

ORIGINAL

20080253

IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 20080253
	)	
Plaintiff/Appellee	)	
	)	Burleigh Co. No. 08-07-K-0021
v.	)	
	)	
David Kunze,	)	
	)	
Defendant/Appellant	)	

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JAN 30 2008

STATE OF NORTH DAKOTA

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BRIEF FOR APPELLANT

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Appeal Taken from Judgment of Conviction  
dated, September 26, 2008  
Burleigh County District Court Case No. 08-07-K-0021  
South Central Judicial District  
The Honorable Gail Hagerty, Presiding

Submitted by:

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## **ISSUE FOR REVIEW**

1. Whether the evidence was sufficient to sustain the jury's verdict of guilty.

## STATEMENT OF THE CASE

This is an appeal in a criminal case from a judgment of conviction for the offense of contact by bodily fluids. See, Criminal Judgment, Appendix to the Briefs, pp. 8-9. The complaint, which alleged the commission of the offense of contact by bodily fluids, a violation of §12.1-17-11 North Dakota Century Code, on or about March 16, 2006, was filed with the Burleigh County Clerk of District Court on January 4, 2007. See, Criminal Complaint, Appendix to the Briefs, p. 6; Clerks's Register of Actions, Appendix to the Briefs, pp. 3-5. Kunze's first attorney filed a motion for psychological evaluation to determine whether Kunze had a defense based upon lack of criminal responsibility, and whether Kunze lacked competency to proceed. The trial court issued an order for the evaluation, but it was never done. Kunze apparently had not ever agreed to have such evaluation, which caused severe disagreement between Kunze and his attorney. Eventually, on February 13, 2008, Kunze's first attorney was allowed to withdraw and new defense counsel was appointed to represent Kunze. Kunze then asked the court to rescind its order for evaluation, and the court granted that request over the objection of the State. The Defendant filed a pretrial motion for dismissal on the ground the State had not preserved the surveillance video tape that would have recorded Defendant's movements just prior to and after the alleged incident. That motion was denied by the trial court, although the court agreed to give an appropriate jury instruction regarding failure to preserve evidence. The charging document upon which this matter went to trial was a second amended information. See Second Amended Information, Appendix to the Briefs, p. 7. Defendant was required to wear prison clothes at trial

and remain shackled hand and foot because he was deemed to be a security risk. The matter was tried on June 20, 2008, and a twelve-person jury rendered a verdict of guilty for the offense of contact by bodily fluids, as charged in the second amended information. On September 19, 2008, Kunze was found to a dangerous special offender, and was sentenced to serve a seven-year sentence, consecutive to any other sentences Kunze was serving or would have to serve. See Criminal Judgment, Appendix to the Briefs, pp. 8-9. Defendant filed his own notice of appeal on October 2, 2008, followed by a second notice of appeal filed by his court appointed counsel on the appeal. See Notice of Appeal, Notice of Appeal and Notice of Filing of Notice of Appeal, Appendix to the Briefs, pp. 10, 11, and 12.

### **STATEMENT OF FACTS**

The State presented three witnesses in its case in chief, those being Jason Bankston, the alleged victim, Randy Smid, and Steve Foster. Each gave testimony that was remarkably different, and directly contradictory, from the testimony of the others on critical factual issues.

**Bankston's Story.** Bankston was a penitentiary guard who was working in the area of the alleged offense at the time the offense was alleged to have occurred. (Trial transcript, pp. 16-82-84) According to Bankston, the incident occurred at approximately 7:10 a.m. on March 16, 2006. (Trial Transcript, p. 29, lines 12-13) According to Bankston, he had just come over to where Randy Smid, another guard, was located to see if Smid needed assistance in dealing with Kunze. (Trial Transcript, p. 37, lines 19-21) Bankston testified that he was at the tier gate, directly behind

Smid who was at the inner cuff gate. (Trial Transcript, p. 38, lines 2-5; p. 48, lines 4-7) According to Bankston, he then observed Kunze rapidly approach the cuff gate while making a gargling/spitting sound, and Kunze then appeared to spit at Smid. (Trial Transcript, p. 38, lines 8-12) According to Bankston, he and Smid rapidly backed up get away from the gate area. (Trial Transcript, p. 38, lines 17-19) Bankston testified that the case manager, the State's third witness, Steve Foster, did not arrive until 8 o'clock. (Trial Transcript, p. 49, lines 11-18)

**Smid's story.** The State's second witness was Randy Smid, the alleged victim. Smid was working as a guard at the penitentiary on the day and time of the alleged offense. (Trial Transcript, pp. 56, lines 13-25; p. 59, line 13) According to Smid, he was having some difficulty with Kunze. (Trial Transcript, p. 65, lines 1-12) According to Smid, Kunze was already at the gate, and then merely approached a little nearer to Smid and spit at Smid. (Trial Transcript, p. 65, lines 8-13) According to Smid, he and Kunze were merely inches apart when this happened. (Trial Transcript, p. 66, lines 1-14) According to Smid, he had no idea that Kunze was going to spit at him. He just thought Kunze was going to ask him some more questions. (Trial Transcript, p. 66, line 22 to p. 67, line 1; p. 13-22) Smid testified that he immediately rushed into the office of the case manager, Steve Foster, to report what happened, and Foster got Kunze to go back to his cell. (Trial Transcript, p. 68, lines 4-25; p. 79, lines 16-25) Smid testified that he went into Foster's office alone. (Trial Transcript, p. 69, lines 1-2) Smid admitted that he had testified in earlier proceedings on March 12, 2007, that there were no other officers present at the time of the incident. (Trial Transcript, p. 74, lines 1-21; p. 77, lines 22; p. 80, lines 4-9)

