you clear your name at that time?

Defendant Rivet: I was informed through many years of experience and police office [sic] movies and everything else get a lawyer first. You talk directly to a lawyer. You do not talk to anybody else. You do not talk to press. You go directly with a lawyer. Let the lawyer clear your name.

Prosecutor: Well, Mr. Rivet, that's not how I recall it. You recall having an interview with Mr. Nelson, don't you?

Defendant Rivet: And I said I went to South Fargo Wal-Mart – or, excuse me, South Fargo by McDonalds. I don't remember anything about the north and I want a lawyer. That consisted of my statement. I want a lawyer.

Prosecutor: Perhaps, Mr. Rivet, if we play the interview for you you'll recall what you said to Mr. Nelson.

(State's Exhibit 30 was played for the jury.)

Prosecutor: Mr. Rivet, it didn't sound like you took the opportunity to clear your name at that time. As a matter of fact, it sounded like you were trying to create an alibi by saying you were up north.

(T at 447, ll. 6-25; T at 448, ll. 1-7.)

[¶27] Defendant Lugert testified to a version of events similar to Defendant Rivet's version. Regarding the events at Bluedog and Lundquist's apartment after the trip to Wal-Mart, Defendant Lugert claimed: Bluedog grabbed Defendant Lugert's hand and twisted it, pulling Lugert downward; Bluedog got a knife from a nearby plate; Bluedog was slashing at Defendant Rivet prior to slashing at Defendant Lugert; Defendant Rivet initially stabbed Bluedog twice; Bluedog lunged at Defendant Lugert; Defendant Rivet then repeatedly stabbed Bluedog; Defendant Lugert was able to break free of Bluedog's grasp; and Bluedog finally fell out of his chair. (T at 472, ll. 1-22; T at 476, ll. 24-25; T at 477; T at 478, ll. 1-12.) Defendant Lugert indicated he was arrested a few days later. (T at 484, ll. 14-15.)

[¶28] Sara Cisneros indicated that for about fifteen to twenty minutes during the early morning of February 16, 2007, the Defendants, Courtney Poitra, and Kelly Miller visited Cisneros' apartment at 2610 15th Street South in Fargo. (T at 352, ll. 12-25; T at 353, ll. 1-2.) Cisneros later heard news reports relating to the stabbing of Bluedog and called Defendant Rivet. (T at 355, ll. 14-18.) After driving to Burlington Coat Factory and picking up Defendant Rivet, Cisneros asked Defendant Rivet to explain what had happened. (T at 355, l. 25; T at 355, ll. 1-5.) Cisneros explained that Defendant Rivet said, "[y]our boy had to be a hero last night" and "I got him in all of the major places." (T at 356, ll. 6-12.)

[¶29] Kelly Miller initially explained: after the trip to Wal-Mart, she returned with the Defendants to the apartment building where Bluedog and Lundquist lived; she backed her car up to the doorway of the building because Defendant Lugert told her to do so; she waited in her car with Courtney Poitra while the Defendants went to Bluedog and Lundquist's apartment; after fifteen or twenty minutes, Defendant Lugert came out of the building carrying a computer; she went up to Bluedog's apartment and saw Bluedog bleeding and laying on the floor; she and Defendant Lugert wiped fingerprints off surfaces in Bluedog's apartment; she and Defendant Lugert gathered items from the apartment; she advised Defendant Rivet she would pick him up in the front of the building; she and Defendant Lugert brought items to her car; Defendant Rivet phoned Miller at about 5:30 a.m.; Miller subsequently picked up Defendant Rivet; the Defendants inquired about the items taken from Bluedog and Lundquist's apartment; and Miller told the Defendants that the items were gone. (T at 315-322.)

[¶30] On cross-examination by Defendant Rivet's attorney, Miller changed her testimony. Miller indicated that upon returning to the apartment building after the trip to Wal-

Mart, she had merely knocked on Cisnero's apartment door, received no answer, and left and did not see anyone steal any items. (T at 333, ll.19-25; T at 334, ll. 1-14.)

[¶31] Courtney Poitra indicated she went with the Defendants and Miller to Wal-Mart and upon returning to the apartment building, waited in Miller's vehicle. (T at 343, ll. 1-16.) Poitra explained that the Defendants went inside the building and Defendant Lugert returned to the vehicle, carrying a computer. (T at 343, ll. 17-25; T at 344, ll. 1-11.)

