

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

State of North Dakota,

Plaintiff/Appellee,

vs.

Benjamin Dean Suelzle,

Defendant/Appellant.

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Supreme Court No.
 20150004

McKenzie County District No.
 27-2013-CR-00502

ON APPEAL FROM VERDICT OF GUILTY AND SENTENCE
 FROM THE DISTRICT COURT
 FOR THE NORTHWEST JUDICIAL DISTRICT
 MCKENZIE COUNTY, NORTH DAKOTA
 THE HONORABLE ROBIN SCHMIDT, PRESIDING

BRIEF OF APPELLANT

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[¶ 1] STATEMENT OF THE ISSUES

[¶ 2] I. The evidence presented at trial was insufficient to support the guilty verdict.

[¶ 3] STATEMENT OF THE CASE

[¶ 4] This is an appeal arising from verdict of guilty following a jury trial and sentence in McKenzie County District Court for the offenses of (1) aggravated assault, (2) reckless endangerment, (3) leaving the scene of an accident involving serious personal injury, (4) aggravated reckless driving, (5) leaving the scene of an accident involving an unattended vehicle, and (6) leaving the scene of an accident involving an attended vehicle.

[¶ 5] On April 26, 2013, Benjamin Suelzle was charged in six separate citations with the following crimes: (1) aggravated assault, a class B felony, in violation of N.D.C.C. § 12.1-17-02; (2) reckless endangerment, a class C felony, in violation of N.D.C.C. § 12.1-17-03; (3) leaving the scene of an accident involving serious personal injury, a class C felony, in violation of N.D.C.C. § 39-08-04; (4) aggravated reckless driving, a class A misdemeanor, in violation of N.D.C.C. § 39-08-03; (5) leaving the scene of an accident involving an unattended vehicle, a class A misdemeanor, in violation of N.D.C.C. § 39-08-07; and (6) leaving the scene of an accident involving an attended vehicle, a class B misdemeanor, in violation of N.D.C.C. § 39-08-05. The State filed long-form complaints and affidavits of probable cause on July 16, 2013 to support counts 1, 2 and 3. It was alleged that Suelzle used his vehicle to injure Shannon Miles in the parking lot of a bar in Watford City, North Dakota, then drove into two vehicles while trying to leave the parking lot.

[¶ 6] A preliminary hearing was held November 14, 2013. At the arraignment, three separate criminal informations were filed for counts 1, 2 and 3. On September 25, 2014 the State filed amended criminal informations for counts 1, 2 and 3. Count 1 was amended from a class B felony to a class C felony.

[¶ 7] A jury trial was held September 30, 2014 and October 1, 2014. Suelzle faced the crimes alleged in the amended criminal informations for counts 1, 2 and 3 and the crimes alleged in the citations for counts 4, 5, and 6. Appendix of Appellant, 8-13. At trial, the court took testimony during the State's case-in-chief from Officer Dylan Bostic and Officer Kyle Giersdorf of the Watford City Police Department and Gelina Miles. The court received into evidence several photographs of injuries to Shannon Miles, injuries to the defendant, damage to vehicles, and a written statement by Gelina Miles. See, Register of Actions, 27-2013-CR-00502, Doc ID# 103-125.

[¶ 8] At the conclusion of the State's case-in-chief, Suelzle made a motion under N.D.R.Crim.P. 29 arguing there was insufficient evidence presented to sustain the State's burden of proof. Transcript on Appeal, September 30, 2014, 185:22 to 189:10. The trial court denied the Rule 29 motion. Transcript, 9/30/14, 189:11 to 189:14.

[¶ 9] Suelzle recalled Officer Bostic and Gelina Miles for his case-in-chief. Suelzle also testified on his own behalf. Suelzle offered a written statement of Shannon Miles as an exhibit. Register of Actions, 27-2013-CR-00502, Doc ID# 126.

[¶ 10] The trial ended on October 1, 2014. The jury returned its verdicts the same day, finding Suelzle guilty of all crimes charged. The court entered an order for a presentence investigation.

