20100002

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
April 16, 2010
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	
	)	Supreme Court No. 201000002
vs.	)	
	)	District Ct. No. 09-08-K-04778
Troy Terrance Lehman,	)	
	)	
Defendant and Appellant.	)	
_____	)	

APPELLEE'S BRIEF

Appeal from the Criminal Judgment and Commitment entered on December 22, 2009, in East Central Judicial District, in Fargo, Cass County, State of North Dakota, The Honorable Steven L. Marquart, Presiding

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[¶ 7] **STATEMENT OF CASE**

[¶ 8] The Appellant was charged by information with the crimes of Kidnapping and Attempt to Commit Theft by Deception. The district court issued an arrest warrant on December 15, 2008.

[¶ 9] The State moved to add a count of Terrorizing on May 6, 2009. With no objection from the Appellant, the trial court granted the motion on June 10, 2009. (Motion Hearing and Dispositional Conference, June 10, 2009, at 5.)

[¶ 10] Trial began on September 22, 2009, and concluded on September 24, 2009. The jury returned verdicts of guilty on count 1, Kidnapping and count 3, Terrorizing. The Appellant was found not guilty of count 2, Attempt to Commit Theft by Deception.

[¶ 11] The Appellant filed a Motion for Judgment of Acquittal and/or New Trial on September 29, 2009 (State-Appellee's Appendix [hereinafter "SA"] at 1-2) and a further brief in support of his motion on October 27, 2009. The State filed a Response on October 12, 2009. (SA. at 3-7.)

[¶ 12] In the meantime, the Appellant filed a notice of Appeal on October 16, 2009, on his own behalf. The undersigned State's Attorney communicated with the Court Clerk on October 22, 2009, that the Defendant had not yet been sentenced. (SA. at 8-9.) On October 27, 2009, the Appellant withdrew the notice of appeal.

[¶ 13] A hearing was held on October 29, 2009, on the Motion for

Judgment of Acquittal and/or New Trial. The trial court denied the Motion for Judgment of Acquittal and issued a Memorandum Opinion and Order on November 2, 2009.

[¶ 14] The Appellant was sentenced on December 22, 2009. Based on the Appellant's crimes in this case and his extensive criminal history, he received a 10 year sentence on the Kidnapping charge and a 5 year sentence on the Terrorizing charge, the time to be served concurrently. (Sentencing Transcript, December 22, 2009, at 26.)

[¶ 15] After sentencing, the Appellant then filed a Notice of Appeal through his attorney on December 30, 2009.

[¶ 16] **STATEMENT OF FACTS**

[¶ 17] On November 7, 2008, the Defendant/Appellant Troy Lehman went to 713 30th Street North, Fargo, North Dakota, and abducted Mr. Daniel Flyinghawk. The Appellant claimed to be a friend of Mr. Flyinghawk and was let into the apartment by Sandra Tweeten, Mr. Flyinghawk's aunt. (Trial Transcript [hereinafter "Tr."] at 313-314.) Once inside, he abducted Mr. Flyinghawk and tied his hands behind his back with the string from Mr. Flyinghawk's hooded sweatshirt. (Tr. at 33 & 316.) He then took Mr. Flyinghawk outside to a waiting car driven by Camille Lorenzen. (Tr. at 318 -319.) For approximately the next two hours, the Appellant and Ms. Lorenzen drove Mr. Flyinghawk around Fargo. (Tr. at 327.)

[¶ 18] Just prior to the abduction, the Appellant spoke by phone to Mr. Kurt Schienbein, the manger for A-Affordable Bail Bonds, headquartered in Brainerd, Minnesota. The Appellant inquired if Mr. Schienbein was looking for Mr. Flyinghawk, and Mr. Schienbein replied that he was. (Tr. at 274-275.) Mr. Schienbein contacted one of his employees, Ms. Sherri Mitchell, to drive from her home in the Detroit Lakes, Minnesota area to meet the Appellant in Fargo. (Tr. at 278.) When Ms. Mitchell spoke to the Appellant by phone, he was very angry about the length of time it was taking her to arrive in Fargo. (Tr. at 278.) Ms. Mitchell told the Appellant to meet her at the Cass County jail. (Tr. at 249.) The Appellant refused because he himself was wanted for an arrest warrant. (Tr. at

254.)

[¶ 19] When the Appellant wasn't receiving payment fast enough from the Bondsman, the Appellant entered into negotiations with Mr. Flyinghawk's family for Mr. Flyinghawk's release. Money, the title to Mr. Flyinghawk's vehicle and/or drugs were all discussed as currency for the exchange. (Tr. at 39-40, 73-75 & 322-323.) As the Appellant told the driver and co-defendant, Ms. Lorenzen, "It's all about the money." (Tr. at 186.)

