

ORIGINAL
(e-filed)

20080021
20080022

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota Plaintiff and Appellee)	Supreme Court Nos. 20080021 & 20080022 Stutsman County Nos. 06-K-1017 & 1018
)	
v.)	FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT
)	JUN 24 2008
Robert Lee Johnson Defendant and Appellant)	STATE OF NORTH DAKOTA

STATE'S BRIEF

Johnson Appeals Two Judgments of Conviction

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CASES:

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State v. Kunkel, 548 N.W.2d 773, (N.D.1996) ¶ 31

State v. Wilson, 2004 ND 51, 676 N.W.2d 98 ¶ 31

STATUTES:

NDCC § 12.1-17-11 contact by bodily fluids or excrement ¶ 5

RULES:

Rule 29 of the North Dakota Rules of Criminal Procedure ¶ 9, 31

[¶ 3] ISSUE PRESENTED FOR REVIEW

Whether, in the entire trial, there was sufficient evidence presented to support both convictions.

[¶ 4] STATEMENT OF THE CASE

[¶ 5] Nature of the case

Robert Johnson appeals from two judgments of conviction on charges of contact by bodily fluid. North Dakota Century Code §12.1-17-11.

[¶ 6] The course of proceedings and disposition below

[¶ 7] The incidents occurred at the James River Correctional Center (JRCC), in June and July of 2006. The complaints and a “Notice Defendant is a Habitual Offender” were filed on 29 November 2006.

[¶ 8] On the 25th of April 2007, Johnson filed notice of intent to proceed with a defense of lack of criminal responsibility.

[¶ 9] In its case in chief, the State presented four employees of the JRCC and a forensic scientist from the state lab. The forensic scientists, Stephanie Maier, found evidence of urea on both Brodigan’s and Irish’s shirts. Johnson moved for Rule 29 judgment of acquittal at the close of the State’s case. Transcript of day 2 [hereinafter T2] 124. Johnson’s motion was denied. T2 125. Johnson called Dr. Rodney Swenson who tried to testify Johnson’s mental condition precluded Johnson from being responsible for his criminal behavior. Transcript of day 3 [hereinafter T3] 1, 40.

[¶ 10] Statement of the Facts

[¶ 11] While an inmate at JRCC, on the 30th of June 2006, Johnson threw urine on

Jeff Brodigan, a correctional officer. This was charged in 06-K-1017.

[¶ 12] On the 6th of July 2006, Johnson twice threw urine on Correctional Officer Duane Irish, and later that same day spit on Duane Irish. Both the spitting and the urine throwing were combined in one count in 06-K-1018.

[¶ 13] Johnson was housed in JRCC's Special Attention Unit (SAU). Transcript of day 1 [hereinafter T1] 120-121. The SAU is treatment unit in which inmates get attention from social workers and psychologists. T1 120. The SAU is not disciplinary detention (DD). T1 120 line 9. Disciplinary detention is for inmates who have committed rule violations. Id. Johnson had been placed in SAU because he had difficulties getting along in the general population and because he had been inflicting harm on his own body. T1 120-121. Johnson had been put in the SAU's observation unit because Johnson had been getting upset and had tried to pull sutures out that had been put in his arm after he cut himself with a broken lightbulb. T1 151, 153.

Jeff Brodigan Incident 30 June 2006

[¶ 14] On the 30th of June 2006, Johnson was visited in the observation unit by Ms. Shannon Erickson, Acting Director of the SAU. Erickson obtained her masters degree from NDSU in clinical psychology and was working towards a Ph.D in clinical psychology T1 148 lines 1-5. Erickson was both paid for her work and receiving credit towards her doctoral degree. T1 147-148.

[¶ 15] Erickson testified Johnson had been getting upset several times a day, T1 152 line 7; had been trying to pull his sutures out, T1 150 lines 19-25, 151; was upset about having been put in observation, T1 152 lines 20-13; and that on the 30th of June 2006,

Erickson was meeting with Johnson at least in part to fulfill her general duty to visit with those in observation. T1152 lines 20-23, 153 lines 18-20.

