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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

JUL 17 2009

State of North Dakota,)	STATE OF NORTH DAKOTA
Plaintiff-Appellee,)	Supreme Court No. 20080286
vs.)	
Antonio Phillip Stridiron,)	District Court No. 51-07-K-1803
Defendant-Appellant.)	
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.)	

APPELLEE'S BRIEF

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

CASE NO. 51-07-K-1803 and 51-07-K-1802 count 1

COUNTY OF WARD

NORTHWEST JUDICIAL DISTRICT

HONORABLE DOUGLAS L MATTSON

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TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of the Issue.....	iii
Statement of the Case.....	1
Statement of Facts.....	1
Law and Argument.....	7
Conclusion.....	11
Affidavit of Mailing.....	12

TABLE OF AUTHORITIES

Patten v. State, 2008 N.D. 29, ¶11, 745 NW 2d 626..... 8, 9

Sambursky v. State, 2008 N.D. 133, ¶12, 751 NW 2d 247..... 8, 9

State v. Barendt, 2007 N.D. 164, ¶9 & ¶21, 740 NW 2d 87..... 8, 9

State v. Curtis, 2008 N.D. 93, ¶5, 748 NW 2d 709..... 8

State v. Curtis, 2008 N.D. 108, ¶28, 750 NW 2d 438..... 7

State v. Haffner, 499 NW 2d 596, 597 (N.D. 1993)..... 10

State v. Laib, 2005 N.D. 191 ¶6, 705 NW 2d 815..... 8

State v. Ulmstead, 246 NW 2d 888, 890 (N.D. 1976)..... 9

NDCC 12.1-01-04(10)..... 9

NDCC 12.1-22-01..... 1

NDCC 12.1-32-02.1..... 1

NDCC 12.1-32-09.1..... 2

STATEMENT OF THE ISSUE

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT FINDING THE DEFENDANTS GUILTY OF ROBBERY IN VIOLATION OF SECTION 12.1-22-01 NDCC. A CLASS B FELONY AS TO EACH RESPECTIVE DEFENDANT.

STATEMENT OF THE CASE

This matter comes before the Court on direct appeal of the conviction of the defendants, Bradley Antoine Davis and Antonio Phillip Stridiron on charges of Robbery, a class B Felony, NDCC 12.1-22-01. The defendants were each charged by Complaint with the Robbery offense on August 29, 2007. They were tried jointly at a jury trial taking place between October 13th and October 16, 2008 in Grand Forks, North Dakota. The jury found both defendants guilty of the Robbery offense as charged. The defendants were sentenced on November 4, 2008, with a subsequent Amended Criminal Judgment being entered by the Court on November 6, 2008 with relation to Stridiron. Timely appeals were filed by each of the defendants to the North Dakota Supreme Court.

STATEMENT OF THE FACTS

The trial of this matter took place between October 13, 2008 and October 16, 2008 in Grand Forks, North Dakota. The defendants, Bradley Antoine Davis (hereinafter Davis) and Antonio Phillip Stridiron (hereinafter Stridiron) were each charged with Robbery in violation of section 12.1-22-01 of the North Dakota Century Code by way of information filed October 26, 2007 alleging as follows:

Count 1: The defendants, Bradley Davis and Antonio Stridiron, in the course of committing a theft, inflicted or attempted to inflict bodily injury upon another or threatened or menaced another with imminent bodily injury, to wit, the defendants, in the course of committing a theft, inflicted or attempted to inflict bodily injury upon Tyrone Tyndell, or threatened or menaced Tyndell with imminent bodily injury, under circumstances in which said defendants were armed with a firearm or were aided by an accomplice actually present. Said offense is a class B Felony for each respective defendant.

Additionally, the information included penalty citations informing each defendant the State alleged the application of NDCC 12.1-32-02.1 (minimum mandatory sentencing

provisions for a class B Felony) and application of NDCC 12.1-32-09.1 (sentencing of violent offenders – 85% provision).

The Robbery charges with relation to Davis and Stridiron were based on an incident occurring in the early morning hours of July 28, 2007 in the Eastwood Park section of Minot, North Dakota. The allegations forming the basis of the charge dealt with the Robbery of Tyrone Tyndell at gunpoint by Davis and Stridiron as Tyndell was leaving a party in the backyard of a duplex dwelling at 127 and 129 6th St. SE, which were the residences of Davis and Stridiron respectively.