[¶ 20] The Appellant and Ms. Lorenzen, with Mr. Flyinghawk tied to the front passenger seat, drove back to Ms. Tweeten's residence for the exchange. (Tr. at 335-340.) The Appellant got out of the rear passenger seat and was met by members of Mr. Flyinghawk's family and Armando Amaya, a family friend and licensed bondsman employed by Stubstad Bonding. Mr. Amaya asked the Appellant for his identification or some paperwork. (Tr. at 123.) Upon hearing this, the Appellant jumped back into the car and hollered at Ms. Lorenzen, "go, go, go!" (Tr. at 124.) Ms. Lorenzen then spun the car around and hit Mr. Amaya in the leg. (Tr. at 124.) Mr. Amaya fired his handgun once at the front, left tire and deflated the tire, but the car sped away. (Tr. at 125.)

[¶ 21] Inside the car, the Appellant threatened to beat up and kill Mr. Flyinghawk because he believed Mr. Flyinghawk and his family had set him up. (Tr. at 341-342 & 198.) After changing the tire, the Appellant called for another

ride and Ms. Lorenzen took Mr. Flyinghawk to the jail. (Tr. at 202.)

[¶ 22] The Appellant got back in phone contact with Ms. Mitchell who was waiting for him at the jail. He screamed at her and demanded she give the money to Ms. Lorenzen. (Tr. at 253-254 & 263.) Against the directive of her boss, Ms. Mitchell gave the $500 to Ms. Lorenzen because she was concerned about reprisal from the Appellant because of the way he was acting. (Tr. at 265-266 & 280.)

[¶ 23] **LAW AND ARGUMENT**

[¶ 24] **I. The trial court appropriately denied Defendant/Appellant Troy Lehman's motion for judgment of acquittal on the charge of Kidnapping.**

[¶ 25] "To grant a judgment of acquittal, 'a trial court must find the evidence is insufficient to sustain a conviction of the offenses charged.'" State v. Maki, 2009 ND 123, ¶ 7, 767 N.W.2d 852 (quoting State v. Kautzman, 2007 ND 133, ¶ 10, 738 N.W. 2d 1 and State v. Delaney, 1999 ND 189, ¶ 4, 601 N.W. 2d 573). "On appeal, this Court reviews the evidence and all reasonable inferences in the light most favorable to the verdict, and will reverse only if no rational factfinder could have found the defendant guilty beyond a reasonable doubt." State v. Ness, 2009 ND 182, ¶ 11, 774 N.W. 2d 254. "In reviewing a question of sufficiency of the evidence under N.D.R.Crim.P. 29(a), we do not resolve conflicts in the evidence or reweigh the credibility of witnesses." Maki at ¶ 7 (quoting State v. Weaver, 2002 ND 4, ¶ 10, 638 N.W.2d 30).

[¶ 26] The Appellant contacted Mr. Kurt Schienbein, the manager of A-

Affordable Bail Bonds, to find out if he was looking for Mr. Daniel Flyinghawk. (Tr. at 274-275.) Mr. Schienbein never had any previous dealings with the Appellant but testified he told the Appellant "…if he brought him in, I would make sure he was taken care of." (Tr. at 277.) Mr. Schienbein further stated, "…from the get go, I didn't take him very serious because of just his attitude and the way he was talking." To Mr. Schienbein, it seemed that the Appellant was high on drugs. (Tr. at 279.) "I wasn't real sure if anything was going to become of this, just because of the conversation and the way Mr. Lehman handled himself on the phone. It was a pretty shaky conversation." (Tr. at 286.) In the light most favorable to the State, these conversations did not create an agency relationship. State v. Kingsley, 383 N.W. 2d 828, 829 (N.D. 1986).

[¶ 27] Mr. Schienbein went on to testify that generally when bounty hunters make an arrest, a certificate of detention along with the bill are then sent to his company. (Tr. at 273 & 278.) Instead, the Appellant called and demanded a cash payment be made to a female third-party. (Tr. at 278.) When Mr. Schienbein told him that he doesn't do business like that, the Appellant "…flipped out threatening me that he was going to get the money. He threatened to come to Brainerd and kick my ass…." (Tr. at 279-280.) In frustration, the Appellant told Mr. Flyinghawk "[w]ell, maybe I just let you go and say you ran away and I sprained my ankle, or whatever it is." (Tr. at 324.)

