

**ORIGINAL**  
(e-filed)

20080021  
20080022

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

State of North Dakota,	)
Plaintiff/ Appellee,	)
	) Supreme Court No. 20080021; 20080022
	)
-vs-	) District Court No. 06-K-1017; 06-K-1018
	)
Robert Lee Johnson,	)
Defendant/ Appellant.	)

**BRIEF OF APPELLANT**

**APPEAL FROM CRIMINAL JUDGMENT AND COMMITMENT  
DATED JANUARY 9, 2008,  
OF SOUTH EAST JUDICIAL DISTRICT  
THE HONORABLE RICHARD W. GROSZ, PRESIDING**

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**MAY 30 2008**

**STATE OF NORTH DAKOTA**

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**TABLE OF AUTHORITIES**

**Cases**

*State v. Myers*, 2006 ND 242, 724 N.W.2d 168 ¶ 20

**Statutes**

N.D.C.C. § 12.1-17-11 ¶ 21

N.D.C.C. § 29-28-03 ¶ 18

N.D.C.C. § 29-28-06 ¶ 18

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**STATEMENT OF THE ISSUES**

[¶ 1] I. Whether there was Sufficient Evidence to Support Defendant's Convictions.

**STATEMENT OF THE CASE**

**A. Nature of the case, course of the proceedings, and disposition in the trial court.**

[¶ 2] This is an appeal from a criminal case. Defendant/Appellant (hereinafter Johnson) was charged with one count of terrorizing and one count of contact by bodily fluids or excrement under file number 06-K-1017. (Appellant Appendix (hereinafter "App." at p. 5). Johnson was also charged with one count of contact with bodily fluids or excrement under file number 06-K-1018. (App. at p. 9).

[¶ 3] The State filed a Notice Defendant is a Habitual Offender on November 29, 2006, in file number 06-K-1017 and on January 3, 2007, in file number 06-K-1018. (File No. 06-K-1017, Docket No. 15; File No. 06-K-1018, Docket No. 20).

[¶ 4] The Criminal Information was filed on February 6, 2007, in both files. (App. at p. 7, 10).

[¶ 5] Johnson filed a Notice of Defense Based on Mental Condition on April 25, 2007, for both files. (File No. 06-K-1017, Docket No. 30).

[¶ 6] A jury trial was held on January 7, 8, and 9, 2008, on all three charges. The Honorable Richard W. Grosz, presided. During the trial, the charge of terrorizing was dismissed with prejudice on the Court's own motion. (Transcript of January 8, 2008, (hereinafter T.2) at p. 71, ln. 1-5). The jury returned a verdict of guilty on the remaining two counts.

[¶ 7] Johnson was sentenced on January 9, 2008, to serve ten (10) years under filed number 06-K-1017, (App. at p. 8), and ten (10) years under file number 06-K-1018, (App. at p. 11), based upon the habitual offender enhancement.

[¶ 8] A notice of appeal was filed on January 22, 2008. (App. at p.12).

[¶ 9] Johnson filed a motion for a new trial on March 10, 2008. (File No. 06-K-1017, Docket No. 88). The motion was denied by the trial court. (File No. 06-K-1017, Docket No. 92).

### **B. Statement of facts**

[¶ 10] On June 30, 2006, Johnson was at James River Correction Center, in Jamestown, North Dakota on unrelated charges. According to the testimony of Jeffrey Brodigan, Johnson had been agitated that day. (T.2 at p. 6, ln. 6-7). Later in the day when Johnson had calmed down, he asked to speak with Brodigan as he walked by. (T.2 at p. 5, ln. 24-p. 6, nl. 3). As Johnson and Brodigan spoke, Johnson was taking sips from a cup. (T.2 at p. 8, ln. 10-11). Johnson began agitated again and Brodigan told him he "would stop talking to you now and come back and talk to you later when you calm down." (T.2 at p. 10, ln. 5-6). Johnson then threw the fluids from the cup at

Brodigan and shouted "That's piss". (T. 2 at p. 10, ln 8-11). Brodigan then got a new uniform, decontaminated, and put the uniform into a paper bag. (T. 2 at p. 12).

