20140390
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 13, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
Respondent / Appellee,	)	**Supreme Court No. 20140390**
vs.	)	**District Court No. 18-2013-CR-02076**
ANTONIO R. MATTHEWS,	)	
Petitioner / Appellant.	)	

APPELLANT'S BRIEF

Appeal from Criminal Judgment Entered on October 15, 2014 by Grand Forks County District Court, Northeast Central Judicial District, State of North Dakota, The Honorable Sonja Clapp Presiding.

Samuel A. Gereszek (ND Bar ID # 07040)
HAMMARBACK & SCHEVING, P.L.C.
308 DeMers Avenue
East Grand Forks, MN 56721
Telephone: (218) 773-6841
Facsimile: (218) 773-2845
Email: sam@egflawyer.com
ATTORNEY FOR THE APPELLANT

[¶ 1] TABLE OF CONTENTS

[¶ 2] TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

[¶ 3] STATEMENT OF THE ISSUE

[¶ 4] Was there sufficient evidence to sustain the Appellant's convictions for Gross Sexual Imposition, Robbery, Terrorizing, and Felonious Restraint?

[¶ 5] STATEMENT OF THE CASE

[¶ 6] Antonio Raheem Matthews ("Appellant") appeals from a criminal judgment, dated October 15, 2014. (Appellant's Appendix "A.A. 66-70.) The Appellant was convicted of three counts of Gross Sexual Imposition in violation of N.D.C.C. § 12.1-20-03, two counts of Robbery in violation of N.D.C.C. § 12.1-22-01, two counts of Felonious Restraint in violation of N.D.C.C. § 12.1-18-02, and one count of Terrorizing in violation of N.D.C.C. § 12.1-17-04. (A.A. 59-65.) The Appellant was then sentenced to Life without Parole. (A.A. 66-70.)

[¶ 7] The Appellant filed a timely notice of appeal on November 4, 2014, pursuant to North Dakota Rule of Appellate Procedure 4. (A.A. 71.) The District Court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8. The Supreme Court has jurisdiction under N.D.C.C. § 29-28-06 and N.D. Const. art. VI, § 2.

[¶ 8] STATEMENT OF THE FACTS

[¶ 9] On September 30, 2013 at approximately 1:00 a.m. a man broke into the apartment of N.C. and B.S. (victims). (A.A. 13.) The man was wearing a North Face zip up type jacket, a purple polo shirt, black athletic pants, and a shirt wrapped around his face. (A.A. 13.) The man, who possessed a handgun, demanded money and the cell phones from the victims. (A.A. 13.) At that point the man forced the victims to a bedroom where he had them remove their clothing. (A.A. 13.) For the

next 30-45 minutes the man raped both of the victims multiple times. (A.A. 13-14.) On October 1, 2013, Sergeant Jacobson with the Grand Forks Police Department, escorted N.C. to a Cenex gas station, where the Appellant was being detained, to view the Appellant's tattoos and listen to his voice. (A.A. 41-43.) N.C. could not recognize the voice, but claimed the Appellant's build was similar to the man that had broken into her apartment and the tattoos looked similar as well. (A.A. 38-39.) Subsequently, a search warrant was executed on the Appellant's residence and vehicle. (A.A. 14.) The search yielded the victims' cell phones and clothing matching the description of that worn by the man in the victims' apartment on September 30, 2013. (A.A. 14.) Additionally, two black BB pistols were discovered from the Appellant's residence. (A.A. 14.) On October 2, 2013, after two days of investigation, the Appellant was charged with the robbery, restraint, and rape of the victims'. (A.A. 15-18.) On August 5, 2014, the State issued an Amended Information adding names to the list of witnesses. (A.A. 19-22.)

[¶ 10] On August 12, 2014 the State prosecuted the Appellant in a three day trial. At the close of the State's case, the Appellant's trial counsel made a Rule 29 motion for judgment of acquittal. (Trial Tr. pg. 528.) The motion was ultimately denied by the trial judge. (Trial Tr. pg. 531.) On August 15, 2014, the jury returned a verdict of guilty on all 8 counts against the Appellant. (A.A. 58-65.)

[¶ 11] **ARGUMENT**

[¶ 12] There is insufficient evidence to sustain Appellant's convictions for Gross Sexual Imposition, Robbery Terrorizing, and Felonious Restraint.

[¶ 13] The burden the Appellant bears in challenging the sufficiency of the evidence against him is a heavy one, but as a matter of policy this Court has previously indicated that under North Dakota case law, ranging back for more than three decades, the so-called Ander's brief procedure has been prohibited from use by appellate attorneys in this state. Thus the traditional Rule 29 motion at the close of the State's evidence in order to preserve the "insufficient evidence" issue that the Supreme Court has come to recognize as the issue of last resort on appeal. The Appellant raises this issue at this time in light of that history and in the interests of limiting potential post-conviction proceedings.