[¶ 16] Erickson testified that as she and Johnson talked they made some headway and Johnson was calming down. T1 153 lines 21-25, 154 lines 1-14. Consequently, Erickson let Johnson know she needed to move on and Johnson became agitated again and threatening to himself and staff. T1 154 lines 15-25. Johnson said, "That's it, I'm just going to f***** go after staff." T1 156 lines 2-4. Erickson indicated that if an SAU inmate is going to bother to make this sort of statement it indicates that the inmate is threatening to do the sort of things she has seen such as grabbing staff through the tray slot and throwing bodily fluid on staff. T1 160 lines 1-15.

[¶ 17] Later on the 30th of June 2006, as Correctional Officer Jeff Brodigan was passing Johnson's cell, Johnson hailed Brodigan. T2 5. Brodigan testified Johnson had been having a tough day, had been put in cuffs, later to insist he did not want the cuffs taken off. T2 5 line 10. Eventually, Johnson calmed down, got the cuffs taken off, T2 5 lines 11-12, 24-25; and asked to talk with Brodigan. Brodigan talked to Johnson hoping to calm him down and ensure the rest of the shift went smoothly. T2 7 lines 3-8. Brodigan knelt down a few feet from the tray slot in Johnson's door so he could hear Johnson well and see Johnson face to face. T2 7 lines 17-25, 8 lines 4-8. Johnson had a Styrofoam cup left after a meal and appeared to be taking sips from it. T2 8 lines 21-25. Brodigan testified that Johnson was not taking big drinks, but simply appeared to be sipping from it. Id. and T2 9 lines 1-2. During the conversation, Johnson's mood shifted from apologetic to angry. T2 9 lines 5-12. Brodigan told Johnson if he didn't simmer

down, Brodigan would stop talking. T2 9 lines 9-11, 10 lines 5-6. At that, Johnson threw fluid in the cup on Brodigan and shouted “[t]hat’s piss!” T2 10 lines 8-13. Brodigan testified that after Johnson yelled, “[t]hat’s piss,” Brodigan got the “creepy crawlies” and didn’t try to smell the fluid. T2 11 lines 15-20. Brodigan acknowledged there was no overwhelming odor of urine. Id. Brodigan got out of his uniform, put it in an evidence bag, washed up and changed clothes. T2 11-14. A couple of days after Johnson doused Brodigan, Johnson apologized to Brodigan. T2 10 lines 17-25. Brodigan testified that Johnson, “. . . apologized for throwing piss on me. He didn’t want to slime me. He wanted to slime someone else.” T2 27 lines 17-23.

Lab Tests of the Clothing Produce Some Positives for Urea

[¶ 18] North Dakota State Crime Lab forensic scientist, T2 83, Stephanie Maier, fka Stephanie Creek, T2 82, testified she conducted two sets of tests on Brodigan’s shirt, an alternative light test and a urea nitrogen tubes test, T2 87 lines 16-20, and that she found urea on one the swatches she had cut from Brodigan’s shirt. T2 104 lines 22-25; 105 line 1 & 6-13.

[¶ 19] Brodigan’s uniform shirt was referred to as item “1B”, (T2 91) in Maier’s lab report, State’s Exhibit 3. T2 106; Docket # 63. On the report Maier declared swatch 1B2 tested positive for urea. State’s 3; T2 94, 97, 98 lines 8-12, 108 lines 15-20, 109.

