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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	Supreme Court Nos.	20170038
)		20170039
Plaintiff and Appellee,)		20170040
)		
vs.)	Case Nos.	2015-CR-00769
)		2015-CR-00770
Omar Toure,)		2015-CR-00771
)		
Defendant and Appellant.)		

BRIEF OF DEFENDANT-APPELLANT, OMAR TOURE

Appeal from Judgment Entered on January 31, 2017

In District Court, Williams County, State of North Dakota

The Honorable David W. Nelson

Laura C. Ringsak (#08146)
Attorney for Appellant, Omar Toure
103 South 3rd Street Ste. 6
Bismarck, ND 58501
(701) 255-1344
lringsak@midcontwork.com

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STATEMENT OF THE ISSUES

¶1 Whether the evidence against Omar Toure (“Toure”) was legally sufficient to sustain the jury’s verdict.

¶2 Whether the trial court’s decision denying Toure’s motion to dismiss is contrary to the manifest weight of the evidence.

STATEMENT OF THE CASE

¶3 This is an appeal from the Northwest Central Judicial District Court finding Toure guilty by jury trial of the following: two (2) counts of terrorizing, a class C felony in violation of N.D.C.C. § 12.1-17-04(1) and 12.1-32-02.1, one (1) count of reckless endangerment, a class C felony in violation of N.D.C.C. § 12.1-17-03, one (1) count of kidnapping, a class a felony in violation of N.D.C.C. § 12.1-18-01 and 12.1-32-02.1, and one (1) count of aggravated assault, a class C felony in violation of N.D.C.C. § 12.1-17-02(1) and 12.1-32-02.1. (App. 68.)

¶4 On March 29, 2015, the Williston Police Department received a call from witness, Mercedes Portia Snyder (“Snyder”), regarding an alleged kidnapping that occurred at the Walmart parking lot in Williston. (App. 19.) Officers arrived on scene and met with Snyder, who informed officers that Toure had a knife, and took Deidre Marie Robinson (“Robinson”), Toure’s fiancée. (App. 19.) While Toure took Robinson, Toure allegedly threatened Daniel David Dumfeh (“Dumfeh”), a friend of Robinson’s, with a knife. (App. 19.)

¶5 Toure’s vehicle was found in Sidney, Montana, with Robinson in the vehicle, bleeding from a cut on her hand. (App. 19.) Robinson later informed officers that she cut her hand while attempting to remove the knife away from her. (App. 19.) Toure came

from Columbus, Ohio, to Williston, North Dakota for the purpose of getting his fiancée Robinson back to Columbus, Ohio. (App. 19.)

¶6 On June 6, 2016, the Defendant moved to dismiss the charges due to the denial of the Defendant's right to a speedy trial. (App. 30.) The State responded arguing the Defendant was responsible for the delays in this case, because the Defendant requested a Woloff interpreter at the final pretrial conference on July 13, 2015. (App. 38.) The Court denied the motion to dismiss. (App. 41; Tr. p. 15, ln. 23, July 5, 2016.)

¶7 A jury trial was held on October 19, 2016 through October 21, 2016. (App. 1.) Toure was found guilty of the following: two (2) counts of terrorizing, one (1) count of reckless endangerment, one (1) count of kidnapping, and one (1) count of aggravated assault. (App. 38, 75.) Toure was sentenced on January 30, 2017. (App. 1.) A notice of appeal was submitted on February 1, 2017. (App. 87.)

STATEMENT OF FACTS

¶8 Toure received a phone call from his fiancée Robinson, stating that Robinson left their child at a friend named Amber's home and is flying from Ohio to North Dakota. (App.. 57; p. 325, lns. 24-25, p. 326, lns. 1-3; October 21, 2016.) Toure went to Amber's house to retrieve the child, but Amber would not allow Toure to enter and retrieve the child. (App. 57; p. 326, lns. 1-5, 18-25, p. 329, lns. 1-3; October 21, 2016.)