[¶ 14] In the case at bar, the State presented evidence of conflicting, inconsistent, and tainted testimony. The testimony about the clothes the suspect was wearing the night in questions, goes from, a leather jacket and jeans, then a black North Face Jacket and sweat pants, to ultimately a red Addidas outfit. The victims claim to have identified a tattoo on the suspect's right hand, yet testify he was wearing "something covering his hands."

[¶ 15] One of the victims was driven to the Appellant, while he was in an impermissibly suggestive situation surrounded by police and asked "are these the tattoos you saw?" Additionally, the Appellant was supposed to have covered an area of over 25 city blocks and crossing the interstate in a matter of 20 minutes, per one officer's testimony. Another officer contradicted his own testimony from direct to cross, in that he claimed the Appellant's BB pistol looked "similar" to that of an M9 or a "Beretta," then under cross examination claims it does *not* look like a "Beretta."

[¶ 16] Moreover, the DNA evidence presented consistently "excluded" the Appellant as a possible contributor to the tests done on the sheets where the rapes were alleged to have occurred. Furthermore, the polo shirt that the Appellant was alleged to have been wearing the night of the rape and robbery, the DNA evidence *excluded* the Appellant as a contributor. When all inconsistent, conflicting, and tainted testimony is considered under the totality of the circumstances, there is no reasonable inference that the Appellant is guilty of these crimes.

[¶ 17] The applicable standards of review for appeals relating to the insufficient evidence issue have long been set forth by this Court:

> 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. 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. When considering insufficiency of the evidence we will not reweigh conflicting evidence or judge the credibility of witnesses….A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty.

State v. Nakvinda, 2011 ND 217, ¶12, 807 N.W.2d 204 (quoting State v. Kinsella, 2011 ND 88, ¶7, 796 N.W.2d 768; and State v. Wanner, 2010 ND 121, ¶9, 784 N.W.2d 143)(see also State v. Bruce, 2012 ND 140, ¶16, 818 N.W.2d 747).

[¶ 18] ***A. There Is Blatant And Troubling Inconsistencies Regarding The Clothing The Suspect And The Appellant Was Wearing The Night Of The Alleged Crimes.***

[¶ 19] The inconsistencies regarding the clothing worn the early morning hours of the crime are not minimal nor slight. At approximately, 12:30 am, the Appellant is supposedly wearing a black leather jacket and denim jeans, per the

testimony of Dara Thumb the clerk at the Cenex store near the victims' apartment. (A.A. 47.) Yet the description of the jacket worn at the time of the crimes was a "North Face" jacket. (A.A. 13 & 35, Trial Tr. pg. 79.)

[¶ 20] The inconsistencies continue in that the Cenex clerk, Dara Thumb, claims at 2:15 am that morning he was wearing "red Addidas jogging pants and a red Addidas T-shirt." (A.A. 48.) However, the Appellant's neighbor, who watched the Appellant leave and return to the apartment that morning at 2:15 am, testified the Appellant was wearing clothing "Black in color, or real dark, dark grey sweatshirt and athletic pants." (A.A. 53.) When the neighbor was asked specifically if the Appellant was wearing "red Addidas pants or shirt" he responded, "the pants were black." (A.A. 53.) The State offered no explanation for this inconsistency.

[¶ 21] ***B. The Identification Of The Appellant's Tattoos Were Tainted And Unrealistic At Best.***

[¶ 22] The most troubling and unanswered question regarding the identification of the Appellant's versus the suspect's tattoos comes from one of the victim's testimony. N.C. under direct examination states the suspect "was wearing a black jacket, like, a white handkerchief over his face and, like, *something **on** his hands*…." (A.A. 34 emphasis added.) One key factor in identifying the suspect as the Appellant throughout the trial were his tattoos, specifically the one on his hand. However, according to one of the victims, his hands were covered.

[¶ 23] The later identification of the Appellant's tattoos comes when the N.C. is taken to the Cenex gas station, where the Appellant is being detained. N.C. is driven to the Cenex and sees the Appellant in an impermissibly suggestive situation surrounded by "a bunch of cop cars." (A.A. 42.) During this impermissibly

suggestive identification, the Appellant is asked to show his hand and belly tattoo to the officers while N.C. is secretly in the back of the officer's vehicle watching. (A.A. 41-43.) Even given that impermissibly suggestive identification, N.C. states that she was not "a hundred percent sure" the Appellant was the suspect. (A.A. 38.)

