

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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AUGUST 20, 2010
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20100186
)	
vs.)	District Court No. 09-09-K-03162
)	
John Ross Berglund,)	
)	
Defendant/Appellant.)	
)	

Brief of Defendant/Appellant John Ross Berglund

Appeal from Criminal Judgment entered
June 25, 2010, in District Court, County of Cass,
State of North Dakota, The Honorable Wickham Corwin

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¶3 Statement of the Issue

Was the evidence sufficient to sustain the conviction?

¶4 Statement of the Case

¶5 This is an appeal by John Ross Berglund (hereinafter Berglund) from the Criminal Judgment and Commitment entered by the Honorable Wickham Corwin, East Central Judicial District Court, on June 25, 2010. (App. 19; C. 35).¹ Berglund was charged with Violation of a Domestic Violence Protection Order as a Second or Subsequent Offense, pursuant to **N.D.C.C. §14-07.1-06 and §12.1-32-01(4)**, a Class C Felony, by Information dated September 11, 2009. (App. 6; C. 1). The case was tried as a bench trial on June 17, 2010. The Court returned a verdict of guilty. (T. 86-89). Sentencing occurred on June 17, 2010. The Court sentenced Berglund to one year in the custody of the North Dakota Department of Corrections and Rehabilitation, first to serve 30 days in the Cass County jail, and the balance suspended for a period of one year of supervised probation following incarceration. Fines and fees totaled \$500.00. (App. 19; C. 35). The District Court entered an Order for Release Pending Appeal, which stayed the jail portion of the sentence pending the outcome of this appeal. (App. 25; C. 40).

¹In the brief, the entries on the Clerk's Case Summary will be abbreviated C, the Appendix App, and the Trial Transcript T.

¶6 Statement of the Facts

¶7 It is not contested that a Domestic Violence Protection Order was entered on March 23, 2009, after a hearing in Ransom County District Court, in favor of Shalee Lyn Ostby and against Berglund, The Honorable Daniel D. Narum presiding, file number 37-09-R-00008. (Hereinafter the Order). The Order contained several provisions, including language directed to Berglund that: "[Y]ou are ordered to refrain from any domestic violence or any direct or indirect contact directed at Petitioner...." A redacted version of the Order was received in evidence as State's Exhibit 1. (T. 7; App. 7; C. 29).

¶8 It is also not contested that Berglund pleaded guilty to the charge of Violation of a Domestic Violence Protection Order on August 12, 2009, in Ransom County District Court, The Honorable Daniel D. Narum presiding, file number 37-09-K-00065/001. The Complaint and Criminal Judgment in that case were received as State's Exhibits 2 and 3. (T. 7; App. 14 & 16; C. 30 & 31).

¶9 This case was distilled to the allegation that Berglund sent messages using Blackberry Messenger to Ms. Ostby specifically on August 20, 2009, thereby violating the Order. Four witnesses testified, Officer Dean Jordheim, Detective Paul Holte, Shalee Ostby, and Berglund. Much of the testimony of the State's witnesses is disputed by Berglund.

¶10 Ms. Ostby went to the police station in Fargo, North Dakota to report a violation of the Order. She met with Fargo Police Officer Dean Jordheim. (T. 8-10). Officer Jordheim confirmed the Order and that Berglund was prohibited from having contact with Ms. Ostby. (T. 10, L. 14). Over multiple objections to hearsay, Officer

Jordheim eventually revealed Ms. Ostby told him that Berglund was contacting her via Blackberry Messenger and that she knew the messages were from him because of a "pin number." Ms. Ostby provided a pin number to Officer Jordheim and he recorded it in his report. (T. 13, L. 12). While they were together, Ms. Ostby received yet another message and she said it was "from John" and showed the screen to the officer with that pin number. (T. 13, L. 20-21). Ms. Ostby then gave the officer a telephone number which she said was Berglund's number. (T. 14-15). The officer called and talked to Berglund, and asked him if he had had any contact with Ms. Ostby that day by email, phone, or Blackberry Messenger, and he said no. (T. 15, L. 10-13). The officer admitted he had no personal knowledge that the "pin number" provided to him by Ostby belonged to Berglund. (T. 15-16). The officer also admitted that he had not obtained phone records for either Berglund or Ms. Ostby. (T. 16). The officer asked Berglund specifically whether he had had contact with Ostby that day, August 20, 2009. (T. 18).