According to Smid, he only found out later that Bankston was supposedly present, but only because Bankston said he was. (Trial Transcript, p. 78, lines 16-24)

**Foster's story.** The state's third witness, Steve Foster, testified that he was a case manager at the penitentiary on March 16, 2006. (Trial Transcript, p. 83, lines 6-8) According to Foster, he began work at 7 o'clock on March 16, and would have been in the administrative segregation unit at about 7:10. (Trial Transcript, p. 84, lines 2-14) According to Foster, Smid and Kunze had been engaged in an argument when he heard Smid say he had been spit upon. According to Foster, Smid came into his office seconds later. (Trial Transcript, p. 87, lines 1-13) Foster testified that he immediately reviewed the surveillance video, but it did not show anything. (Trial Transcript, p. 88, line 25, to p. 89, line 2; p. 89, line 20 to p. 90, line 10) On cross examination Foster testified that he had filed his first report of the incident on April 17, 2007, and Foster had reported that Smid and Bankston, together, had come into his office to report the incident. (Trial Transcript, p. 98, line 16 to p. 100, line 12)

The penitentiary had a protocol for collection and preservation of evidence for incidents such as they alleged here, but they did not use it. (Trial Transcript, p. 51, lines 3-16; p. 69, lines 6-25) The surveillance video was not kept for evidence, and no one made an attempt to keep and analyze Smid's uniform.

Kunze moved for a judgment of acquittal under the authority of Rule 29, North Dakota Rules of Criminal Procedure at the close of the state's case based upon the serious, irreconcilable disparities in the testimonies of Bankston, Smid, and Foster. The motion was denied. (Trial Transcript, pp. 108-109) Kunze then testified in his own defense that, in essence, he had not spit on Smid. (Trial Transcript, pp.



## ARGUMENTS

### **I. Kunze's conviction should be reversed because the evidence is insufficient to sustain the guilty verdict.**

"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. Schmeets*, 2007 ND 197, ¶8, 742 N.W.2d 513, *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 guilt when viewed in the light most favorable to the verdict. *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." In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses. *State v. Klose*, 2003 ND 39, ¶19, 657 N.W.2d 276, *State v. Noorlun*, 2005 N.D. 189 705 N.W.2d 819) [¶20]

Kunze is keenly aware of the burden he must meet in persuading this court to reverse his conviction for want of evidence. Nevertheless, Kunze argues that despite the standards of review, there must be a line drawn when the evidence is so contradictory, so irreconcilable, on major, critical points of evidence, that a conviction

must be reversed because no jury could, based upon that evidence, reasonably and rationally find a defendant guilty beyond a reasonable doubt. Kunze argues that this is such a case.

Kunze asks this court, in reviewing his claim of insufficiency of the evidence, to analyze the testimonies of the three State witnesses . If Bankston is truthful in his account, then Smid cannot be truthful when he testified that he never realized another officer was present at the time of the incident, nor is Foster truthful about hearing the incident and about having Smid and Bankston immediately coming into his office together to report the incident. Bankston said Foster did not start working until 8:00 o'clock, well after the incident happened. Nor is Smid truthful when he said he was extremely close to Kunze and the Kunze spit on him without any warning, because Bankston testified that he saw Kunze move quickly towards the gate area while making a gargling/spitting sound.

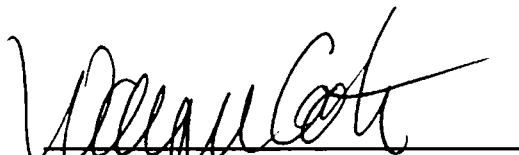
If Smid is truthful, then Bankston, contrary to his testimony, could not have been anywhere near the area where the incident occurred at the time it occurred and could not have witnessed the incident. Moreover, Foster could not have been truthful when he testified that both Smid and Bankston came into his office together to report the incident immediately after it occurred.

If Foster is truthful, then Smid certainly was not, because they directly contradicted each other about the presence and participation of Bankston. Nor could Bankston be truthful, because Bankston testified Foster was not even there yet.

Kunze argues that this is definitely not a case of picking away at inconsistencies in minor, non-critical factual points of the case. Rather, the direct

contradictions here go to the heart of the case and cannot be explained as mere inconsistencies or rationalized in some manner. Kunze argues that no factfinder, acting rationally and reasonably, could have found him guilty beyond a reasonable doubt based upon this evidence. The only evidence which could have meant anything would have been the destroyed video and the collection, preservation and analysis of the alleged spit on Smid and Smid's uniform, but the state deliberately chose not to follow its own protocol to do this. Given the unreasonable and irreconcilable testimonies in the record and the lack of any corroborating physical evidence, Kunze argues that he has met his burden of persuasion here on appeal, and that this Court should reverse his conviction on the ground of insufficiency of the evidence.

Dated: 30 January 2009.



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