[¶ 24] This impermissibly suggestive identification was done a mere day and half after N.C. traumatic ordeal. N.C. would have been desperate to know her attacker was found and about to be taken into custody. This tainted identification of the Appellant's tattoos and the unexplained issue of seeing a hand tattoo despite the attacker wearing "something on his hands" can only lead to one inevitable conclusion, the tattoo identification was impermissibly tainted.

[¶ 25] ***C. The Appellant's BB Pistol Was Does Not Match The Description Of The Gun Used In The Commission Of The Crime.***

[¶ 26] Detective Mike Jennings testified to two very opposite observations regarding the Appellant's BB pistol on direct examination versus cross examination. On direct Detective Jennings testified the in his opinion, the "gun seized from the defendant's bed" looked similar to an M9 or Beretta. (A.A. 56.) Then shortly after, Detective Jennings stated on cross, "I, personally don't know what real pistol this is modeled to look after…if they meant this to look like a Beretta, they missed the mark, because it does *not* look like a Beretta." (A.A. 57 emphasis added.)

[¶ 27] The BB pistol recovered from the Appellant was a major factor in the State's case, because it indicated the Appellant was in possession of a weapon like the one used during the crimes. However, by Detective Jennings' own testimony, the BB pistol recovered from the Appellant did not resemble the one used in the commission of the crimes.

[¶ 28] ***D. The Distance The Appellant Covered Was Unrealistic And Implausible.***

[¶ 29] Though it may seem unimportant and insignificant, the State used this fact to help articulate the movements of the Appellant the night of the crimes. Officer Johnson testified he saw, what he believed to be the Appellant, at Gateway Terrace at 2335 that evening. (A.A. 44.) Then approximately 20-30 minutes later (midnight) he saw the same individual 22 blocks away walking into the Cenex where Dara Thumb was working. (A.A. 45-46.) However, per Dara Thumb's testimony, the Appellant did not enter the Cenex until 12:30 that morning for the first time. (A.A. 47.)

[¶ 30] By this logic and timeline, it took the Appellant 30 minutes to cover 22 blocks and cross an interstate, then another 30 minutes to enter the Cenex. Once again, what may seem unimportant and insignificant, points out inconsistencies in the State's testimony and timeline. When viewing these inconsistencies as a whole, or under a "totality of the circumstances" analysis, the evidence against the Appellant begins to unravel.

[¶ 31] ***E. The DNA Evidence Consistently Excludes The Appellant As A Contributor To Major Pieces Of Evidence Of The Crime.***

[¶ 32] Most troubling of all is the lack of DNA evidence linking the Appellant to the crime in question. Yet made a big deal by the State through statistics and "contributions" at trial. (*See* Trial Tr. pgs. 493-526.) When analyzing the report itself from Jennifer Penner we see the following:

a. The Appellant is *excluded* from ALL sheet cutting profiles (Items 1A, 1D, 1F);

b. The Appellant is *excluded* as a contributor to the purple polo (Item 6A);

c. The Appellant and victims are *not* excluded as contributors to the sample from the gun (Item 5A), however, the frequency in which unrelated contributors would be expected on the gun is 1 in 255 for Caucasians.

(See A.A. 23-29.)

[¶ 33] Therefore, breaking this analysis down, the Appellant is excluded from any evidence collected at the scene of the crime (specifically the sheets where the rapes occurred). Additionally, the purple polo, which was supposed to have been worn by the Appellant during the commission of the crimes, the Appellant is *excluded* as a contributor to any profiles on that shirt, meaning he was not, nor ever wore that polo. The State claimed in their closing argument, that the Appellant was seen in Facebook photos wearing a purple polo, but that argument precludes the idea of more than one purple polo in existence. Finally, though all three (the Appellant and the victims) cannot be excluded from the profiles on the gun, the frequency in which this would be expected is 1 in 255 in Caucasians. Because the gun was recovered from the Appellant's apartment, logic would dictate his profile would be on the gun. Consequently, the question shifts to how often would it be expected to see the victims' profiles on the gun, which is 1 in 255. Therefore in a city the size of Grand Forks (est. population of 50,000), this test would result the same way 196 other times. Therefore, the only piece of DNA evidence linking the Appellant to the victims is a gun, which per Detective Jennings, does not resemble the one used in

crime, and would give the same results to nearly 200 other people just in the city of Grand Forks alone.

[¶ 34] ***F. Evidence Not Collected.***

[¶ 35] The final piece of concern is the evidence that was never recovered. A bottle of liquor, a wallet, a credit card, and nearly a thousand dollars in cash that was taken from the victims' apartment, but never recovered and never explained by the State. When Detective Jennings was asked about this particular issue, he simply stated these items were never recovered. (A.A. 57.) Despite the fact the Appellant was apprehended and his residence and vehicle were searched a mere day and half after the crime, none of these items were ever accounted for in anyway, nor was an explanation provided for their disappearance.

