20180251

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OCTOBER 18, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	Supreme Court No. 20180251
vs.	)	District Ct. No. 09-2017-CR-04758
	)	
Nyynkpao Banyee,	)	
	)	
Defendant and Appellant.	)	

APPELLEE'S BRIEF

Appeal from the June 1, 2018, Criminal Judgment
East Central Judicial District
the Honorable John C. Irby, Presiding

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[¶ 3] STATEMENT OF ISSUES

[¶ 4] I. Whether I.M.'s and T.H.'s testimony that the Defendant pointed a gun at them during a theft and Officer Fauske's testimony relating to the Defendant's consciousness of guilt constituted competent evidence allowing the district court to draw an inference reasonably tending to prove the Defendant committed robbery.

[¶ 5] II. Whether the district court acted within its discretion in admitting photos that I.M. identified as depicting his stolen iPad, and even if admission had been improper, it was harmless error.

[¶ 6] **STATEMENT OF CASE**

[¶ 7] The Defendant appeals from a criminal judgment entered after the district court found him guilty of robbery. Seeking reversal, the Defendant challenges the sufficiency of the evidence and the admission into evidence of two photos.

[¶ 8] The State asserts sufficient evidence existed allowing the district court to draw an inference reasonably tending to prove the Defendant committed robbery. In particular, I.M. and T.H. testified that the Defendant pointed a gun at them during a theft, and Officer Tyrell Fauske testified about the Defendant's consciousness of guilt, i.e., his untruthfulness about his whereabouts and his possession of an on-line account used to set up the robbery. The State also contends that the district court did not err in admitting photos of an iPad. That is because I.M. testified that the photos depicted his stolen iPad. Regardless, even if admission of the photos had been improper, it was harmless error. The State requests that this Court affirm the judgment.

[¶ 9] **STATEMENT OF FACTS**

[¶ 10] Seeking to sell an iPad in October 2017, I.M. listed his iPad for sale using "Let Go," a cellphone app. (Felony Court Trial Transcript, June 1, 2018, "Tr." 5:24-6:11, 27:25-28:1.) A man expressing interest in buying the iPad, whom I.M. later identified as the Defendant, arranged to meet with I.M. on October 26, 2017, at the Family Fare parking lot in south Fargo. (Tr. 7:1-17, 8:6-21, 16:23-17:14, 28:1-3.) I.M. and his friend T.H. drove to the lot and waited. (Tr. 7:23-8:10, 28:14-22.) The Defendant and others arrived. (Tr. 8:11-21, 28:22-29:17.) After some discussion, I.M. and T.H. agreed to meet the Defendant at a nearby apartment building. (Tr. 9:10-20, 29:18-24.)

[¶ 11] The Defendant, "Sal," I.M., and T.H. met inside the nearby apartment building. (Tr. 10:10-25, 31:2-25.) By this time, it was early evening. (Tr. 15:20-16:1.) Sal asked to inspect the iPad, and the iPad was handed to him. (Tr. 11:1-5, 12:20-21.) At some point, the Defendant walked upstairs. (Tr. 11:5-6, 32:20-22.) A short while later, the Defendant returned, possessing a gun. (Tr. 11:7, 33:4-9.) The Defendant pointed the gun at I.M. and T.H. and told them to empty their pockets. (Tr. 11:7-10, 12:6-9, 13:6-12, 33:15-17.) I.M. gave his wallet to the Defendant. (Tr. 12:24-13:2, 34:18-22.) The Defendant and Sal told I.M. and T.H. to leave, which they did. (Tr. 13:18-23, 35:15-17.) I.M. then called 911. (Tr. 13:24, 36:1-4.)

[¶ 12] Based on the "Let Go" app photo of the man expressing interest in I.M.'s iPad, Fargo Police suspected the Defendant was involved in the robbery. (Tr.