¶9 Toure then called Robinson, asking her to come back to get their child, as he was not being allowed access to his child. (App. 57; p. 329, lns. 18-25; October 21, 2016.) Toure informed Robinson that he had to come get her, and rented a car and drove to Williston, North Dakota. (App. 57; p. 331, lns. 21-23; October 21, 2016.) When Toure was in Williston, he made contact with Robinson, who informed him she was heading to

Walmart, and stated where she was at in the parking lot. (App. 57; p. 345, lns. 11-13; p. 347, lns. 14-23; October 21, 2016.)

¶10 On March 29, 2015, police received a phone call from Mercedes Snyder (“Snyder”). Snyder informed dispatch that she saw a man, later identified as Toure, pull up in the Walmart parking lot behind a vehicle occupied by Robinson and Dumfeh. (App. 43; Tr. p.50; lns.10-16; October 19, 2016.) Dumfeh and Robinson are in an on and off relationship, and Robinson and Toure are engaged with a child. (App. 47; Tr. p. 107, lns. 4-6; p. 108, lns. 1-3; October 20, 2016.)

¶11 After Toure pulled up behind Robinson and Dumfeh’s vehicle, Toure grabbed Robinson while displaying a knife. (App. 47; Tr. p. 184, lns. 10-11, 21-23; October 20, 2016.) Robinson and Dumfreh testified Toure was displaying the knife to her neck or throat area, while Toure testified that he never held the knife to Robinson’s throat. (App. 47; Tr. p. 184, lns. 10-11, 21-23; October 20, 2016; App. 57; Tr. p. 351, lns. 8-10; October 21, 2016.) Robinson then grabbed the knife and was cut. (App. 57; Tr. p. 308, lns. 24-25, p. 309, ln. 1; October 21, 2016.) Toure put Robinson in the back seat of Toure’s vehicle. (App. 47; Tr. p. 104, lns. 9-12; p. 105, lns. 17-20; October 20, 2016.) While Toure was putting Robinson in the vehicle, Dumfeh testified he attempted to interject and Toure gestured at Dumfeh’s direction with the knife. (App. 47; Tr. p. 103, lns 15-21; October 20, 2016.) However, Toure testified that he did not threaten Dumfeh in any way with the knife. (App. 57; Tr. p. 351, lns. 11-13; October 21, 2016.) Blood spots were located by law enforcement on the ground at the scene. (App. 47; p. 104, lns. 13-18; October 20, 2016.)

¶12 Toure and Robinson took off in Toure's vehicle. (App. 47; p. 189, ln 25, p. 190, ln. 1; October 20, 2016.) Shortly after Toure and Robinson left the scene, law enforcement arrived. (App. 47; p. 190, lns. 6-10; October 20, 2016.) Once law enforcement arrived, they discovered blood droplets and Snyder handed law enforcement a sheath to a knife. (App. 43; p. 50, lns. 17-19; p. 55, lns. 18-20; October 19, 2016.) Toure and Robinson were later found in Sidney, Montana. (App. 47; p. 206, lns. 6-11; October 20, 2016.)

¶13 Toure was arrested and charged with three (3) counts of terrorizing, a class C felony in violation of N.D.C.C. § 12.1-17-04(1) and 12.1-32-02.1, two (2) counts of reckless endangerment, a class C felony in violation of N.D.C.C. § 12.1-17-03, kidnapping, a class a felony in violation of N.D.C.C. § 12.1-18-01 and 12.1-32-02.1, and aggravated assault, a class C felony in violation of N.D.C.C. § 12.1-17-02(1) and 12.1-32-02.1. (App. 15, 21.) Toure applied for indigent defense services and was appointed to Attorney Jonathan Green. (App. 26.)