[¶20] Maier testified she used a florescent light, which in layman’s terms is a black light, T2 93 lines 1-5, to fluoresce any biological material on the fabric. T2 92. Under black light, Maier circled the areas that fluoresced with ink from a black Sharpie pen. T2 93. Maier inspected the areas circled for crust or residue and if any was found, cut out a

swatch of cloth from it. T2 94, 97, 98. After she had circled the areas but before she cut the swatches, Maier took a photograph of Brodigan's shirt and the photograph was admitted as State's 45. T2 94-95. The swatch from the circled area on Brodigan's right front pocket was named item IB2 in Maier's report. T2 94, 97, 98 lines 8-12, 108 lines 15-20, 109

[¶ 21] Each swatch was put in its own test tube, T2 102, lines 14-18, and a series of solutions were added which in the end would turn a shade of blue, the more potent the urea in the swatch, the more vibrant the blue in the solution. T2 99 lines 13-16 et seq. thru p104. Maier acknowledged there are other sources of urea besides urine, i.e. fertilizer, ammonia, and some antibiotics. T2 106-107. Maier also acknowledged that if the urea is from a human, this test does not identify whose urine it is. T2 107 line 17.

Duane Irish Incident 6 July 2006

[¶ 22] The conviction on the second charge, 06-K-1018 covers three contacts that all occurred on the 6th of July 2008 and both involving Correctional Officer Duane Irish.

[¶ 23] Just after Irish started his shift, Shannon Erickson called Irish over to Johnson's cell and told Irish that Johnson was refusing to pull his arm in inside his cell. T2 34, 39 lines 18-21. Johnson was aware that his arm is not to be outside the tray slot. T2 35, lines 19-25, T2 36 lines 2-7. The procedure requiring tray doors to be shut is common knowledge among the inmates. Id. A closed tray door prevents inmates from grabbing staff, throwing things on staff, or assaulting staff with sharp objects. T2 35. Hanging the arm out the door prevents staff from closing the tray door. T2 60 lines 22-24. Johnson wanted to talk with Shannon Erickson, but Erickson was done talking with

Johnson. T2 38 lines 19-21. Johnson used the rule violation in an attempt to negotiate for more face time with Shannon Erickson. T2 36-37, 39 lines 23-25, 40 lines 1-2.

Johnson was also trying to get CO Irish to come over and speak with him. T2 36 lines 16-21, T2 39 lines 7-13. Irish told Johnson he would come right away to talk with Johnson if Johnson would pull his arm inside the tray slot. T2 39 lines 7-13.

[¶ 24] During the hour and a half Irish did rounds he never did stop to speak with Johnson and eventually, as Irish passed by Johnson's cell on his rounds, Johnson threw a liquid on Irish that Irish testified had a very strong odor of urine. T2 40 lines 2-19, T2 61. Irish continued to the end of the hall, got his jacket, and when he was passing Johnson's cell Johnson threw what Irish assumed was the rest of the contents of the cup at Irish. T2 43-44, T2 40 lines 13-19, T2 62-63.

[¶ 25] Irish left the unit, disinfected, changed his clothes, and put his clothes in evidence. T2 40-41, 44-45.

[¶ 26] Later that same day, Johnson became self destructive and JRCC staff went in the cell to put grip restraints on Johnson and Johnson said to Irish, "[h]ow do you like having my piss all over you?" T2 41 lines 19-25. Another comment Johnson made later was that he would continue to assault staff until he left the unit. T2 43. In JRCC the term assault can include throwing bodily fluids or excrement. T2 43.

[¶ 27] After the restraints were applied, Irish ordered the other staff members in the cell to exit the cell while Irish maintained control of Johnson. T2 50. As Irish let go of Johnson, Johnson turned and spit at Irish hitting Irish in the face and on the left collar. T2 50. Although the defense was insinuating through its questioning that they doubted the

stain on Irish's collar was from spit, Irish stated there was no question in his mind that Johnson spit on his collar and that it was bloody spit. T2 66.

[¶ 28] Later that night, Irish felt Johnson had calmed down enough to remove the grip restraints. T2 42. Irish gave Johnson a sandwich, they talked, and Johnson apologized claiming he didn't mean to throw urine on Irish but that it was meant for someone else. T2 42 lines 1-7.