[¶ 11] A sentencing hearing was held December 17, 2014. For count 1, aggravated assault, count 2, reckless endangerment, and count 3, leaving the scene of an accident involving serious personal injury, Suelzle was sentenced to concurrent terms of five years with North Dakota Department of Corrections and Rehabilitation (ND DOCR), with four years and one day suspended. Appendix, 14-16. Suelzle was given credit for 230 days served. Id. Suelzle was ordered to pay \$1,100.00 in court fees and was placed on supervised probation for five years. Id. For count 4, aggravated reckless driving, and count 5, leaving the scene of an accident involving an unattended vehicle, Suelzle was sentenced to 230 days in the McKenzie County jail, with credit for all time served. Id., 16-17. For count 6, leaving the scene of an accident involving attended vehicle, Suelzle was sentenced to 30 days in the McKenzie County jail, with credit for all time served. Id., 17.

[¶ 12] Suelzle timely filed a notice of appeal on January 9, 2015. Appendix, 18. Suelzle now appeals the verdict of guilty and the sentence imposed thereafter. Suelzle argues there was not sufficient evidence to support a finding of guilty beyond a reasonable doubt for any of the verdicts.

[¶ 13] STATEMENT OF THE FACTS

[¶ 14] On April 25, 2013 officers with the Watford City Police Department responded to suspicious activity at Outsiders Bar in Watford City at approximately 1:30 a.m. Officer Dylan Bostic and Officer Kyle Giersdorf responded. The officers were on a traffic stop in a nearby parking lot when they observed the activity at Outsiders Bar. Transcript on Appeal, September 30, 2014, 132:4 to 132:9. Bostic observed a vehicle “doing a donut” in the parking lot. Transcript, 9/30/14, 132:21 to 132:23. Bostic

testified that he and Giersdorf were at Outsiders approximately 30 to 45 seconds after observing the activity. Transcript, 9/30/14, 135:2 to 135:4.

[¶ 15] Bostic identified Gelina Miles at the scene. Gelina informed Bostic that her vehicle was struck and identified Benjamin Suelzle as the driver of the other vehicle. Transcript, 9/30/14, 137:16 to 137:24. Bostic identified Shannon Miles at the scene and observed that Shannon was injured. Transcript, 9/30/14, 138:2 to 138:13.

[¶ 16] Bostic observed damage to the right rear bumper of Gelina's vehicle. Transcript, 9/30/14, 137:16 to 137:19. Bostic observed a mark on the rear passenger door of another vehicle in the parking lot. Transcript, 9/30/14, 139:25 to 140:2. Bostic believed the mark was caused by a vehicle parked next to the damaged vehicle that had its driver's door open and while the door was open the vehicle went into reverse. Transcript, 9/30/14, 140:7 to 140:11.

[¶ 17] Bostic testified he observed Shannon's injuries at the hospital. Bostic testified that Shannon had a bone protruding from his finger and that the finger was broken. Transcript, 9/30/14, 142:10 to 142:17. Bostic testified that Shannon's right pant leg had a tire tread mark. Transcript, 9/30/14, 147:2 to 147:4. Bostic did not identify from where the tire tread came. Transcript, 9/30/14, 147:5 to 147:8. Shannon identified to Bostic that Suelzle was the person who caused Shannon's injuries. Transcript, 9/30/14, 154:6 to 154:12.

[¶ 18] Officers were not able to identify Suelzle on the night of the incident. Suelzle called the police department the following day to speak with an officer. Transcript, 9/30/14, 155:9 to 155:11. Bostic identified an injury on Suelzle's lip that Suelzle claimed was caused by Shannon. Transcript, 9/30/14, 157:13 to 157:18.

[¶ 19] The State introduced two videos of surveillance footage from Outsiders Bar. State's Exhibit 16, 17; see, Register of Actions, 27-2013-CR-00502, Doc ID# 118, 119. Bostic testified that it appeared Shannon was running away from Suelzle. Transcript, 9/30/14, 162:4 to 162:6.

