

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff - Appellee,)	Supreme Court No. 20080331
)	
vs.)	
)	
Bradley A. Davis,)	
)	District Court No. 51-07-K-1802 count 1
Defendant - Appellant.)	

APPELLANT'S BRIEF

APPEAL FROM THE CRIMINAL JUDGMENT AND COMMITMENT ENTERED ON
NOVEMBER 4, 2008

CASE NO. 51-07-K-1802

COUNTY OF WARD

NORTHWEST JUDICIAL DISTRICT

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
	<u>Paragraph</u>
Statement of the Issues	1
Statement of the Case	3
Statement of the Facts	5
Law and Argument	25
Conclusion	40

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph</u>
<u>State v. Demery</u> 331 N.W.2d 07 (N.D. 1983)	28
<u>State v. Hatlewick</u> 2005 ND 125, 700N.W.2d 717 (N.D. 2005)	28
<u>State v. Kingsley</u> 383 N.W.2d. 828 (N.D. 1986)	29
<u>State v. Plentychief</u> 454 N.W.2d 373, 375 (N.D. 1990).	27
<u>Statutes</u>	<u>Paragraphs</u>
N.D.C.C.§12.1-22-01	2, 4, 6, 26
<u>Rules of Criminal Procedure:</u>	<u>Paragraph</u>
Rule 29	24

1. STATEMENT OF ISSUES

2. Whether there was insufficient evidence to support the verdict finding Defendant guilty of Robbery in violation of Section 12.1-22-01 N.D.C.C., a Class B Felony.

3. STATEMENT OF THE CASE

4. This is an appeal from a "CRIMINAL JUDGMENT" based upon a jury verdict finding the Defendant guilty of Robbery, a Class B Felony defined by section 12.1-22-01 of the North Dakota Century Code. Defendant was charged by Complaint dated August 29, 2007. Defendant was tried on October 13, 2008. The jury found the Defendant guilty. The "Criminal Judgment and Commitment" was filed on November 4, 2008. Defendant filed his notice of appeal on December 2, 2008, appealing from the Judgment entered on November 4, 2008.

5. STATEMENT OF THE FACTS

6. Based on an incident which took place on the early morning hours of July 28, 2007. Tyrone Tyndell and Keri Ness gave statements to members of the Minot Police Department, and as a result, Antonio Stridiron and Bradley Davis were charged with Robbery through a complaint dated August 29, 2007 and citing N.D.C.C. §12.1-22-01. That statute states that a person who, in the course of committing a theft, willfully possesses or pretends to possess a firearm, destructive device, or other dangerous weapon or menaces another with serious bodily injury or inflicts bodily injury upon another or is aided by an accomplice actually present, is guilty of Robbery. The cases were combined for the purpose of trial and trial was set for October 13, 2008.

7. During the trial, the state called Tyrone Tyndell, the alleged victim, as its first witness. Tyndell testified that he had been working from 3:00 p.m. until 12:00 a.m. on July 27, 2007. (Tr. at 410). From there, he proceeded to the "Original" bar in Minot with a friend. (Tr. at 411). At the "Original" he met an acquaintance named Keri Ness, and plans were made to attend an after party at the Davis residence. (Tr. at 413). He testified that he left the "Original" with Ms. Ness, and that she took him home where he changed, and that they proceeded to the party at between 1:20 or 1:30 a.m. (Tr. at 439).

8. When he arrived, he indicated that Ms. Ness parked in the middle of a parking lot near the residence. (Tr. at 461). He observed people in the pool area. (Tr. at 416). Later he stated that there were 30 to 40 people in the backyard. (Tr. at 462). He stayed for not more than an hour, and ultimately the decision was made to leave. (Tr. at 417-418). He testified that he proceeded toward the alley from the backyard when he heard his name called. (Tr. at 418) He looked back and took a few steps back towards the party. (Tr. at 418). Not seeing anyone, he proceeded to the car. He testified that he took 10 steps back towards the car, and by that time the Defendants were there. (Tr. at 443). He felt a gun on his neck, turned completely around and observed Davis with the gun. (Tr. at 419) Which he assumed was a 9 mm. (Tr. at 420). He described it as a black gun and acknowledged that there are a lot of black guns. (Tr. at 467). He observed Davis, Stridiron, Ness and a few others around. (Tr. at 420). He testified that it was 150 feet from the back to the shed and that part of the backyard was readily observable from his vantage point. (Tr. at 421).