At the trial the State called Tyrone Tyndell as the first witness. Tyndell testified that after the closing of a bar in Minot, North Dakota, he had accompanied an individual named Keri Ness to an after-party occurring at the Davis/Stridiron residence. (Tr. at 439) Tyndell indicated upon arriving in the party area they parked up the alley on the side of a nearby apartment building. (Tr. at 415, lines 14-16) Tyndell indicated he and Keri Ness stayed at the party for not more than an hour and decided to leave. (Tr. at 417 – 418) Tyndell indicated as he got to the parking position where they had left the car, he felt something at the back of his neck and knew immediately it was a gun. (Tr. at 419) Tyndell indicated he turned and observed Davis holding a gun on him which he described as a black .9 mm. (Tr. at 419, 420) Tyndell further identified Stridiron as being with Davis while this was occurring. (Tr. at 420) Tyndell indicated Davis said something to the effect of ‘this is business, not personal.’ (Tr. at 423) Tyndell indicated while Davis was holding the gun on him Stridiron pulled down the pants and underwear that Tyndell was wearing (Tr. at 423, 424) Tyndell indicated Stridiron went through the pockets of his clothing and removed \$61.00 in cash, his checkbook, and cell phone. (Tr. at 425)

Tyndell indicated Davis transferred the firearm to Stridiron while he (Davis) counted the money. (Tr. at 425 and 426) Tyndell testified Stridiron got in his face and had the gun under his chin and struck him with the butt of the gun near his hairline causing a small cut. (Tr. at 426 – 427) Tyndell indicated Stridiron was demanding more money from Tyndell indicating Tyndell owed a debt of \$350.00 and that it was now being doubled to \$700.00. (Tr. at 427, 428) Tyndell described himself as shocked, a little fearful, and apprehensive as a result of the robbery. (Tr. at 430) Tyndell testified that Stridiron told him if he went to the police that he (Stridiron) would get him or anybody in his family. (Tr. at 429) Tyndell indicated after Stridiron and Davis allowed him to leave the area his companion, Ms. Ness, agreed to go back and see if she could recover his checkbook/wallet because it contained all his IDs and personal pictures that meant a lot to him. (Tr. at 431) He indicated he remained in the car while she went back to attempt to recover that specific property. (Tr. at 431) He indicated he never recovered the money taken in the course of the robbery. (Tr. at 432) Tyndell made in court identifications of defendants Stridiron and Davis as the two individuals that had robbed him at gunpoint. (Tr. at 432) Tyndell was shown Exhibit 4 which was a black .9 mm pistol which was subsequently seized by Minot Police Detective Jason Sundbakken from the basement of Stridiron's residence where it had been placed on top of some duct work. (Tr. at 647 – 648) Tyndell said the weapon, identified as Exhibit 4 was similar to the weapon which was used by Davis and Stridiron in the robbery. (Tr. at 434-435)

Keri Ness testified following Tyndell at the trial. She indicated she accompanied Tyndell to the party at the Davis/Stridiron residence in the early morning hours of July 28, 2008. She testified she knew both Davis and Stridiron. (Tr. at 472) She identified

each of the defendants in court. (Tr. at 474) She indicated that as she and Tyndell were leaving the party and had arrived at her vehicle, Davis came up and put a gun to the back of Tyndell's neck. (Tr. at 481) She described the gun as what appeared to be a black .9 mm. (Tr. at 482) She indicated Stridiron pulled down Tyndell's pants and underwear and cleaned his pockets out while Davis had the gun on Tyndell. (Tr. at 483) She indicated Stridiron handed the money to Davis and took the gun from him. (Tr. at 483) She indicated Davis told Stridiron that the money totaled \$61.00 and that Stridiron said now it's going to be \$700.00 you owe. (Tr. at 484) She indicated Stridiron struck Tyndell in the head with the gun causing a stream of blood to run down Tyndell's face. (Tr. at 484) She indicated Stridiron threatened another female, Miranda Lafloe, telling her he would blow her away too, and that this was about business and he would kill anybody that got in the way. (Tr. at 485) She indicated during the course of the event she became fearful when she observed Davis had his finger on the trigger when he had the gun and that she became more fearful when Stridiron took the gun because she thought for sure she was going to see Tyrone's head blown off. (Tr. at 486) Ness indicated that after Davis and Stridiron allowed them to leave she did return and was able to retrieve Tyndell's checkbook and pictures. (Tr. at 492) Ness further indicated that the .9 mm black pistol identified as State's Exhibit 4 looked like the gun used by Stridiron and Davis in the Robbery. (Tr. at 495) As is alluded to above, the .9 mm black pistol identified as State's Exhibit 4 was the weapon seized from the basement of Stridiron's house by law enforcement during a search.