[¶ 11] On July 6, 2006, Johnson was at James River Correction Center in Jamestown, North Dakota on unrelated charges. According to the testimony of Duane Irish, Johnson was being held in the observation cell and refused to put his arm and hands in his cell. (T. 2 at p. 34, ln. 14-15). Johnson was calm and non-argumentative, but would not comply with Irish's request for him to pull his arm or hand in and close the tray door to his cell. (T. 2 at p. 38, ln. 24-p. 39, ln. 6). During this time, Johnson repeatedly asked Irish to speak with him and Irish decline to speak with Johnson. (T. 2 at p. 39, ln. 11).

[¶ 12] According to the testimony of Irish, at approximately 3:45 p.m., Johnson had his arm out of his cell and as he walked in front of Johnson's cell, Johnson threw a liquid on him that had the strong odor of urine. (T. 2 at p. 40, ln. 7-11) Irish left the unit, disinfected himself, and placed his clothes in a bag for evidence. (T. 2 at p. 41, ln. 1-2).

[¶ 13] Irish testified that later the same day, he went into Johnson's cell to place him in grip restraints. (T. 2 at p. 41, ln. 5-7). After the restraints were applied, Irish ordered the other staff that were in the cell to exit it as he maintained control of Johnson. (T. 2 at p. 50, ln. 16-18). As Irish let go of Johnson, Johnson turned and spit on Irish's left collar. (T. 2 at p. 50, ln. 18-20).

[¶ 14] On November 29, 2006, Johnson was charged with one count of terrorizing and one count of contact by bodily fluids or excrement under file number

06-K-1017. (App. at p. 5). On the same day, he was also charged with one count of contact with bodily fluids or excrement under file number 06-K-1018. (App. p. 9).

[¶ 15] A jury trial was held on January 7, 8, and 9, 2008, on all three charges. The Honorable Richard W. Grosz, presided. During the trial, the charge of terrorizing was dismissed with prejudice on the Court's own motion. (T.2 at p. 71, ln. 1-5). The jury returned a verdict of guilty on the remaining two counts.

[¶ 16] Johnson was sentenced on January 9, 2008, to serve ten (10) years under file number 06-K-1017, (App. at p. 8), and ten (10) years under file number 06-K-1018, (App. at p. 11), based upon the habitual offender enhancement.

[¶ 17] A notice of appeal was filed on January 22, 2008. (App. at p. 12).

## **LAW AND ARGUMENT**

### **A. Jurisdiction**

[¶ 18] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provide as follows:

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.

N.D.C.C. § 29-28-06.

## **B. Whether there was Sufficient Evidence to Support Defendant's**

### **Convictions.**

[¶ 19] Johnson contends there was not sufficient evidence presented at trial to support his convictions.

[¶ 20] The North Dakota Supreme Court outlined the standard for review for challenges of sufficiency of the evidence in *State v. Myers*:

In an appeal challenging the sufficiency of the evidence, we look only to the evidence and reasonable inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing 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 factfinder could find the defendant guilty beyond a reasonable doubt. In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses. A verdict based on circumstantial evidence carries the same presumption of correctness as other verdicts. A conviction may be justified on circumstantial evidence along if the circumstantial evidence has such probative force as to enable trier of fact to find the defendant guilty beyond a reasonable doubt. Moreover, a jury may find a defendant guilty even though evidence exists which, if believed, could lead to a not guilty verdict.

*State v. Myers*, 2006 ND 242, ¶ 19, 724 N.W.2d 168 (citations omitted).

[¶ 21] Johnson was charged and subsequently convicted of two counts of Contact by Bodily Fluid or Excrement in violation of section 12.1-17-11, N.D.C.C.

The statute provides in part:

1. An individual is guilty of an offense if the individual causes blood, emesis, excrement, mucus, saliva, semen, vaginal fluid, or urine to come in contact with:
  - a. A law enforcement officer acting in the scope of employment;
  - b. An employee of a correctional facility or the department of corrections and rehabilitation acting in the scope of employment unless the employee does an act within the scope of employment which requires or causes the contact;



- c. Any person lawfully present in a correctional facility who is not an inmate;
- d. Any person lawfully present in the penitentiary or an affiliated facility of the penitentiary who is not an inmate; or
- e. Any person who is transporting an individual who is lawfully detained.

N.D.C.C. § 12.1-17-11.

[¶ 22] In the instructions to the jury, the court listed the essential elements of the offense as follows:

Number one. On or about June 30, 2006, in Stutsman County, North Dakota, the Defendant, Robert Lee Johnson, caused urine to come into contact with Jeff Brodigan.