9. During the encounter, Tyndell testified that he can't remember what was said, but that he recalled something about business. (Tr. at 423). He didn't recall Davis saying anything. (Tr. at 464). At some point his pants were pulled down above his knees and someone he called "Anthony" went through his pockets. (Tr. at 423). He testified as to having \$61.00, a checkbook, and a cell phone. (Tr. at 425).

10. He then said the gun was passed to Antonio, and that's "when it changed" with the gun to his face. (Tr. at 426). He testified he was struck by Stridiron with the gun, and that it caused a cut although he received no stitches or medical attention of any kind. (Tr. at 427). He testified that a person named Miranda handed him a tissue. (Tr. at 430). He then recalled discussions about money and that he owed someone they knew. (Tr. at 427). He stated he was shocked and caught off guard, a little fearful and apprehensive at that point. (Tr. at 430). However, on cross examination, Tyndell indicated he was more shocked than afraid, and wasn't afraid at all. (Tr. at 452). He also acknowledged that when he was asked the specific question by law enforcement as to whether he was frightened or in fear for his life, he told the officer that he "can't say that I was." (Tr. at 466). In any event, Tyndell acknowledged that the tone changed when Stridiron took over. (Tr. at 466).

11. On cross examination, Tyndell admitted to having a large amount of money in his shoe, (Tr. at 448) which he never mentioned to the detective or in his direct testimony. (Tr. at 449). He spoke of \$500.00 cash, and that he'd been paid with a check earlier, (Tr. at 449) although he didn't recall where he had cashed the check. (Tr. at 450).

12. Keri Ness then testified regarding her recollection of the events in question. She testified that she met Tyndell at the "O" (Tr. at 472) and gave him information as to the after party at the Davis residence. (Tr. at 475). She then testified that she picked Tyndell up at his residence, and that they arrived at the party at 1:45 a.m. (Tr. at 476). She observed 35 to 40 people, and that people were all around the all around the alleyway where they parked, and in the yard. (Tr. at 476).

13. At some point Ness, Tyndell decided to leave and walked to the vehicle, when she heard Davis' voice and saw him push Tyndell up against the car at gunpoint. (Tr. at 480). On cross examination, Ness indicated that when she heard the voice, she and Tyndell kept walking. (Tr. at 508). She testified that Tyndell didn't turn around or walk back towards the pool area. (Tr. at 508). Ness then testified that Davis pushed Tyndell against the car, ten seconds after hearing the voice. (Tr. at 509). Although she didn't hear any footsteps, that Davis and Stridiron were by the pool when she and Tyndell had left, and acknowledged that there would be a lot of distance to cover in that amount of time. (Tr. at 510).

14. She stated that Tyndell did not spin around to face Davis (Tr. at 512) and that Tyndell's back was facing Davis, (Tr. at 525) and was still facing the car when Stridiron got the gun. (Tr. at 527).

15. Ness testified that the situation was not alarming initially and that she was not fearful at first due to the fact that Davis was smiling and acting in a joking manner while he held the gun. (Tr. at 514). Her thought at that point was that this isn't something that is serious. (Tr.

at 514). She also testified that Davis was really not doing much of anything. (Tr. at 483). That he had a smile on his face, and that Tyndell was cool, calm and collected. (Tr. at 486).

16. She next testified that Stridiron took Tyndell's pants and underwear down and took money out. (Tr. at 483). She also recalled talk of Tyndell owing \$350.00, (Tr. at 481) talk of business, (Tr. at 516) and an agreement to a time period to pay off the balance. (Tr. at 517).