Cherona Leah Jerome was called by the State as a witness. She testified that she had been at the party at the Davis/Stridiron residence and had observed Davis and

Stridiron robbing Tyrone Tyndell. She indicated specifically that one of the individuals had a gun to Tyndell's face and the other was checking out to see what he had. (Tr. at 594) She identified the two defendants in court as the individuals robbing Tyndell. (Tr. at 593) She indicated Tyndell was against a car and the gun was being held near his face. (Tr. at 596) She indicated Tyndell was accompanied by a white woman with blond hair during the course of the robbery by Stridiron and Davis. (Tr. 592 and 593) She further indicated the gun was at one point turned on her and the individual wielding it indicated get out of here, go, leave. (Tr. at 596)

The State also called as a witness Tinotenda Chisenga. Chisenga indicated he was familiar with both Davis and Stridiron. He indicated Davis was the father of a baby born to his sister-in-law. (Tr. at 615) He identified both Davis and Stridiron in the courtroom. (Tr. at 616) He indicated he had been at the party at the Stridiron/Davis residence in the early morning hours of July 28, 2007. (Tr. at 617) Chisenga indicated that he became aware of a commotion taking place in the parking lot area which he described as a confrontation of some sort. (Tr. at 624) He recalled seeing a tall black gentleman with braids who had his pants pulled down. (Tr. at 625) He also indicated Stridiron and Davis were there as well. (Tr. at 626, 627) He indicated after observing the confrontation he left right away because he didn't think it was a good deal that was going on. (Tr. at 629) He further acknowledged that Davis was a good friend of his. (Tr. at 629) He acknowledged he did not want to stick around. (Tr. at 631)

The State also called Miranda Lafloe as a witness. She testified she had been at the party in the early morning hours of July 28, 2007. (Tr. at 696) She indicated as she was going to leave the party she observed Davis had pulled a gun out and pointed it at

Tyrone Tyndell. (Tr. at 698, 699) She indicated she asked Davis what he was doing and he replied 'this was business.' (Tr. at 699) She indicated Stridiron was questioning Tyndell as to where his money was. (Tr. at 699) She further testified that Stridiron took the gun from Davis and pointed it towards her making a threat. (Tr. at 700) She indicated Davis and Stridiron had some money from Tyndell that they had found in his pockets and that his pants were pulled down. (Tr. at 701) She described the gun being wielded by Davis and Stridiron as "black and it sounded heavy". (Tr. at 701)

The State called Lamonte Jacobson, a forensic scientist from the Criminal Laboratory Division of the North Dakota Attorney General's Office. Jacobson testified as to his background as a firearms examination specialist and that he had testified in courts regarding firearms and ballistics. He further indicated that he examined Exhibit 4 which he identified as a High Point model C-9 .9mm pistol. (Tr. at 547) This is the weapon that was seized from Stridiron's residence by law enforcement as alluded to above. Jacobson indicated he test fired the weapon and all test fired cartridges were fired and ejected successfully. (Tr. at 548) He indicated the weapon was tested for fingerprints and swabs for DNA were taken from the plastic grips on the pistol. (Tr. at 549, 550) He indicated no identifiable fingerprints were developed on the weapon and that he did not find that unusual given the nature of the surfaces examined. (Tr. at 551)

The State also called Hope Olson, the Director of the North Dakota Crime Laboratory Division, North Dakota Office of Attorney General. Ms. Olson testified as to her training and experience with regard to the identification of DNA profiles. She testified she had received swabs from the trigger and the pistol grips of the weapon identified as State's Exhibit 4, which was the .9 mm firearm seized from the basement of

the Stridiron residence. She indicated she was able to develop partial profiles and a mixture of at least two individuals. (Tr. at 571) She indicated she was unable to make any positive identification based on the partial profiles. (Tr. at 571) Olson indicated although she could not make a positive identification of the DNA of Davis, Stridiron or Tyndell, she could not exclude them either as being contributors to the partial profile. (Tr. at 580 – 581)