¶14 At the final pretrial conference on July 13, 2015, the Defendant allegedly requested Woloff interpreters at trial, which was scheduled for July 27, 2015. (App. 38.) An Order for a Scheduling Conference was issued on August 17, 2015, scheduling the conference for August 28, 2015. (App. 27.) However, on August 18, 2015, Attorney Green moved to withdraw as counsel and the court issued an order on October 28, 2015, granting the withdrawal of Attorney Green. (App. 28.) On October 30, 2015, Toure was appointed Attorney McCabe. (App. 29.) There were more scheduling and status conferences, however ultimately the trial was rescheduled for October of 2016. (App. 1.)

¶15 During the time period between Attorney McCabe's involvement and the trial, the

Defendant moved to dismiss the case due to the denial of the Defendant's right to a speedy trial. (App. 30.) The State responded arguing the Defendant was responsible for the delays in this case, because the Defendant requested a Woloff interpreter at the final pretrial conference on July 13, 2015. (App. 38.) The Court denied the motion to dismiss. (App. 41; Tr. p. 15, ln. 23, July 5, 2016.)

¶16 At trial, Toure renewed his motion to dismiss as Toure's "speedy trial violation was not adhered to." (App. 43; Tr. p. 12, lns. 6-8, October 19, 2016.) At trial, the State presented its evidence and witnesses' testimony consistent with the above facts. After the State rested, the defense moved for a Rule 29 motion for judgment of acquittal on all cases. (App. 57; Tr. p. 286, lns. 5-8; October 21, 2016.) The Court denied the motion. (App. 57; Tr. p. 286, lns. 14-16; October 21, 2016.) Toure was found guilty of the following: two (2) counts of terrorizing, one (1) count of reckless endangerment, one (1) count of kidnapping, and one (1) count of aggravated assault. (App. 68.) Toure was sentenced on January 30, 2017. (App. 1.) A notice of appeal was submitted on February 1, 2017. (App. 87.)

LAW AND ARGUMENT

I. The Standard of Review.

¶17 This Court's standard of review for challenges to sufficiency of the evidence is as follows:

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. Kinsella, 2011 ND 88, ¶ 7, 796 N.W.2d 678 (citing State v. Wanner, 2010 ND 121, ¶ 9, 784 N.W.2d 154) (quotations omitted). Standard of review on appeal is the same whether sufficiency of evidence is questioned on motion for judgment of acquittal at close of state's case, at close of evidence, or after return of guilty verdict. State v. Lambert, 539 N.W.2d 288, 289 (N.D. 1995).

II. The Evidence Presented at Trial was Insufficient to Sustain the Guilty Verdict.

¶18 “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.” N.D.R.Crim.P. 29(a). “The court may reserve decision on the motion, proceed with the trial 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(b).

¶19 In the present case, the State and Defendant presented conflicting testimony. Robinson and Dumfreh testified Toure was displaying the knife to her neck or throat area, while Toure testified that he never held the knife to Robinson's throat. (App.3 47; Tr. p. 184, Ins. 10-11, 21-23; October 20, 2016; App. 57; Tr. p. 351, Ins. 8-10; October 21, 2016.) Also, While Toure was putting Robinson in the vehicle, Dumfeh testified he attempted to interject and Toure gestured at Dumfeh's direction with the knife. (App. 47; Tr. p. 103, Ins 15-21; October 20, 2016.) However, Toure testified that he did not threaten Dumfeh in any way with the knife. (App. 57; Tr. p. 351, Ins. 11-13; October 21, 2016.) Toure also testified that he made contact with Robinson, who informed him she

was heading to Walmart, and stated where she was at in the parking lot, knowing he was coming to pick her up. (App. 57; p. 345, lns. 11-13; p. 347, lns. 14-23; October 21, 2016.)

¶20 At trial, after the State rested, the defense moved for a Rule 29 motion for judgment of acquittal on all cases. (App. 57; Tr. p. 286, lns. 5-8; October 21, 2016.) The Court denied the motion. (App. 57; Tr. p. 286, lns. 14-16; October 21, 2016.)