[¶ 20] Bostic testified he found a knife on the ground in the bar parking lot. Transcript, 9/30/14, 164:14 to 164:20. According to Bostic's report, Shannon and Suelzle were having an argument while Suelzle was seated in his vehicle and Shannon was standing outside the vehicle. Transcript, 9/30/14, 166:21 to 167:2. The driver's door was open and Shannon was standing near the inside portion of the door. Transcript, 9/30/14, 167:4 to 167:10. Shannon stated that Suelzle pulled a knife and threatened to kill Shannon so Shannon punched Suelzle in the face and threw the knife away. Transcript, 167:11 to 167:25. Shannon then grabbed Suelzle's open car door and Suelzle put the vehicle in reverse, trapping Shannon's finger between Suelzle's open door and the car next to it. Transcript, 9/30/14, 168:2 to 168:11.

[¶ 21] Gelina testified that she was sitting in her vehicle at the time of the incident. Gelina stated she saw Suelzle put his vehicle in reverse and drive toward Gelina's vehicle. Transcript, 9/30/14, 179:23 to 180:1. Gelina stated her vehicle was hit by Suelzle's vehicle. Transcript, 9/30/14, 180:1 to 180:3. Gelina stated she did not hear the conversation between Shannon and Suelzle but they had been hanging out together all night long. Transcript, 9/30/14, 180:9 to 180:14. Gelina testified that Shannon's heel bone was shattered after being hit by Suelzle's vehicle. Transcript, 9/30/14, 181:13 to 181:16.

[¶ 22] Suelzle testified that he and Shannon were drinking and playing pool together at Outsiders Bar until 1:00 a.m. Suelzle testified that after he left the bar he was sitting in his vehicle and Shannon was standing next to it when Shannon asked Suelzle for his knife. Transcript on Appeal, October 1, 2014, 215:9 to 215:25. Suelzle testified that he gave his knife to Shannon, who then threw the knife toward the bar and started punching Suelzle in the face. Transcript, 10/01/14, 216:6 to 216:13. Suelzle testified that he put his vehicle in reverse and tried to drive away at that time. Transcript, 10/01/14, 216:14 to 216:17. Suelzle testified that Shannon was hanging onto the driver's side door and tried to open it as Suelzle moved the vehicle. Transcript, 10/01/14, 216:19 to 217:3.

[¶ 23] Suelzle testified he ran into another vehicle in the parking lot because he was trying to get away from Shannon. Transcript, 10/01/14, 218:6 to 218:19. Suelzle testified that he was doing everything he could to get out of the parking lot and away from Shannon because Suelzle thought he was going to be stabbed by Shannon. Transcript, 10/01/14, 218:20 to 219:12. Suelzle testified that he did not immediately call the cops because he did not want to get Shannon in trouble with law enforcement. Transcript, 10/01/14, 220:11 to 220:21.

[¶ 24] Suelzle testified that he called law enforcement the next day to report that he ran his vehicle into other vehicles in the parking lot. Transcript, 10/01/14, 221:10 to 221:24. Suelzle testified that he did not want to be labeled a snitch which is why he did not call law enforcement immediately. Transcript, 10/01/14, 227:25 to 228:3.

[¶ 25] JURISDICTION

[¶ 26] Appeals are allowed from lower district courts to the Supreme Court as provided by law. N.D. Const. art. VI, § 6. A defendant may appeal from a verdict of guilty and final judgment of conviction. N.D.C.C. § 29-28-06.

[¶ 27] STANDARD OF REVIEW

[¶ 28] “When the sufficiency of evidence to support a criminal conviction is challenged, [the Supreme] 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. Owens, 2015 ND 68, ¶ 16, 860 N.W.2d 817. This standard also applies to a review of the district court’s denial of a motion of judgment of acquittal under N.D.R.Crim.P. 29. State v. Romero, 2013 ND 77, ¶ 24, 830 N.W.2d 586.

[¶ 29] ARGUMENT

[¶ 30] I. The evidence presented at trial was insufficient to sustain the guilty verdict.

[¶ 31] Suelzle argues the evidence presented at trial was insufficient to find him guilty of the crimes alleged because Suelzle was acting in self-defense. The Supreme Court reviews the record at trial “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. A conviction is not supported by sufficient evidence when no rational factfinder could have found the defendant guilty beyond a reasonable doubt, even after viewing the evidence in the light most favorable to the prosecution and giving the prosecution all reasonable inferences. Id. The Supreme Court should reverse a guilty verdict if no reasonable factfinder could

find the defendant guilty beyond a reasonable doubt. State v. Vantreece, 2007 ND 126, ¶ 14, 736 N.W.2d 428.