Additionally, witnesses were called from Minot law enforcement to establish the collection of the weapon that was offered as Exhibit 4. Officer Jason Sundbakken testified that he found the .9 mm pistol above duct work in Stridiron's basement. He indicated there was a magazine contained in the weapon and a magazine lying next to it. He indicated the magazine in the gun was empty, but there was a round in the chamber of the weapon and that the magazine lying next to the gun was loaded with seven .9 mm rounds at the time it was seized. (Tr. at 649)

Following establishment of a chain of custody, the weapon represented by State's Exhibit 4 was received without objection by the Court. (Tr. at 671)

At the conclusion of the trial the jury following deliberations returned verdicts of guilty as charged with relation to both of the defendants.

LAW AND ARGUMENT

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT FINDING THE DEFENDANTS GUILTY OF ROBBERY IN VIOLATION OF SECTION 12.1-22-01 NDCC, A CLASS B FELONY AS TO EACH RESPECTIVE DEFENDANT.

This Court has on many occasions restated its well settled standard of reviewing claims that evidence presented at trial was insufficient to support a guilty verdict.

Recently in *State v. Curtis*, 2008 N.D 108, ¶28, 750 NW 2d 438, this Court indicated:

“When a jury verdict is challenged on appeal based on the sufficiency of the evidence, our standard of review is highly deferential to the jury’s verdict. State v. Laib, 2005 N.D. 191 ¶6, 705 NW 2d 815. When reviewing challenges to the sufficiency of the evidence, we must draw all inferences in favor of the verdict. State v. Curtis, 2008 N.D. 93, ¶ 5, 748 NW 2d 709; State v. Barendt, 2007 N.D. 164, ¶19, 740 NW 2d 87. We will reverse a criminal conviction only if, after reviewing the evidence and all reasonable evidentiary inferences in the light most favorable to the verdict, no rational fact finder could have found the defendant guilty beyond a reasonable doubt. Curtis at ¶5; Barendt at ¶19.

This Court has also recently reaffirmed that the task of weighing credibility of witnesses belongs to the finder of fact and not to the appellate court. (See Sambursky v. State, 2008 N.D. 133, ¶12, 751 NW 2d 247; Patten v. State, 2008 N.D. 29, ¶11, 745 NW 2d 626; State v. Barendt, 2007 N.D. 164, ¶21 740 NW 2d 87.

Stridiron and Davis in their respective Briefs to the Court acknowledged the standard of review above stated, but assert the testimony of the State’s witnesses was not credible and was inconsistent. In that regard it is notable that Stridiron claims testimony of the State’s witnesses “approaches insufficiency”. Stridiron goes on to claim the evidence presented by the State reaches the “point of irrationality”. (See Stridiron Brief paragraph 15) It is significant however that although Stridiron engages in this hyperbole, he does not mention one specific area of contradiction or lack of credibility of the witnesses.

Davis broadly alleges insufficiency in the physical evidence provided by the State and the testimony of the State’s facts witnesses. (See Davis Brief at paragraph 30)

With regard to the gun presented in evidence in this matter, Davis misses the point entirely. The relevance of the gun is predicated upon the fact it was recovered in a position in which it had been secreted in the basement of the duplex, that it matched the

description given by witnesses to the robbery of a black .9 mm, that it had a round in the chamber, and that upon test firing by Lamonte Jacobson, it was shown to meet the definition of “firearm” as laid out in NDCC 12.1-01-04(10) in that it was clearly capable of expelling a projectile as noted in that definition. It is highly probative that a firearm matching exactly the description given by witnesses to the robbery was found hidden in Stridiron’s basement upon search by law enforcement.