[¶ 36] CONCLUSION

[¶ 37] In conclusion, when reviewing the record here to determine whether there is competent evidence for a jury to reasonably infer guilt in the case at bar, there simply is not. The problems here may be explained away one at a time or when viewed in a vacuum, however, using the doctrine of totality of the circumstance, the evidence here does not raise to the level "allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction." See Nakvinda, 2011 ND 217, at ¶12, 807 N.W.2d 204. Understandably 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. It can be argued that the Appellant had the victims' phones and the victims identified his tattoos, and he was seen near the scene of the crime near the time of the crime. Then viewing those facts in a light

most favorable to the verdict, the jury got it correct. However, the problem with this argument is the totality of the circumstances. This was a horrific crime and as a society we want someone to be found guilty of this crime. Nevertheless, as a society we have come a long way from convicting someone out of fear and heartbreak. We demand that the prosecution prove guilt beyond all reasonable doubt. In the case at bar, the jury was blinded by the horrific nature of this crime and completely overlooked daunting and inescapable evidence.

[¶ 38] That the Appellant was seen in red addidas clothing after the crime at Cenex and simultaneously, someone was seen in dark almost black clothing rummaging in back of the Appellant's vehicle at the Appellant's apartment building.

[¶ 39] That the victims claim their attacker was wearing something covering his hands, yet were able to identify a hand tattoo.

[¶ 40] That a mere day and a half after the attack, one victim was escorted to an impermissibly suggestive situation wherein the Appellant was surrounded by police and the victim was asked if the Appellant was her attacker, to whit the victim could not identify him to a hundred percent certainty.

[¶ 41] That the gun owned by the Appellant was not similar to the one used in this crime.

[¶ 42] That someone matching the Appellant was seen by an officer entering the Cenex 30 minutes before the Cenex clerk claims the Appellant entered the Cenex.

[¶ 43] That the only DNA material that linked the victims to the Appellant was the swab from the gun, which in turn was the lowest possible statistical frequency of all the possibilities.

[¶ 44] That the Appellant was excluded from the DNA contributors of the sheets on the victims' beds (where the rapes occurred).

[¶ 45] That the Appellant was excluded from the DNA contributors to the purple polo which had the victims as DNA contributors.

[¶ 46] That all other evidence stolen from the victims was not recovered from the Appellant.

[¶ 47] When viewing the evidence as a whole and under the totality of the circumstances, this is simply a conviction in error and a conviction out of fear. Therefore, there is insufficient evidence to support the guilty verdicts in this case and his convictions should be vacated, or in the alternative, his convictions should be overturned and remanded to the district court for a new trial.

Respectfully submitted this Friday, February 13, 2015.

/s/ Samuel A. Gereszek

Samuel A. Gereszek (ND Bar ID # 07040)
HAMMARBACK & SCHEVING, P.L.C.
308 DeMers Avenue
East Grand Forks, MN 56721
Telephone: (218) 773-6841
Facsimile: (218) 773-2845
Email: sam@egflawyer.com
ATTORNEY FOR THE APPELLANT

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
Respondent / Appellee,	)	**Supreme Court No. 20140390**
vs.	)	**District Court No. 18-2013-CR-02076**
ANTONIO R. MATTHEWS,	)	
Petitioner / Appellant.	)	

CERTIFICATE OF SERVICE

I, Samuel A. Gereszek, attorney for the Petitioner / Appellant, and officer of the court, hereby certify that I served a true and correct copy of the following:

1. *APPELLANT'S BRIEF (in .pdf and word format via email & Printed form U.S. Mail);*
2. *APPELLANT'S APPENDIX*

On the following:

Clerk of the Supreme Court **North Dakota Supreme Court**	**Mark Jason McCarthy** **Attorney for Respondent – Appellee**	**Mr. Antonio R. Matthews #40366** **North Dakota State Penitentiary** **P.O. Box 5521** **Bismarck, ND 58506-5521**
supclerkofcourt@ndcourts.gov	sasupportstaff@gfcounty.org	Served via U.S. Mail

All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

Dated this Friday, February 13, 2015.

HAMMARBACK & SCHEVING, P.L.C.

/s/ Samuel A. Gereszek

Samuel A. Gereszek (ND Bar ID # 07040)
Hammarback & Scheving, P.L.C.
308 DeMers Avenue
East Grand Forks, MN 56721
Telephone: (218) 773-6841
Facsimile: (218) 773-2845
sam@egflawyer.com
Attorney for Petitioner/Appellant