17. At the conclusion of the incident, she and Tyndell proceeded to leave. She drove 50 yards and out of the parking area. (Tr. at 518). She then got out and went back to the party to retrieve Tyndell's wallet, feeling like there was no threat to her at that point. (Tr. at 493).

18. Finally, Ness stated that there were people all over the alleyway throughout the time she was there describing it a bustling activity. (Tr. at 523-524). And that Tyndell never received any medical attention. (Tr. at 488).

19. The state called three other witnesses as to their observations of the evening in question. Cherona Jerome testified that as she was leaving the party towards Riverside Drive, she observed Tyndell and two other gentlemen (Tr. at 592) and a white blonde girl. (Tr. at 593). She stated that she observed events for 10 seconds, (Tr. at 604) and that the one with the hat had the gun. (Tr. at 593). The person with the dreads was going through Tyndell's possessions. (Tr. at 606) She never noticed anything about Tyndell's clothing. (Tr. at 606).

20. Tinotenda Chisenga testified that he was at the Davis residence after being at the bar that evening. (Tr. at 617). He observed an incident, but that it was not light enough to

identify any particular face, that he observed about 10 people there, and that there was a tall gentleman with his pants down around his knees. (Tr. at 625). He did not see a gun present, (Tr. at 634), did not see anyone going through clothing, (Tr. at 635) and that he never saw any pushing or physical altercations. (Tr. at 636).

21. Miranda Lafloe then testified. At the time of her testimony, Ms. Lafloe had been released from the hospital and was taking medications in the form of painkillers. (Tr. at 703). She admitted that she was a little groggy (Tr. at 699) and was under the influence of those medications. (Tr. at 703). In any event she testified that she was at the Davis residence, and that when she left sometime between 3:00 and 3:30 a.m. (Tr. at 706) she observed an incident. (Tr. at 697). She observed Davis pull out a gun and point it at Tyndell. (Tr. at 698). She described it as a black gun. (Tr. at 701). And observed pants pulled down. (Tr. at 701) She heard discussion of “business” (Tr. at 703) and noted that Davis was smiling. (Tr. at 708).

22. LaMonte Jacobson was then called as to the investigation he had conducted with regard to the firearm. He test fired the weapon he received, as the weapon allegedly used in the course of the incident needed to be operable and capable of expelling a projectile. (Tr. at 548). He also conducted fingerprint tests. (Tr. at 551) He acknowledged that there were no identifiable prints, (Tr. at 551) and that no prints of value for comparison were obtained. (Tr. at 556) There were ridges developed, and the weapon didn’t appear to be wiped down. (Tr. at 556). He allowed that if there would be been fingerprint information, it would have been presented to the jury, and that fingerprint evidence can be very significant evidence.

(Tr. at 561) He did not forward the prints to the BCI (Tr. at 557) and stated that he would have done so if there were any usable evidence. (Tr. at 561). Finally, he admitted that he could not ascertain whether the magazine was in the gun at the time of the incident. (Tr. at 562).

23. Hope Olson testified that she conducted the DNA analysis of the pistol grips, and compared that to buccal swabs of both Davis and Stridiron. (Tr. at 570). She conducted these tests using her nationally certified and accredited lab, and “state of the art” equipment. (Tr. at 573). Ms. Olson could not separate any results beyond a partial profile, and could not positively identify any individuals. (Tr. at 571). She agreed that DNA results are significant evidence (Tr. at 578) and that she could draw no conclusions. (Tr. at 580). Her ultimate conclusion was “maybe, maybe not.” (Tr. at 581). Finally, Sergeant Sundbakken was called to speak of a weapon he recovered in Stridiron’s basement (Tr. at 648) and that the magazine in the gun was empty. (Tr. at 649).