[¶ 32] A defendant may move the trial court to enter a judgment of acquittal prior to jury deliberations if the prosecution has failed to establish its case with sufficient evidence to sustain a conviction. N.D.R.Crim.P. 29(a). A motion under Rule 29 preserves the issue of sufficiency of the evidence for appellate review. Romero, 2013 ND 77, ¶ 24, 830 N.W.2d 586. Suelzle made a motion for acquittal under N.D.R.Crim.P. 29 at the close of the State's case-in-chief. Transcript, 9/30/14, 185:22 to 185:25. The trial court denied the motion. Transcript, 9/30/14, 189:11 to 189:14.

[¶ 33] Rule 29 of the North Dakota Rules of Criminal Procedure states:

MOTION FOR JUDGMENT OF ACQUITTAL

(a) Before Submission to the Jury. After the prosecution closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the prosecution's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (when the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

N.D.R.Crim.P. 29.

[¶ 34] Under Rule 29, the court must order entry of judgment of acquittal after the prosecution closes its evidence or after the close of all evidence if the evidence is insufficient to sustain a conviction. State v. Kinsella, 2011 ND 88, ¶ 7, 796 N.W.2d 678.

When a court concludes that evidence is legally insufficient to support a guilty verdict, the court concludes that the State has failed to meet its burden to prove its case. State v. Kringstad, 353 N.W.2d 302, 306 (N.D. 1984) (citing Tibbs v. Florida, 457 U.S. 31, 41 (1982)). “A conviction rests upon insufficient evidence when, even after viewing 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 have found the defendant guilty beyond a reasonable doubt.” Kringstad, at 306 (citations omitted).

[¶ 35] It is the defendant’s burden on appeal to show the evidence does not support the verdict even when all reasonable inferences are given to the prosecution. State v. Zottnick, 2011 ND 84, ¶ 14, 796 N.W.2d 666. The Supreme Court will not reweigh conflicting evidence or judge the credibility of witnesses. Id. A jury may find a defendant guilty even if evidence exists could lead to a verdict of not guilty. Id. The Court “assume[s] the jury believed the evidence supporting the verdict and disbelieved any contrary evidence.” State v. Sabo, 2007 ND 193, ¶ 18, 742 N.W.2d 812.

[¶ 36] Suelzle argues that the evidence presented at trial does not support the jury’s guilty verdicts. Suelzle testified that his actions on the night of the incident were in self-defense.

[Ms. LeClair] Q: Okay. So, when he asked you for your knife, did you give it to him?

[Suelzle] A: Yeah.

Q: Okay.

A: And he threw it at the building and started punching me through the window.

Q: How many times did he punch you?

A: I think two.

Q: Okay. And then what did you do when he started punching you?

A: My car was already running, and I put it in reverse and tried to take off.

Q: Okay. Now, --

A: And he grabbed a hold of the door.

Q: Okay. Hang on. Back up just a little. Your car door open at this point?

A: It was closed when he was hitting me. When I put it in reverse and -- when I was trying to put it in reverse and stuff he tried to open it.

Q: Okay. And what -- why was he trying to open your car?

A: He was yelling at me to get out of the car and whatever, and he was trying to open the door and pull me out of the car.

Q: So, when opened the door and was trying to pull you out of the car, why didn't you drive forward?

A: Because then I would have had to go up on the sidewalk and maybe hit the building that was in front of me.

Q: How far away was the building from you, approximately?

A: Couldn't have been more than ten feet.

Q: Okay.

A: Probably not even that.

Q: So, where we left -- so, where we are is -- just now you said you put it in reverse. And then what happened?

A: He had a hold of the door. I was trying to back up and the -- and since he had opened the door and had a hold of it, it got caught on the car next to me. And then my vehicle -- like, I was trying to back up and then the vehicle got stuck on the side of that car.

Transcript, 10/01/14, 216:6 to 217:18.

[Ms. LeClair] Q: So, you just backed up you, you're caught in the other vehicle, and then what happened?