¶11 Detective Paul Holte of the Fargo Police Department testified that the case had been provided to him for follow-up. (T. 19). After reviewing the initial report, Detective Holte called Berglund. (T. 21). Detective Holte had a telephone conversation with Berglund, and started by explaining that he was calling about the Order and Berglund acknowledged the Order and that he could be arrested if he violated the Order. (T. 22). Berglund was asked about the earlier call from the other officer and Detective Holte's memory was that Berglund said he did not remember that conversation. (T. 22, L. 5-6). Detective Holte testified he then asked Berglund a number of questions about his Blackberry account, including the pin number, and

that Berglund then admitted that he had attempted to make contact with Ostby on August 20, 2009, using his Blackberry (T. 24-25).

¶12 Detective Holte acknowledged that he could have subpoenaed Berglund's phone records, but he did not. He said he did not because Berglund admitted or confessed to the violation during their phone conversation. (T. 29). When Holte asked about the specific pin number, Berglund did not remember if that was his pin number or not. (T. 29, L. 18-19). Detective Holte admitted that during their conversation he made Berglund think that he had his phone records right in front of him, which was not true. (T. 30-31). Berglund did tell the detective that he and Ostby had gotten back together after the Order was in effect. (T. 32). Detective Holte admitted that his report did not state that Berglund had admitted to contacting Ostby on August 20, 2009, or that Berglund admitted to sending Blackberry "friend requests" to Ms. Ostby. (T. 33). The report also indicated that Berglund told the detective that Ms. Ostby had contacted him on a regular basis since the Order was entered and that he was simply responding to her. (T. 34, L. 5-8). Detective Holte never did obtain any phone records for either Berglund or Ostby, and he did not interview Ms. Ostby. (T. 34-35). Detective Holte reiterated that the context of his conversation was about the alleged contact on August 20, 2009, and that he made it "very clear" to Berglund that is what they were talking about. (T. 35, L. 20-21)(Note: there is no indication anywhere in the record that Holte's actual conversation with Berglund was mechanically recorded).

¶13 Berglund testified that he did not admit to Detective Holte that he had contacted Ms. Ostby on August 20, 2009, and that he did not contact her by

Blackberry or any other means on August 20, 2009. (T. 41). He did admit to other contacts with Ms. Ostby and that he had been prosecuted for violating the Order. (T. 41). Despite vigorous cross-examination, he did not waiver in his denials. (T. 42-51).

¶14 Ms. Ostby testified that Berglund had been trying to contact her via Blackberry Messenger, and that when a person makes a "friend request" they can add a message. On August 20, 2009, she stated that Berglund had sent twenty-two such requests in a twenty-four hour period. (T. 53-54). His messages were to the effect of: "Why don't you talk to me? Why are you doing this to me? Stop being immature and just talk to me." (T. 54, L. 6-8). She stated that when she was at the police station making her report on August 20, 2009, Berglund sent yet another message to her and she showed that to the officer. (T. 55, L. 1-4). The officer called Berglund in her presence to ask about the contacts. (T. 55). Ms. Ostby admitted to calling Berglund twenty-eight times between August 4th and 8th, 2009, based upon phone records which were shown to her during her testimony. (T. 63, L. 5-12)(Note: there is no indication that the records shown to Ms. Ostby were ever marked, offered or received as an exhibit in this case). She agreed that there were no calls from Berglund listed on the records after August 8, 2009. (T. 64). She then indicated that Berglund would block his calls and they would come up as an unavailable or unknown number and that the Blackberry messages would not show on her phone bill. (T. 75). However, she had to admit that his calls did show up during the period August 4th through August 8th on the records. (T. 78).

¶15 Argument²

¶16 The evidence was insufficient to sustain the conviction.

¶17 Berglund's position is that the State simply did not prove that he sent the alleged electronic messages to Ms. Ostby on August 20, 2009, contrary to the testimony of all three witnesses for the State.

¶18 Trial Counsel for Berglund 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. The trial court denied the motion. (T. 38-40). This Court discussed the issue of the sufficiency of the evidence in ***State v. Yineman*, 2002 ND 145, 651 N.W.2d 648**. Berglund did not need to make a motion for a judgment of acquittal pursuant to **N.D.R.Crim. P. 29(a)** to preserve this issue on appeal, because the case was tried to the court without a jury. ***Yineman* at ¶7**.