24. At the conclusion of the State’s case, both Defendants moved for a Rule 29 Judgment of Acquittal as to sufficiency of the evidence, including factual discrepancies, no showing of the gun tested as being the one involved in the incident, and no showing of menacing or infliction or attempt to inflict bodily injury. (Tr. at 710-711).

25. LAW AND ARGUMENT

26. Whether there was insufficient evidence to support the verdict finding Defendant guilty of Robbery in violation of Section 12.1-22-01 N.D.C.C., a Class B Felony.

27. “It is a well-settled rule of statutory construction that criminal statutes are strictly construed in favor of the Defendant and against the government.” State v. Plentychief, 454 N.W.2d 373, 375 (N.D. 1990). The state must prove each element of the offense beyond a reasonable doubt. *Id.* At 376.

28. In reviewing the sufficiency of the evidence to support a criminal conviction, the standard of review is well-established:

In reviewing the sufficiency of the evidence to convict, we look 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. 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. Hatlewick, 2005 ND 125, 700N.W.2d 717 (N.D. 2005).

A challenge to the sufficiency of the evidence to sustain a conviction requires us to make a comparatively limitative review of the evidence presented at trial. Although the jury is entitled to judge the credibility of witnesses and determine the relative weight to be given their testimony, we are not. Rather, we must look only to the evidence which favors the verdict and accept all the reasonable inferences therefrom to see if the trier of fact could reasonably conclude that the essential elements of the crime were established beyond a reasonable doubt. State v. Demery, 331 N.W.2d 07 (N.D. 1983).

29. This Court has held that in deciding a motion for judgment of acquittal the trial court, upon reviewing the evidence most favorable to the prosecution, must deny the motion if there is substantial evidence upon which a reasonable mind could find guilt beyond a reasonable doubt. State v. Kingsley, 383 N.W.2d. 828 (N.D. 1986).

30. Defendant submits there are two areas which indicate that the State failed to meet its burden of proof beyond a reasonable doubt as to this charge, and that there was insufficient

evidence to support criminal convictions; physical evidence and the testimony of the State's fact witnesses.

31. With regard to the physical evidence, the State's witnesses consisted of LaMonte Jacobson, Hope Olson, and Jason Sundbakken. Mr. Jacobson testified that there were no identifiable prints, but only ridges which did not appear to be wiped down and as such, offered no physical evidence connecting Davis to the weapon he tested. He acknowledged this was significant evidence. In addition he admitted he could not ascertain whether the magazine was even in the gun at the time of the alleged incident. Defendant submits that even if taken as evidence most favorable to the verdict, this witness could not establish the weapon tested was involved in the alleged incident, that Davis had possession of a weapon, or that the alleged gun was capable of expelling a projectile.

32. Hope Olson also was not able to provide the jury with any DNA evidence connecting the gun she tested to Davis, and also acknowledged that this was significant evidence. Jason Sundbakken testified that the magazine in the gun he recovered was empty and as such, Defendant submits that the State failed to prove beyond a reasonable doubt that the alleged gun used was capable of expelling a projectile at the time of the alleged incident.

33. With regard to the testimony of the fact witnesses, this evidence consisted of inconsistent statements from all of the witnesses defeating the credibility of the State's case, and in addition the testimony of the State's witnesses, even if believed, did not rise to the level needed to establish guilt beyond a reasonable doubt.

34. The first area of inconsistency entered on how Mr. Tyndell came to be at the residence initially, whether it be that Ms. Ness met him at his hotel, or took him there. Secondly, and more importantly, was the description of the events at the scene. These consisted of differences in testimony of whether he walked back towards the party or kept walking as Ms. Ness testified. Furthermore, Mr. Tyndell testified that he turned around to face Mr. Davis when he felt a gun, as opposed to Ms. Ness testimony that Mr. Tyndell did not turn around and was still facing away from Davis when Stridiron go the gun. Finally, the stories changed with regard to what happened at the conclusion of the incident.