Number two. Jeff Brodigan was a law enforcement officer acting in the scope of employment or a person lawfully present in a correctional facility who is not an inmate; and

Number three. The Defendant Robert Lee Johnson knowingly caused the contact.

(T.2 at p. 139, ln. 19- p. 140, ln. 5). And,

Number one. On or about July 6, 2006, in Stutsman County, North Dakota, the Defendant, Robert Lee Johnson, caused mucus, saliva or urine to come into contact with Duane Irish.

Number two. Duane Irish was a person lawfully present in a correctional facility who is not an inmate; and

Number three. The Defendant Robert Lee Johnson knowingly caused the contact.

(T.2 at p. 141, ln. 2-9).

[¶ 23] Johnson made a motion for acquittal during the jury trial. (T.2 at p. 124, ln. 8-p. 125, ln. 5). The motion was based upon the assertion that was no evidence that either Brodigan or Irish were hit by either urine or spit as alleged by the State. (T.2 at p. 124, ln. 8-p. 125, ln. 5). The trial judge denied the motion. (T.2 at p. 125, ln. 20-21). Johnson asserts that the trial court erred in denying Johnson's motion for acquittal.

[¶ 24] Johnson maintains that there is insufficient evidence that he caused urine to come in contact with Brodigan. Brodigan testified at trial that Johnson was taking sips from a cup, (T.2 at p. 8, ln. 10-11), and that Johnson threw the fluid from the cup on him. (T.2 at p. 10, ln. 8-9). He testified that he was hit from the face down to the hip (T.2 at p. 17, ln. 15-16), but testified that he did not smell the fluid that was thrown on him and that there was no “overwhelming odor”. (T.2 at p. 11, ln. 19-20). He also testified that it could possibly have been water. (T. 2 at p. 25, ln. 9-11).

[¶ 25] Laboratory testing was conducted on cuttings from the uniform shirt Brodigan was wearing during the incident. Of the numerous samples tested, only one was positive for urea. (T.2 at p. 105, ln. 12-13). The undershirt Brodigan was wearing at the time of the incident did not reveal any biological fluids when the alternative light source test was conducted on it. (T.2 at p. 100, ln. 14-23).

[¶ 26] Stephanie Maier, a forensic scientist, testified at trial that urea is found in human urine, fertilizer, ammonia, and that the test performed on the clothing can be influenced by some antibiotics. (T.2 at p. 106, ln. 16- p. 107, ln. 12). There was also testimony that the testing that was conducted does not indicate which individual, if any, the urea came from.

[¶ 27] Accordingly, Johnson argues that there was insufficient evidence to support a conviction that he caused urine to come in contact with Brodigan.

[¶ 28] Johnson also maintains that there is insufficient evidence that he caused urine or spit to come in contact with Irish. Irish testified that Johnson threw liquid on him that smelled of urine, (T.2 at p. 40, ln. 10-11), and spit on him. (T.2 at p. 50, ln. 18-19). He testified, however, that he did not know what was in the cup of liquid that

was thrown at him. (T.2 at p. 64, ln. 5-7). He also testified, after the observed his uniform shirt, at trial that the stain on the collar of his shirt where he allegedly was spit on “looks like a sweat stain”. (T.2 at p. 64, ln. 8-25).

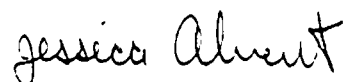
[¶ 29] Irish testified that the liquid hit him on the left side of his body from the knees to the shoulder, the back of his head and ears, and on his back. (T. 2 at p. 61, ln. 16-19; p. 63, ln. 22-24). Several cuttings were taken from Irish’s uniforms he was wearing on the day of the incident. The cuttings, numbered two, three, and four, which were taken from the bottom front left of the shirt tested negative for urea. (T. 2 at p. 112, ln. 23-p. 113, ln. 15). The cuttings from close to the button line and on the right side of the uniform shirt were the cuttings that tested positive for urea. (T.2 at p. 113, ln. 16-p. 114, ln. 3).

[¶ 30] Accordingly, Johnson contends that there was insufficient evidence to support a conviction that he caused Irish to come into contact with saliva or urine. There was not substantial evidence presented at trial to warrant the conviction and the evidence presented at trial was not of such probative force as to enable the jury to find Johnson guilty beyond a reasonable doubt.

### CONCLUSION

[¶ 31] Based on the forgoing, the Court should reverse the judgment on the conviction and remand this action to the trial court with instructions to dismiss it with prejudice.

Dated this 29th day of May, 2008.



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