16:23-17:14, 40:20-41:12.) Officer Fauske and another officer went to the south Fargo residence where they believed the Defendant lived. (Tr. 41:20-23.) The Defendant was at the residence and allowed the officers to enter. (Tr. 42:1-4.) During initial discussions, the Defendant claimed that he had not left his residence that evening and that he did not have a "Let Go" account. (Tr. 42:12-17.) Officer Fauske showed the Defendant a photo, which appeared to depict the Defendant and matched the photo of the "Let Go" account owner. (Tr. 42:17-43:4.) The Defendant then admitted that he did have a "Let Go" account but claimed that his cousins had been using it. (Tr. 43:6-9.) The Defendant also admitted that he had left his residence. (Tr. 43:15-24.) After the Defendant consented, Officer Fauske's colleague briefly searched for a gun in the residence but did not find one. (Tr. 44:22-45:7.)

[¶ 13] While at the Defendant's residence, Officer Fauske noticed that a little girl was playing on an iPad. (Tr. 45:20-22.) That iPad appeared to match the description of the iPad stolen from I.M. (Tr. 46:2-3.) The iPad was taken as evidence and returned to I.M. later that night. (Tr. 46:13-14, 17:19-24.)

[¶ 14] The Defendant was charged with robbery. (App. 1.) A court trial took place in June 2018. (App. 2.)

[¶ 15] I.M. and T.H. testified about the Defendant's conduct – meeting at the apartment building with I.M. and T.H. (Tr. 10:10-25, 31:2-25), going upstairs and later returning with a gun (Tr. 11:5-6, 32:20-22, 11:7, 33:4-9), pointing the gun at them (Tr. 11:7-10, 13:6-12, 33:15-16), and telling them to empty their pockets (Tr.

12:6-9, 33:15-17).

[¶ 16] I.M. and T.H. mentioned details about I.M's iPad and had some variances – a topic the Defendant emphasizes on appeal. T.H. believed that I.M.'s iPad had an "otter box" case and said that when meeting with the Defendant and Sal, they began removing the iPad cover to show there were no cracks. (Tr. 32:13-23, 34:7-8.) I.M. explained that he knew the iPad returned to him was in fact his because its front protective screen had been removed and it had a tiny scratch on the bottom right corner, two little cracks near circles on the top, and a Survivor case. (Tr. 19:1-20:6.) Although he could not see the tiny scratch or small cracks in the photos marked as Exhibits 3 and 4, I.M. testified that the exhibits were photos depicting his iPad. (Tr. 18:3-20:6.) When the State offered the exhibits, the defense objected, asserting "it's not the best evidence" and "[i]t's not the iPad[,] but it is photographs; it has been identified." (Tr. 18:20-23.) Overruling the objection, the district court admitted the exhibits. (Tr. 18:24-25.)

[¶ 17] Officer Fauske testified about the Defendant's contradictory statements – initially claiming he had not left his residence and did not have a "Let Go" account but later admitting he had left his residence and did have a "Let Go" account but asserting he believed his cousins had been using his account. (Tr. 42:12-17, 43:6-17.) Officer Fauske also explained that it was common for police to photograph stolen items and then return them to their owners and that Exhibits 3 and 4 were photos taken of the stolen iPad. (Tr. 48:20-22, 49:15-23.)

[¶ 18] After the State rested, the Defendant testified. (Tr. 51:8.) The

Defendant asserted that he and his friend "Aleo" or "Aleal" had purchased the iPad from I.M. and T.H. about three days before October 26, 2017. (Tr. 52:3-22.) Aleal wanted the iPad to create music and paid $250 for the iPad. (Tr. 52:7-8, 53:2-9.) The Defendant claimed that Aleal had been using the Defendant's Let Go account and that the Defendant himself had paid about $90 or $100 of the purchase price for the iPad. (Tr. 59:2-16.) The Defendant claimed that on October 26, 2017, I.M. and T.H. contacted Aleal and wanted the iPad back. (Tr. 53:14-16.) The Defendant later suggested that either Aleal wanted to sell the iPad back to I.M. and T.H. for $350 or that I.M. and T.H. wanted more money for the iPad. (Tr. 54:8-13.) The Defendant admitted that he had been untruthful to Officer Fauske and that he had pleaded guilty to giving false information to law enforcement on a prior occasion. (Tr. 60:1-8.)