[¶32] During closing arguments, the prosecutor contended Kelly Miller's direct examination testimony was credible and her conflicting cross-examination testimony was not credible. The prosecutor emphasized the difficult situation and pressure Miller faced:

Kelly's testifying today I would submit is truthful on direct. She got scared. Mr. Fisher got up and he questioned her. She sees her ex-fiancé starring [sic] at her, on again, off again relationship. He's starring [sic] at her and suddenly her testimony changes. You saw how her testimony changed. She was being truthful on direct. As soon as Mr. Fisher put her under pressure, she began to lie.

...

Kelly's change of heart. She came in here, folks. She told the truth on direct. When Mr. Fisher got up and cross-examined her, she in that instant had to choose between love and fear and what she was getting in exchange for her testimony. She chose love and fear. She chose her ex-fiancé. You saw her. She had a difficult time testifying on direct. It was hard telling you what she did with her ex-fiancé and Mr. Lugert that night. It was hard. And when she was pressed, she changed.

(T at 519, ll. 17-24; T at 552, ll. 1-9.)

[¶33] LAW AND ARGUMENT

[¶34] I. The prosecutor properly impeached Defendant Rivet by contrasting Rivet's direct examination testimony with Rivet's post-Miranda statements given previously to Sergeant Nelson

[¶35] The Defendants contend the prosecutor improperly commented on Defendant Rivet's invocation of his right to remain silent and to consult with an attorney. Because the

Defendants' counsel failed to object to the alleged misconduct, review is limited to determining whether the prosecutor's conduct prejudicially affected the Defendants' substantial rights, so as to deprive them of a fair trial. See State v. Burke, 2000 ND 25, ¶ 22, 606 N.W.2d 108. A prosecutor's use of a defendant's post-arrest silence after receiving Miranda warnings to impeach a defendant's exculpatory account, told for the first time at trial, violates the defendant's right to due process. See id. at ¶ 29.

[36] In this case, the prosecutor properly impeached Defendant Rivet's direct examination story with Defendant Rivet's prior inconsistent statements given to Sergeant Nelson. Defendant Rivet testified he stabbed Bluedog in an attempt to defend Defendant Lugert. When speaking with Sergeant Nelson, however, Defendant Rivet initially indicated he was drunk and did not know where he had been during the night of the stabbing and subsequently indicated he had only been in south Fargo, the location of the stabbing, for a few seconds while dropping off a friend.

[¶37] The Defendants assert "the prosecutor's comments implied adverse inference from Rivet's silence." Brief of Appellant Rivet at ¶ 35. Defendant Rivet tried to claim during cross-examination that he had merely invoked his rights and had not made any statements. The evidence, however, showed that Defendant Rivet gave the statements to Sergeant Nelson before invoking his right to an attorney. (T at Exhibit 30.) The prosecutor's cross-examination questions focused on Defendant Rivet's statements prior to invoking his rights. The prosecutor expressly referenced Defendant Rivet's prior statements as "trying to create an alibi by saying you were up north."

[¶38] Rule 613, N.D.R.Evid., permits using a witness's prior statements to impeach his testimony. The prosecutor's questions were a proper means of using Defendant Rivet's prior inconsistent statements to impeach his testimony. See State v. Burke, 2000 ND 25, at ¶ 30 (concluding the prosecutor appropriately used the defendant's prior inconsistent statements for impeachment where "the defendant did not remain silent after arrest" and made such inconsistent statements).

[¶39] II. **The prosecutor was within the bounds of fair and reasonable criticism of the evidence and fair and reasonable argument when he contended Kelly Miller's direct examination testimony was more credible than her cross-examination testimony.**

[¶40] The Defendants allege the prosecutor vouched for the credibility of Kelly Miller during closing argument. 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. See 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 unfairly prejudicial. See State v. Ebach, 1999 ND 5, ¶ 5, 589 N.W.2d 566. Closing comments are unfairly 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." State v. Ash, at 482 (citation omitted).