35. In any event, the testimony of Tyndell and Ness was similar in one respect regarding Mr. Davis, and which Defendant submits did not rise to the level needed to show guilt beyond a reasonable doubt. And that had to do with the tone of the encounter with regard to Mr. Davis. Tyndell observed Davis not saying anything, and that the tone changed when Stridiron assumed control of the situation. Tyndell acknowledged that he was not afraid at all, and wasn't frightened or in fear for his life, but was shocked and caught off guard. Ness testified that Davis was smiling and joking when he had the gun, and even that she felt at that point that it wasn't serious. Davis was not doing much of anything and that Tyndell was cool, calm and collected. These observations by the State's two main fact witnesses leads to the conclusion that the State failed to meet its burden of proof beyond a reasonable doubt that Davis inflicted or attempted to inflict bodily injury which there was no evidence of, or that Tyndell was menaced or threatened with imminent bodily injury by Davis.

36. With regard to the State's other three fact witnesses the only one who even observed Davis with a gun was Miranda LaFloe, who admittedly was a little groggy and under the influence of pain killers at the time of her testimony. In any event, her observations were not consistent with Tyndell or Ness. Cherona Jerome did not observe Davis with a gun or mention anything about Tyndell's clothing. Tinotenda Chisenga testified he couldn't identify any faces, did not see a gun or anyone going through any clothes.

37. Appellant concedes that he has the burden to show the evidence, when viewed in the light most favorable to the verdict, permits no reasonable inference of guilt. But appellant submits that is the case, and that the State failed to meet its burden of proof beyond a reasonable doubt with regard to Davis.

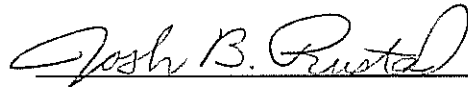
38. Criminal statutes are to be strictly construed in favor of the defendant and against the government, and in this case, even in the light most favorable to the verdict, there was not substantial (emphasis added) evidence to warrant a conviction. There was not substantial evidence that Tyndell was menaced or threatened with imminent bodily injury by Davis or that Davis inflicted or attempted to inflict bodily injury in the course of committing a theft or that the gun allegedly used was capable of expelling a projectile.

39. As the State failed to show substantial evidence to warrant a conviction, appellant submits that looking at the evidence in a light most favorable to the verdict and giving the State the benefit of all inferences, the evidence was not sufficient to convict Davis on the offense of Robbery.

40. CONCLUSION

41. In conclusion the verdict should be reversed as not supported by the evidence. This Court should reverse the decision at the trial court level and order a dismissal with prejudice.

Respectfully submitted this 22nd day of May, 2009.



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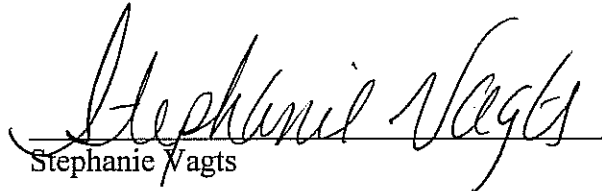
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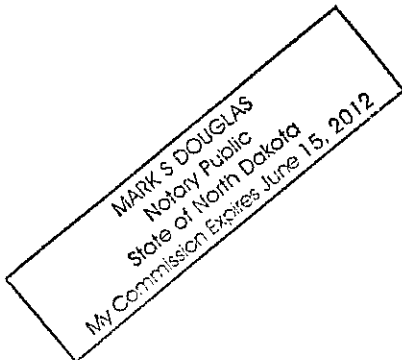
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AFFIDAVIT OF SERVICE

Stephanie Vagts, being first duly sworn, deposes and says that on May 22, 2009, she served the attached **Appellant's Brief** and **Appendix** upon Rozanna C. Larson, attorney for the State of North Dakota, by sending a true and correct copy to the email address of Roza.larson@co.ward.nd.us and to Robert Martin, attorney for Antonio Phillip Stridiron, at the email address of rmartin@nd.gov.


Stephanie Vagts

Subscribed and sworn to before me this 22nd day of May, 2009.




Notary Public