

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File No.
)	20200023
)	
Plaintiff and Appellee,)	Stutsman County No.
)	08-2019-CR-1917
v.)	
)	
Russell Metz,)	APPELLANT'S BRIEF
)	
Defendant and Appellant.)	

**Appeal from the amended criminal judgment in Burleigh
County district court, south central judicial district,
Bismarck, North Dakota, March 13, 2020, the Honorable
Douglas Bahr, presiding.**

ORAL ARGUMENT REQUESTED

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N.D.C.C. § 29-28-06	¶ 1

Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant's written arguments on their merits.

Transcript References:

The Jury Trial for this matter was conducted on January 23, 2020. The transcript of the jury trial is referred to as [Tr.] in this brief.

JURISDICTION

[¶ 1] The Defendant, Russel James Metz, timely appealed the criminal judgment arising out of the district court. This Court has appellate jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-06 which states:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

STATEMENT OF THE ISSUES

- I. Whether the district court erred by denying Mr. Metz’s motion for acquittal.

STATEMENT OF CASE

[¶ 2] This is a criminal matter on direct appeal from the south central judicial district, Burleigh County criminal judgment. This case was before the district court in *State v. Metz*, 08-2019-CR-1917. The criminal information was filed with the court on July 2, 2019 and Mr. Metz proceeded to trial.

[¶ 3] Mr. Metz was found guilty of conspiracy to commit burglary, in violation of N.D.C.C. §§ 12.1-06-04 (defining conspiracy) and N.D.C.C. § 12.1-22-02(1) (defining burglary), a class C Felony. He was found guilty. The

criminal judgment was entered in this case on January 24, 2020. Mr. Metz now timely appeals the criminal judgment. He was sentenced to serve two years with all but 60 days suspended, later amended to 53 days, and two years of supervised probation. Mr. Metz timely appealed the district court's final judgment in this case.

STATEMENT OF FACTS

[¶ 4] On the morning of July 1, 2019, Scott Schiermeister, the maintenance manager at the Gateway Mall in Bismarck, saw an individual pulling out of the old Sears store garage door on a forklift. Tr. pp. 60-61. Ivan Mukave rents the space that used to be the Sears store. Tr. p. 73. He kept electronic and DJ equipment as well as his Toyota van in the space. Tr. pp. 73, 75. Mr. Schiermeister noticed that the forklift was not being operated by Mr. Mukave and that equipment was falling off the forklift into the parking lot. Mr. Schiermeister did not see Mr. Metz near the forklift. He did see him in a teal pickup truck. Tr. p. 69. He called the police to the parking lot where the forklift had been stopped. He witnessed Mr. Chrisikos remove a bookbag from the forklift. Tr. p. 82.

[¶ 5] Officers arrived on the scene and questioned Mr. Schiermeister, Mr. Chrisikos, and Mr. Metz. Officer Paulson testified that the call came in at roughly 6:49 in the morning. Tr. p. 81. It was determined that Mr. Schiermeister, followed the path of electronics equipment through the parking lot with his Bobcat, where he found the forklift parked on the 800

block of East Gateway Avenue, on the north side, facing west. Tr. p. 82.

Officer Betz looked in the windows of the teal pickup and saw what appeared to be two headphones, that were missing from Mr. Mukave's van.

[¶ 6] Mr. Metz testified that he knew Mr. Chrisikos because his wife knew him. Tr. p. 120. Mr. Metz testified that his wife purchased a large metal shelf from Mr. Chrisikos about two months prior to that day. Tr. pp. 120-121. However, the shelving was too heavy for him to move into the house alone. Mr. Chrisikos came over on July 1, 2019, early in the morning to help him move it into the house. Tr. p. 121. Because it was so early Mr. Metz wanted to wait until his family was awake before moving the shelving. *Id.* Mr. Chrisikos left for a time and then came back close to when the police arrived. Tr. p. 126.