[Suelzle] A: Then I was trying to go forward. Then he come running back up there. I was trying to pull -- I was going to pull off that other vehicle, then he came running back towards me. And then I just took off out of there. The building was right in front of me and I had to go to the right. That was the only way I could go.

Q: Okay. And you say he --

A: If I would have went to the left then I would have probably hit the building for sure.

Q: Okay. And so you were going -- you -- did you just say he was running towards you and then you drove forward?

A: Yeah. I drove forward to pull myself off the other vehicle, and I went to the right just so I could leave. I was just trying to leave is all I was trying to do.

Q: Okay. And -- so what -- at that moment do you remember what was going through your mind?

A: I just wanted to leave, get out of there.

Q: How were you feeling?

A: I don't know. I was just stunned that it happened, and I was just trying to leave.

....

Q: So you just said that you were stunned?

A: I was stunned and I was -- I mean, that's why I was trying to leave is because I was afraid that he was trying to pull me out of the vehicle. And then when he came back I didn't know that he had ran over and I didn't know what he had. I figured he went and picked my knife up again. I figured he was going to try to stab me.

Transcript, 10/01/14, 218:4 to 219:12.

[¶ 37] Suelzle's testimony shows that he was acting in self-defense when the incident occurred. A person is justified in using force to defend himself against the danger of imminent unlawful bodily injury. N.D.C.C. § 12.1-05-03.

In the context of self-defense, this means that a person who believes that the force he uses is necessary to prevent imminent unlawful harm is justified in using such force if his belief is a correct belief; that is to say, if his belief corresponds with what actually is the case. If, on the other hand, a person reasonably but incorrectly believes that the force he uses is necessary to protect himself against imminent harm, his use of force is excused.

The distinction is arguably superfluous because whether a person's belief is correct and his conduct justified, or whether it is merely reasonable and his conduct excused, the end result is the same, namely, the person avoids punishment for his conduct. Furthermore, because a correct belief corresponds with an actual state of affairs, it will always be a reasonable belief; but a reasonable belief will not always be a correct belief, viz., a person may reasonably believe what is not actually the case. Therefore, the decisive issue under our law of self-defense is not whether a person's beliefs are correct, but rather whether they are reasonable and thereby excused or justified.

State v. Leidholm, 334 N.W.2d 811, 815 (N.D. 1983) (emphasis in original) (internal citations omitted). "A person's conduct is excused if he believes that the use of force upon another person is necessary and appropriate to defend himself against danger of imminent unlawful harm, even though his belief is mistaken." Id. Here, Suelzle was justified in his actions because it was his belief that Shannon was trying to assault him. Suelzle took actions necessary to protect himself against imminent harm, and any force used against Shannon was justified.

[¶ 38] CONCLUSION

[¶ 39] The guilty verdict was not supported by sufficient evidence. Suelzle requests the Supreme Court to reverse the criminal judgment and remand for an entry of judgment of acquittal.

[¶ 40] The Appellant respectfully prays that the Court grant the relief requested.

Dated this 17th day of June, 2015.

Respectfully submitted,

/s/ Lee M. Grossman

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**IN THE SUPREME COURT
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)	27-2013-CR-00502
)	
)	CERTIFICATE OF SERVICE
Benjamin D. Suelzle,)	
Defendant-Appellant.)	
)	

I, Lee M. Grossman, do hereby certify that on June 17, 2015, I served the following documents:

1. Brief of Appellant
2. Appendix of Appellant

On:

Jacob T. Rodenbiker
McKenzie County State's Attorney
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by Electronic Filing, pursuant to N.D. Sup. Ct. Admin. Order 16.

Dated this 17th day of June, 2015.

I, Lee M. Grossman, hereby certify that pursuant to Rules 5(b) and 5(f), NDR CivP, that on the 17th day of June, 2015, I deposited, with postage prepaid by first class mail, in the United States post office at Valley City, North Dakota, a true and correct copy of the following document(s):

1. Brief of Appellant
2. Appendix of Appellant

The copies of the foregoing were securely enclosed in an envelope and addressed as follows:

Benjamin Suelzle
201 7th Ave NW
Watford City, ND 58854

To the best of my knowledge, information, and belief, such address was the last known post office address of the party intended to be so served. These above-referenced documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, Rule 5.

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