Davis also alleges Hope Olson was not able to provide the jury with DNA evidence connecting the gun to Davis. While this is true, the DNA evidence Ms. Olson did establish constituted a partial profile of more than one individual. She further testified clearly that she could not exclude Davis, Stridiron or Tyndell (who had been struck in the head by the weapon) as contributors to that partial profile. (Tr. at 581)

Stridiron and Davis generally attacked the State’s lay witnesses who were witnesses to the event as being not credible based on alleged inconsistencies in their testimony. As previously mentioned, this Court has repeatedly stated and recently reaffirmed that the task of weighing the credibility of witnesses belongs to the finder of fact and not to the appellate court. (See *Sambursky v. State*, 2008 N.D. 133, ¶12, 751 NW 2d 247; *Patten v. State*, 2008 N.D. 29, ¶11, 745 NW 2d 626; *State v. Barendt*, 2007 N.D. 164, ¶21, 740 NW 2d 87. While the State does not concede any meaningful contradictions or inconsistencies in the testimony of the witnesses to the robbery, it is significant to note that this Court has stated:

“At the appellate level we do not substitute our judgment for that of the jury or trial court where the evidence is conflicting, if one of the conflicting inferences reasonably tends to prove guilt and fairly warrants a conviction.” *State v. Ulmstead*, 246 NW 2d 888, 890 (N.D. 1976)

This Court has indicated it would not second guess a trier of facts assessment of the credibility and weight of the evidence. *State v. Haffner*, 499 NW 2d 596, 597 (N.D. 1993).

Contrary to the generic assertions of inconsistency of the State's fact witnesses, a review of the transcript reveals remarkable consistency as to relevant facts including the time and location of the robbery, that Davis and Stridiron were the people robbing Tyndell, that Davis initially threatened Tyndell with the weapon which was subsequently transferred to Stridiron, that the perpetrators pulled down the pants of the victim during the confrontation, that money was taken from the victim, that Stridiron struck Tyndell with the weapon, that assertions were made that "this was business" by the robbers, that threats to the well being of Tyndell, his family and onlookers to the incident were made by Stridiron, and the consistent description of the firearm (which matched exactly the firearm recovered from Stridiron's residence) by several of the witnesses.

Davis finally raises an argument that is literally absurd on its 'face.' He attempts to indicate that because some witnesses say Davis was smiling during part of the robbery sequence, it cannot be established that the victim was menaced or threatened with imminent bodily injury by Davis. Common sense as well as the testimony of witnesses shows the absurdity of this argument. Initially, to even consider the assertion one must assume Davis is acknowledging brandishing the weapon and participating in the robbery of Tyndell. Beyond that, to contend that an individual who has a firearm placed to his neck and/or face and whose pants are pulled down while he is being robbed of money is not threatened or menaced with imminent bodily injury simply because the robber had a smile on his face is completely illogical. If that were the case, all armed robbers could

look to wearing a Mickey Mouse mask during the course of the robbery to avoid culpability. In the real world, as Keri Ness noted in her testimony, when you have a gun pressed to the back of your neck, that's threatening to shoot somebody. (Tr. at 532)

CONCLUSION

In conclusion the State of North Dakota indicates that the evidence presented in this case clearly supports the jury's finding of guilty as to each of the defendants. As such, the State respectfully requests that this Court affirm the conviction of each defendant.

Dated this 17th day of July, 2009.

RESPECTFULLY SUBMITTED,



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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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 vs.)
 Bradley A. Davis,) District Court No. 51-07-K-1802 count 1
 Defendant-Appellant.)

AFFIDAVIT OF SERVICE BY MAIL

LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 17 day of July, 2009, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

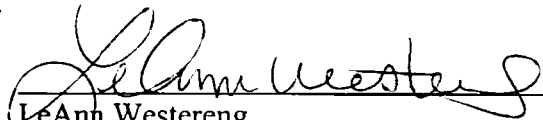
BRIEF OF PLAINTIFF-APPELLEE

That said envelope was addressed to the following person at his address as follows:

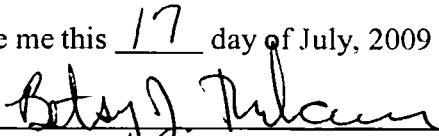
ROBERT MARTIN
 ND PUBLIC DEFENDERS OFFICE
 11 1ST AVE SW
 MINOT ND 58701

JOSH RUSTAD
 ND PUBLIC DEFENDERS OFFICE
 16 EAST BROADWAY
 WILLISTON ND 58801

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.


 LeAnn Westereng

Subscribed and sworn before me this 17 day of July, 2009 by LeAnn Westereng.


 Notary Public

BETSY J TRUMBAUER
 Notary Public
 State of North Dakota
 My Commission Expires Nov. 17, 2014