[¶ 7] Before Mr. Chrisikos came back, Mr. Metz went to get a pack of cigarettes and saw the forklift driving through the mall parking lot. Tr. p. 122. He saw an individual dressed all in black with possibly a grey wig on driving the forklift. Tr. p. 125. Mr. Metz was by his truck parked in front of his home when police questioned him and Mr. Chrisikos. Police asked for both men's identification. Mr. Metz gave him his ID and then testified, "[Mr. Chrisikos] said it was in my truck...so they asked me to open it up because I said it was locked, so I had walked over, unlocked it, left the key there and turned around and went back to tell what I seen." Tr. p. 129. Mr. Metz testified he believed that was when Mr. Chrisikos placed items into his truck,

including the backpack he retrieved from the forklift. Tr. p. 130, 131 ln 17. Mr. Mottinger made a motion for acquittal and the close of the State's case and at the close of Mr. Metz's case. Tr. pp. 113, 138.

LAW AND ARGUMENT

I. Whether the district court erred by denying Mr. Metz's motion for acquittal?

[¶ 8] The appellate standard of review regarding a claim of insufficiency of evidence is well-established. In *State v. Schmeets*, 2007 ND 197, ¶8, 742 N.W.2d 513, the court stated: "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." *State v. Igou*, 2005 ND 16, ¶5, 691 N.W.2d 213. 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.* "A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor." *State v. Knowels*, 2003 ND 180, ¶6, 671 N.W.2d 816.

[¶ 9] Mr. Metz was found guilty of conspiracy to commit burglary. Burglary is defined by statute as an individual who, "willfully enters or

surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein. All the evidence presented by the State's witnesses only placed Mr. Chrisikos, inside the building and on the forklift. He's the only person who could have committed the crime of burglary. However because this case was charged as a conspiracy the State must also prove there was an agreement to enter the old Sears store and to commit a crime therein, in this case theft, before Mr. Chrisikos did so.

[¶ 10] The essential elements necessary for conspiracy in this case are:

1. On or about July 1, 2019;
2. In Burleigh County, North Dakota;
3. The Defendant, Russell James Metz;
4. Agreed with one or more persons;
5. To engage in or cause conduct constituting the crime of Burglary; and
6. Any one or more of such persons in the agreement then committed an overt act to effect an objective of the conspiracy.

See Jury Instructions Index # 38. The State failed to prove that Mr. Metz agreed with Mr. Chrisikos to commit a burglary. Because the crime charged is burglary the agreement had to have occurred prior to the unauthorized entry into Mr. Mukave's property. There was no testimony or evidence that indicated Mr. Metz agreed to improperly enter the old store or

commit the crime of theft, both are necessary to find him guilty of conspiracy to commit burglary in this case.

[¶ 11] Because there was no evidence presented that Mr. Metz's intention was to agree to Mr. Chrisikos entering the store with an intent to engage in a crime, the State did not carry its burden of beyond a reasonable doubt. Consequently, Mr. Metz's motion for acquittal should have been granted.

CONCLUSION

[¶ 12] There was insufficient evidence at trial to support a conviction. The evidence provided by the State proves that Mr. Chrisikos had access to Mr. Metz truck and Mr. Metz lived across the street from the mall. There was no indication that Mr. Metz knew or agreed to Mr. Chrisikos stealing from Mr. Mukave.

[¶ 13] WHEREFORE the Defendant respectfully requests the Court to reverse the verdict and judgment of the trial court.

Dated this 4th day of May, 2020

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)	
Russell Metz,)	CERTIFICATE OF
)	COMPLIANCE
Defendant and Appellant.)	

[¶ 1] This Appellant's Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: May 4, 2020.

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Russell Metz,)	CERTIFICATE OF
)	SERVICE
Defendant and Appellant.)	

[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief with Certificate of Compliance
Appellant's Appendix

And that said copies were served upon:

Justin Schwarz, Assistant State's Attorney, bc08@nd.gov

by electronically filing said documents through the court's electronic filing system and upon:

Russell Metz, 2520 N 8 St #205, Bismarck, ND 58501

by placing a true and correct copy of said documents in a sealed envelope with USPS.

Dated: May 4, 2020.

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