¶19 This Court recently stated the standard of review which applies to this appeal in ***State v. Corman*, 2009 ND 85, 765 N.W.2d 530**:

[¶8] We have previously discussed our standard of review for sufficiency of the evidence challenges:

"In an appeal challenging the sufficiency of the evidence, we look only to the evidence and reasonable inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing the

² In filing this brief and making the arguments herein, the undersigned attorney is mindful of his obligations as a State Public Defender appointed to represent an indigent defendant on this appeal. **See *State v. Vondal*, 1998 ND 188, ¶¶ 27-29, 585 N.W.2d 129, citing *State v. Lewis*, 291 N.W.2d 735 (N.D. 1980).**

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. Noorlun*, 2005 ND 189, ¶20, 705 N.W.2d 819** (citations omitted); ***see also State v. Myers*, 2006 ND 242, ¶ 19, 724 N.W.2d 168**. Our standard of review for a criminal trial before the district court without a jury is the same as a trial with a jury. ***State v. Brossart*, 2007 ND 39, ¶ 6, 729 N.W.2d 137; *State v. Brandner*, 551 N.W.2d 284, 286 (N.D. 1996)**.

¶20 Based upon this standard, Berglund believes that the State did not prove that he committed the charged offense. Berglund asserts that there are many significant problems with the proof and that, taken together, the evidence of record is insufficient as to that proof.

¶21 The State did not obtain any records to corroborate the testimony. Berglund pointed out that the police had obtained records of transmissions on other occasions, but did not as to August 20, 2009. Berglund believes it would have been

a simple matter for the police to obtain either his telephone records or Ms. Ostby's telephone records to show that the alleged messages originated with his Blackberry device. Detective Holte explained that, because Berglund admitted to trying to contact Ostby on August 20, 2009, so he saw no need to go any further with the investigation. (T. 29). However, Berglund denies that he made any such admission; he admits having contact on other occasions, but not on the day in question. Ms. Ostby acknowledged that there were no contacts from Berglund documented in the phones records she was shown during the trial after August 8, 2009. (T. 64). The assertions that the contacts originated from Berglund using his Blackberry were made solely by Ms. Ostby, other than the admissions claimed to have been made by Berglund, which he denied. Berglund steadfastly denied making the contacts and he denied he ever admitted to Detective Holte that he made any such contacts. (T. 41). Holte acknowledged that his report did not specify that Berglund had admitted to contacting Ostby on August 20, 2009, using his Blackberry. (T. 33). The conversations between Berglund and the officers were not recorded in any manner, so credibility is at issue. However, the trial court specifically found the testimony of the State's witnesses more credible. (T. 88). Based upon the evidence of record, Berglund believes that was not a rational conclusion. Ostby was certainly a biased witness, and she admitted to having multiple contacts with Berglund despite the Order. (T. 63). Detective Holte's report did not support his trial testimony; he admitted his report did not document the specific admission claimed. The other officer's testimony was based solely upon Ms. Ostby's assertions. To do a complete investigation, Detective Holte could have and should have subpoenaed

Berglund's Blackberry records and he could have and should have obtained a search warrant to seize and analyze the contents of Berglund's Blackberry. The burden of proof was on the State, and it failed to meet that burden.

¶22 Berglund feels that it was not rational for the trial court to have found that the State proved its case beyond a reasonable doubt, giving the State's evidence the benefit of all reasonable inferences. Berglund admitted that he had contact with Ostby in violation of the Order, but he had been prosecuted for those contacts, and that he did not have any contact with Ostby on August 20, 2009, which is what the State was required to prove. Although the State alleged that the crime happened "on or about" August 20, 2009, the State limited its case to events on August 20, 2009 and only August 20, 2009. Ordinarily the State need not prove that a crime happened on a certain date, just that it happened sometime prior to the date the Information was filed and within the statute of limitations. **See State v. Vance, 537 N.W.2d 545, 549 (N.D. 1995)(citations omitted)**. However, the record in this case shows that the State's proof failed if it did not prove a violation on August 20, 2009. (T. 87-88).

¶23 Given the totality of the circumstances, the district court should have found Berglund not guilty and dismissed the charge.

¶24 Conclusion

¶25 The judgment of the district court should be reversed, and this Court should order that the charge against Mr. Berglund be dismissed, and order the entry of a Judgment of Acquittal.

Respectfully submitted this 20th day of August, 2010.



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