[¶ 29] Forensic scientist, Stephanie Maier performed the same battery of tests on Irish's clothes as she had on Brodigan's. T2 105 lines 18-20. Maier found urea on 3 of the 6 swatches she cut from Irish's uniform shirt. T2 105-106. On "page 1 of 2" of laboratory report 07-01120, received as "State's Exhibit 3", T2 106, in the section entitled "evidence submitted", item 2 is identified as "One sealed brown paper bag marked "Officer Irish D, 7-6-06 3:40 PM". T2 112. There are three items designated as coming from the bag, and they're called 2A, 2B, and 2C. Id. Item 2B, a Martin's Officer shirt, had 6 swatches cut out, T2 112 lines 20-22, of it and 3 of the 6 are reported as urea detected.

[¶ 30] **Standard of Review**

[¶31] The standard of review for this sort of case was set out in 2005 in *State v. Krull*.

"We treat [a] motion to dismiss as a motion for judgment of acquittal under Rule 29(a), N.D.R.Crim.P., and proceed to determine whether or not the evidence ... was sufficient to sustain the judgment of conviction." *State v. Engebretson*, 326 N.W.2d 212, 214 (N.D.1982) (internal citation omitted); see N.D.R.Crim.P. 29(a) ("The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information, or complaint after

the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.").

In an appeal challenging the sufficiency of the evidence, this Court "look[s] only to the evidence most favorable to the verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction." *State v. Knowels*, 2003 ND 180, ¶ 6, 671 N.W.2d 816 (quoting *State v. Kunkel*, 548 N.W.2d 773, 773 (N.D.1996)). "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." *Id.* This Court "will not weigh conflicting evidence, nor judge the credibility of witnesses." *State v. Klose*, 2003 ND 39, ¶ 19, 657 N.W.2d 276. The existence of conflicting testimony or other explanations of the evidence does not prevent the jury from reaching a conclusion the evidence is clear beyond a reasonable doubt. *State v. Charette*, 2004 ND 187, ¶ 7, 687 N.W.2d 484. "A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty." *State v. Wilson*, 2004 ND 51, ¶ 9, 676 N.W.2d 98 (quoting *State v. Hatch*, 346 N.W.2d 268, 277 (N.D.1984)).

State v. Krull, 2005 ND 63, ¶ 13 693 N.W.2d 631, 637 -638.

[¶ 32] Argument

[¶ 33] Johnson was agitated on the 30th of June 2008. T1 150-152; T2 5 lines 4-7. As Ms. Shannon Erickson visited, Johnson calmed down, T1 153 lines 21-25, 154 lines 1-14, so Erickson said she was going to her next duty, T1 154 lines 15-25, and Johnson warned her, "[t]hat's it, I'm just going to f***** go after staff." T1 156 lines 2-4. Later that day, as Correctional Officer Brodigan visited him, Johnson appeared to be sipping from a cup. T2 8 lines 21-25, T2 9 lines 1-2. Johnson changed moods and Brodigan said he told Johnson, "[if this is the way you are going to behave] I [will] stop talking to you now and come back and talk to you later when you calm down." T2 10 lines 1-7. At that, Johnson threw the cup with urine on Brodigan and as he threw it

shouted, “[t]hat’s piss!” T2 10 lines 8-13. Brodigan testified he’d been hit on the right side of his body by the fluid Johnson threw. T2, 17, lines 15-17.

[¶ 34] Brodigan testified that a couple of days after the incident, Johnson apologized to Brodigan for throwing urine on Brodigan. T2 10 lines 17-25; T2 27 lines 17-23.

[¶ 35] The state also introduced into evidence a lab report in which it was declared that swatch 1B2, from the right chest pocket of Brodigan’s shirt, tested positive for urea. State’s Exhibits 3 and 45, T2 94, 96, 97, 98 lines 8-12, 108 lines 15-20, 109.

[¶ 36] In his appellate brief, Johnson points out that Brodigan didn’t smell the odor of urine and that the lab test on several swatches produced only one positive test for urea. There’s no specific requirement that the victim identify the urine by odor, color, or other means and there is no specific requirement that the State provide a scientific test result that proves urine or other bodily fluid was found to have been on the clothes, hair, or skin of the victim and that the fluid came from the defendant. The jurors are allowed to make reasonable inferences from the evidence. The evidence is that Johnson shouted “that’s piss” when he threw the cup’s contents on Brodigan. Johnson had a desire to speak more to Shannon Erickson and when his desire was denied, he said he was going to go after staff. Johnson followed through on his warning, and the State corroborated Johnson’s own admission with a forensic test showing urea on the correctional officer’s pocket and Johnson’s later apology.