[¶41] In this matter, the prosecutor's closing argument was within the bounds of fair and reasonable criticism of the evidence and reasonable argument based upon the prosecutor's theory of the case and the evidence. The Defendants' contention the prosecutor

vouched for the credibility of Miller is without merit. The prosecutor argued Miller's testimony on direct examination was credible and her contradictory cross-examination testimony was not incredible. The prosecutor pointed out the possible motivation for Miller to change her testimony was Miller's recurring relationship with Defendant Rivet and the pressure Miller faced while testifying in the trial. The prosecutor made no personal assurances regarding credibility and did not suggest the jurors should believe him because he had information unknown to the jury.

[¶42] The Defendant has failed to show the prosecutor's closing comments were improper and prejudicial. The prosecutor's arguments were based on the testimony and in-court observations that the jurors could hear and see. The prosecutor's comments constituted appropriate closing argument.

[¶43] **III. There was sufficient evidence from which a reasonable jury could have concluded beyond a reasonable doubt that the Defendants were guilty.**

[¶44] The Defendants argue there was insufficient evidence presented to support their convictions. 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). This Court has explained:

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.

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

[¶45] Under N.D.C.C. § 12.1-16-01(1)(a), a person is guilty of murder if the person “intentionally or knowingly causes the death of another human being.” A person is guilty of attempt if, “acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact constitutes a substantial step toward the commission of the crime.” See N.D.C.C. § 12.1-06-01(1). A person may be convicted as an accomplice if “with intent that an offense be committed, he commands, induces, procures or aids the other to commit it.” See N.D.C.C. § 12.1-03-01(1)(b).

[¶46] Under N.D.C.C. § 12.1-22-01(1), a person is guilty of robbery if “in the course of committing a theft, he inflicts or attempts to inflict bodily injury upon another or threatens or menaces another with imminent bodily injury.” An act is deemed “‘in the course of committing a theft’ if it occurs in an attempt to commit theft, whether or not the theft is successfully completed[.]” See N.D.C.C. § 12.1-22-01(3)(a).

[¶47] In the instant case, there was ample evidence supporting Defendant Rivet’s conviction for attempted murder and Defendant Lugert’s conviction for accomplice to attempted murder. Bluedog indicated that Defendant Lugert attacked Bluedog from behind, putting Bluedog in a choke hold and that Defendant Rivet stabbed Bluedog after Defendant Lugert initiated the attack. Bluedog further explained that Defendant Lugert kicked Bluedog in the head. Dr. Dees indicated that Bluedog suffered nine stab wounds and that at least one of the wounds was life-threatening. Cisneros relayed Defendant Rivet’s admission that he “got [Bluedog] in all the major places.” Under such circumstances, the jury reasonably concluded that the Defendants engaged in the attack with intent to kill Bluedog.

[¶48] There was likewise ample evidence supporting Defendant Rivet's conviction for robbery and Defendant Lugert's conviction for accomplice to robbery. Bluedog explained that after being attacked, he was tied up and he heard persons searching through his apartment. Defendant Rivet admitted he tied Bluedog's hands behind his back. Bluedog explained that he saw that his computer was missing right after he regained consciousness and managed to untie himself. Miller explained, on direct examination, that Defendant Lugert told her to back her car up to the apartment building door and both Defendants then went inside. Both Poitra and Miller, initially, indicated that Defendant Lugert carried a computer from the apartment building to Miller's car. Miller indicated on direct examination that the Defendants inquired about the items stolen from Bluedog and Lundquist's apartment and Miller told them that the items were gone. Given the facts, it was reasonable for the jury to conclude the Defendants inflicted injury upon Bluedog during the course of a theft.

[¶49] Although the Defendants emphasize their testimony that they acted in self-defense and did not steal any items, the jury was not obligated to accept the Defendants' story. See City of Jamestown v. Neumiller, 2000 ND 11, ¶ 12, 604 N.W.2d 441. This Court has explained "[e]ven if there is conflicting testimony or other explanations of the evidence, a jury may reach a guilty verdict beyond a reasonable doubt." State v. Muhle, 2007 ND 132, ¶ 47, 737 N.W.2d 647. Reviewing the evidence in the light most favorable to the State and giving the State the benefit of all inferences reasonably to be drawn in its favor, a rational fact finder could find the Defendants guilty of the charges beyond a reasonable doubt.

[¶50] CONCLUSION

[¶51] The State respectfully requests the Court affirm the district court judgments.

Respectfully submitted this 21st day of May, 2008

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[¶52] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on the 21st day of May, 2008 to: Mark Blumer at: mark_myhrelaw@qwestoffice.net

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