III. The Standard of Review.

¶21 The North Dakota Supreme Court has outlined the standard of review for a motion to dismiss in a criminal case. State v. Thill, 2005 ND 13, ¶ 6, 691 N.W.2d 230. The Court stated the following:

We will not reverse a trial court's findings of fact in preliminary criminal proceedings if, after the conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the findings and if the trial court's decision is not contrary to the manifest weight of the evidence.... This deferential standard of review recognizes the importance of the opportunity of the trial court to observe and assess the credibility of witnesses.

State v. Thill, 2005 ND 13, ¶ 6, 691 N.W.2d 230 (citing State v. Berger, 2011 ND 44, ¶ 11, 623 N.W.2d 25).

IV. The Trial Court's Decision Denying Toure's Motion to Dismiss is Contrary to the Manifest Weight of the Evidence.

¶22 “The right to a speedy trial is guaranteed in the Sixth Amendment of the United States Constitution and article 1, section 12 of the North Dakota Constitution.” State v. Moran, 2006 ND 62, ¶ 8, 711 N.W.2d 915. “In Barker v. Wingo, 407 U.S. 514, 530 (1972), the United States Supreme Court developed a four factor test to decide whether a defendant's right to a speedy trial has been violated: (1) the length of the delay, (2) the reason for the delay, (3) the accused's assertion of his right to a speedy trial, and (4) the

prejudice to the accused.” State v. Moran, 2006 ND 62, ¶ 8, 711 N.W.2d 915 (citing State v. Bergstrom, 2004 ND 48, ¶ 15, 676 N.W.2d 83). “No single factor is controlling, and all factors must be weighed.” Moran, 2006 ND 62, ¶ 8 (quoting Barker, at 533). “For speedy trial issues, appellate courts review the district court's decision de novo, with the district court's findings of fact reviewed under a clearly erroneous standard of review.” Moran, 2006 ND 62, ¶ 8.

¶23 In the present case, Toure was delayed trial of over one year, which is presumptively prejudicial. State v. Fischer, 2008 ND 32, ¶ 29, 744 N.W.2d 760. The complaint was filed on April 14, 2015, but the trial was not until October of 2016. (App. 1.) Furthermore, the record of void of the nature of difficulties Attorney Green and Toure had. (App. 30.) The Defendant did not request the appointment of new counsel and did not initiate any proceedings to do so, he has not attempted to evade the law. (App. 30.) Attorney Green also failed to file and serve a request for a speedy trial at any point prior to withdrawing from the matter. (App. 30.)

¶24 Toure must also “factually link [his] loss of liberty with any specific prejudice to [his] right to a fair trial.” Moran, 2006 ND 62, ¶ 20 (citing City of Fargo v. Thompson, 520 N.W.2d 578, 580 (N.D. 1994)). Toure has been incarcerated for over a year and a half, when he was previously employed prior to incarceration. (App. 30.) Moreover, Toure was unable to find additional evidence and/or witnesses has suffered due to time, which is significant as there were conflicting statements from several parties involved. (App. 30.) This case relied heavily on witness testimony, therefore time is of the essence.

CONCLUSION

¶25 The Appellant respectfully requests this Court reverse the District Court’s

decision denying the Motion to Dismiss and for failure to comply with North Dakota Rules of Criminal Procedure.

Dated 12th day of July, 2017.

/s/ Laura Ringsak

Laura C. Ringsak (#08146)
Attorney for Appellant, Omar Toure
103 South 3rd Street Ste. 6
Bismarck, ND 58501
(701) 255-1344
lringsak@midcontwork.com

CERTIFICATE OF SERVICE

A true and correct copy of ***BRIEF OF APPELLANT*** and ***APPENDIX OF APPELLANT*** was e-mailed to the following this 12th day of July, 2017:

Nathan Kirke Madden
Attorney at Law
Williams County State's Attorney Office
P.O. Box 2047
Williston, ND 58802
53sa@co.williams.nd.us

/s/ Laura Ringsak

Laura C. Ringsak (#08146)
Attorney for Appellant, Omar Toure
103 South 3rd Street Ste. 6
Bismarck, ND 58501
(701) 255-1344
lringsak@midcontwork.com