[¶ 19] The district court found the Defendant guilty of robbery. (Tr. 64:15-20.) Judgment was entered, and the Defendant appealed. (App. 6, 11.)

[¶ 20] **LAW AND ARGUMENT**

[¶ 21] The Defendant claims that insufficient evidence existed to support his conviction and that the district court erred in admitting Exhibits 3 and 4. The State disputes both claims.

[¶ 22] **I. I.M.'s and T.H.'s testimony that the Defendant pointed a gun at them during a theft and Officer Fauske's testimony relating to the Defendant's consciousness of guilt constituted competent evidence allowing the district court to draw an inference reasonably tending to prove the Defendant committed robbery**.

[¶ 23] In reviewing an insufficient evidence claim, this Court determines whether there is competent evidence allowing the factfinder to draw an inference reasonably tending to prove guilt. State v. Bauer, 2010 ND 109, ¶ 7, 783 N.W.2d 21 (citations omitted). For the robbery the Defendant was charged with, the evidence had to show that "in the course of committing a theft, [the Defendant] … threaten[ed] or menace[d] another with imminent bodily injury" and the Defendant and did so by "possesse[ing] … a firearm … or other dangerous weapon[.]" See N.D.C.C. § 12.1-22-01(1) & (2); N.D.C.C. § 12.1-32-02.1(1)(a). The evidence must be viewed in the light most favorable to the prosecution, and the prosecution must be given the benefit of all inferences reasonably to be drawn in its favor. State v. O'Toole, 2009 ND 174, ¶ 8, 773 N.W.2d 201 (citation omitted).

[¶ 24] Applying that standard shows that sufficient evidence existed supporting the Defendant's robbery conviction. Indeed, I.M.'s and T.H.'s testimony each established the requirements of the robbery; they testified that the Defendant pointed a gun at them (Tr. 11:7-10, 13:6-12, 33:15-16) and told them to empty their

pockets (Tr. 12:6-9, 33:15-17). Whether T.H. knew about minor imperfections to I.M.'s iPad or the type of case it had is irrelevant; reweighing the credibility of witnesses or resolving conflicts in evidence is not part of the review for sufficiency of evidence. See O'Toole, 2009 ND 174, ¶ 8, 773 N.W.2d 201.

[¶ 25] Further, Officer Fauske's testimony about the Defendant's untruthfulness – regarding having a "Let Go" account and his whereabouts earlier in the evening – allowed the district court to reasonably infer the Defendant's consciousness of guilt. See Rizzo v. United States, 304 F.2d 810, 830 (8th Cir. 1962) (citing Wilson v. United States, 162 U.S. 613, 620-21 (1896) ("It has long been settled that the fact that a defendant has made false statements in explanation of the conduct which is the subject of a criminal charge against him is admissible as tending to indicate his guilt.")); United States v. Sloan, 293 F.3d 1066, 1068 (8th Cir. 2002) ("An effort to deceive in order to distance oneself from wrongdoing implies a consciousness of guilt, a circumstance that can support a conviction."). Still further supporting guilt was Officer Fauske's testimony that the stolen iPad was located at the Defendant's residence.

[¶ 26] While the Defendant includes in his insufficiency argument a contention that Officer Fauske's testimony contained hearsay, his claim is not supportable. The Defendant asserts that the "investigation leading up to Fauske's role in the case was the foundation to introduce Fauske's own testimony" and "[t]he district court was only presented with information that other officers identified [the Defendant] as a suspect with no way to discuss the validity of the investigation that

led to finding him." (Appellant's Brief at ¶ 32.) But Officer Fauske's testimony that the Defendant was identified as a suspect was not offered for its truth. Inherent in the meaning of "suspect" is uncertainty. Officer Fauske's testimony was offered to provide context for his attempt to find the Defendant. The evidence identifying and implicating the Defendant was instead the testimony of both I.M. and T.H.