[¶ 37] Johnson notes in his appellate brief that the forensic test doesn’t prove whose urea it is. That is an accurate observation. But when it is unsupported by any fact indicating the source of the urea was someone other than Johnson all it amounts to is a

possibility, not a doubt based on a salient reason. When the observation is considered among the surrounding evidence: on the very day of the incident Johnson threatened he was going to go after staff, Johnson admitted when he threw it “that’s piss”, Brodigan said he got hit on his right side and the positive swatch came from his right side chest pocket, and Johnson later apologized to Brodigan for throwing urine on him; the observation doesn’t amount to anything that would make the jury’s finding unreasonable.

[¶ 38] Taking all the evidence in a light most favorable to the State there is enough evidence to warrant the conviction on the Brodigan charge.

[¶ 39] On the 6th of July 2006, Johnson again wanted more time with Shannon Erickson and was hanging his arm out the tray door to get it. T2 38 lines 19-21. Neither Irish nor Erickson were capitulating to Johnson’s demands. T2 39 lines 7-13, T2 34 lines 13-15. Irish held the line that once Johnson pulled his arm inside the tray slot, Irish would commence discussion with Johnson. T2 39 lines 7-13. Johnson wouldn’t pull his arm in and eventually threw urine on Irish twice in one of Irish’s rounds. T2 40 lines 2-19, 61, 62, 63.

[¶ 40] Later the same day, Johnson added insult to insult by asking Irish, “[h]ow do you like having my piss all over you?” T2 41 lines 19-25. As Irish left Johnson’s cell, Johnson spit on Irish’s face and collar. T2 50, 66. Later still in the day, Johnson calmed down, Irish gave Johnson a sandwich, and Johnson apologized for throwing urine on Irish claiming he meant to hit someone else. T2 42 lines 1-7. Several swatches from Irish’s uniform shirt tested positive for urea. T2 105-106 and “State’s Exhibit 3.”

[¶ 41] Ignoring Irish’s testimony that the fluid he was hit with had a very strong

odor of urine, the Defense argues that Irish did not know what the fluid in the cup was. There is no requirement for the correctional officer who is hit with the fluid to do an immediate test with a gas chromatograph mass spectrometer followed with DNA profile in order for him conclude it is urine. The fluid had a very strong odor of urine. From this alone, without the scientific test, the Defendant's later insult "[h]ow do you like having my piss all over you", or the Defendant's later apology for throwing urine on Irish, the jury could reasonably conclude the fluid was urine.

[¶ 42] The Defense points out that only three of six swatches were positive for urea and insinuates that a 50% positive rate is somehow insufficient or somehow indicative that it was not urine that was thrown by Johnson. No basis for that conclusion is given. No proof was supplied that a 50% positive rate on these sorts of tests is lower than should be expected.

[¶ 43] Regardless of the validity of the Defense argument on the percentage of positive tests, when one takes the circumstances as a whole, there is plenty of direct evidence that Johnson threw urine on Irish and spit on Irish to warrant the conviction for contact with bodily fluid on the 6th of July 2006.

[¶ 44] Taking this evidence in a light most favorable to the State there is enough evidence to warrant the conviction on the Irish charge.

[¶ 45] Conclusion

The State asks the Court to affirm the judgments of conviction because the record contains competent evidence tending to prove guilt and fairly warranting the convictions.

Dated 24 June 2008

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[¶ 46] CERTIFICATE OF SERVICE

On 24 June 2008, a copy of the State's Brief was served by e-mail to:

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On 24 June 2008, a copy of the State's Brief was filed electronically with the Clerk of the Supreme Court by e-mailing to: supclerkofcourt@ndcourts.gov

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