[¶ 27] **II. The district court acted within its discretion in admitting photos that I.M. identified as depicting his stolen iPad, and even if admission had been improper, it was harmless error.**

[¶ 28] The admission of photos in criminal cases is largely within the trial court's discretion. State v. Streeper, 2007 ND 25, ¶ 13, 727 N.W.2d 759. Photos are generally admissible to establish or clarify evidence of physical facts and to help the factfinder understand evidence. State v. Engel, 289 N.W.2d 204, 209 (N.D.1980). To authenticate a photo, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. State v. Leavitt, 2015 ND 146, ¶ 16, 864 N.W.2d 472 (citing N.D.R.Ev. 901). One way to do that is "by introducing testimony of a witness with knowledge 'that an item is what it is claimed to be.'" Id. (citing N.D.R.Ev. 901).

[¶ 29] The district court did not abuse its discretion because Exhibits 3 and 4 were authenticated. I.M., the owner of the iPad, testified that the exhibits depicted the iPad that had been taken and later returned to him. (Tr. 18:3-20:6.) I.M. was a witness with knowledge of the iPad. As the owner, he was the ideal person to identify photos of his iPad. His testimony was a valid means of authentication under N.D.R.Ev. 901(b)(1).

[¶ 30] The Defendant's contention that the best evidence rule required admission of the iPad itself is not supportable. The Defendant's contention is incorrectly premised on the iPad itself being the "original" of the photos. The originals of the iPad photos depicted in Exhibits 3 and 4 would be negatives or the first created visual representations of the iPad – not the object depicted itself. See N.D.R.Ev. 1001(d) (explaining an original of a "writing" and an original of a "photograph"). "[T]the Best Evidence Rule does not usually apply to photographs, [unless] th[e] case is one of 'those relatively rare instances in which [the photographs'] contents are sought to be proved.'" United States v. Stockton, 968 F.2d 715, 719 (8th Cir. 1992) (emphasis added). Stockton involved photographs of paperwork, which a witness even read from during trial. Id. Thus the contents of a "writing" were involved in Stockton. In contrast, the photos depicted in Exhibits 3 and 4 simply showed an iPad and did not constitute writings with contents. The Defendant's best evidence rule contention thus fails.

[¶ 31] Regardless, even if admission of Exhibits 3 and 4 had been improper, the error was harmless. When evidence is improperly admitted, the harmless error standard is applied on review. State v. Carlson, 2016 ND 130, ¶ 14, 881 N.W.2d 649. An error should be disregarded as harmless if it did not affect substantial rights in light of the entire record. Id. Exhibits 3 and 4 depicted what the State asserted was I.M.'s stolen iPad. But they were not necessary to establish guilt. Sufficient evidence of guilt was established by the previously noted evidence - I.M.'s and T.H.'s testimony identifying the Defendant as the robber and Officer Fauske's

testimony about the Defendant's deception showing consciousness of guilt. In light of all the evidence, admission of Exhibits 3 and 4 did not impact substantial rights of the Defendant.

[¶ 32] CONCLUSION

[¶ 33] Sufficient evidence supported the Defendant's robbery conviction. Further, the district court acted within its discretion in admitting Exhibits 3 and 4. And even if admission of the exhibits had been improper, it was harmless error. The State requests that this Court affirm the criminal judgment.

[¶ 34] Respectfully submitted this 18th day of October 2018.

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[¶ 35] CERTIFICATE OF SERVICE

[¶ 36] A true and correct copy of the foregoing document was sent by e-mail on the 18th day of October 2018 to: Caitlyn Pierson at cate@capierson.com.

Reid A. Brady, NDID# 05696