[¶ 28] The Appellant and Ms. Camille Lorenzen then drove around Fargo

for approximately two hours with Mr. Flyinghawk. (Tr. at 327.) During this time, he negotiated with Mr. Flyinghawk's family for the release of Mr. Flyinghawk in exchange for $800, the title to his vehicle, and/or two-eight balls of drugs. (Tr. at 39-40, 73-75 & 322-323.) With Mr. Flyinghawk tied to his seat, the Appellant and Ms. Lorenzen then drove back to the residence where Mr. Flyinghawk was abducted to make the exchange. (Tr. at 335-340.) If an agency relationship did exist with A-Affordable Bail Bonds, clearly these actions were not part of any agreement with nor sanctioned by Mr. Schienbein's company. No such exchange could ever have legally been made for Mr. Flyinghawk's freedom. The arrest warrant for Mr. Flyinghawk was issued by a judge, and its terms were not negotiable by the Appellant. In a candid statement to Ms. Lorenzen, the Appellant said "It's all about the money." (Tr. at 186.) As to the charge of Kidnapping, it certainly cannot be said that "no rational factfinder could have found the defendant guilty beyond a reasonable doubt." Ness, at ¶ 11. Indeed, a jury of 12 Cass County citizens did just that.

[¶ 29] The Appellant also argues that the word "abduct" was not defined for the jury. However, this is simply not true. While not in the original packet of jury instructions, the legal definition was read in open court, with the parties present and a written copy given to the jury by the trial court during deliberations. (Tr. at 445-446 and SA. at 10.) See N.D.C.C. 28-14-19. "The court may instruct the jury at any time after a trial begins and before the jury is discharged." N.D.R.Crim.P

30 (b)(2)

[¶ 30] **II. The trial court did not err by not instructing on a private citizen's right to make an arrest.**

[¶ 31] The Appellant argued during trial that he was a bounty hunter working for a fee, as an agent of A-Affordable Bail Bonds. (T. 430.) The Appellant did not argue nor ask for a jury instruction regarding a private citizen's authority to arrest. As such, the issue was not properly preserved for appellate review. N.D.Crim.P. 30(d)(1)(B).

[¶ 32] For the Court to take up this issue on appeal, it must find obvious error under N.D.Crim.P. 52 (b). "Our power to notice obvious error is exercised cautiously and only in exceptional situations where the defendant has suffered serious injustice." State v. Miller, 388 N.W.2d 522 (ND 1986) (citing State v. Johnson, 379 N.W.2d 291 (N.D.1986)).

[¶ 33] Section 29-06-20, N.D.C.C., provides:

A private person may arrest another:

1. For a public offense committed or attempted in the arresting person's presence.
2. When the person arrested has committed a felony, although not in the arresting person's presence.
3. When a felony has been in fact committed, and the arresting person has reasonable grounds to believe the person arrested to have committed it.

[¶ 34] In the case at hand, no public offense was committed in the Appellant's presence. The Appellant also did not have reasonable grounds to

believe that Mr. Flyinghawk committed a felony. The only testimony regarding this issue came from Kurt Schienbein, manager of A-Affordable Bonds. He stated that the Appellant called him to confirm that Mr. Schienbein was looking for Daniel Flyinghawk. (Tr. at 274.) There was no testimony at all that the Appellant was aware of what Mr. Flyinghawk's arrest warrant was for. Simple knowledge that he was wanted for missing a court appearance is insufficient to grant a private person the right to arrest under the above statute.

[¶ 35] Finally, no serious injustice was visited on the Appellant by the absence of this instruction. It is undisputed that the Appellant abducted Mr. Flyinghawk and tied him up with the string from his hooded sweatshirt. However, as the jury found, Kidnapping required proof that the Appellant "hold Daniel Flyinghawk for ransom or reward." (SA. at 12.) Even assuming for argument's sake that the Appellant legally abducted Mr. Flyinghawk either as a bounty hunter or a private citizen, the Appellant still could not have exchanged Mr. Flyinghawk's freedom for money or property. A private person's right to arrest is no shelter for the Appellant's crime of holding Mr. Flyinghawk for ransom or reward.

[¶ 36] **III. The guilty verdict for Kidnapping is not inconsistent with the acquittal for Attempted Theft by Deception.**

[¶ 37] This Court has defined "an inconsistent verdict as a situation where the jury has not followed the court's instructions and the verdicts cannot be rationally reconciled." State v. McClary, 2004 ND 98, ¶ 9, 679 N.W.2d 455.

"[L]ogical consistency in the verdict as between the several counts in a criminal information is not required. The verdict will be upheld despite the fact that the counts of which the defendant was convicted cannot be logically reconciled with the counts of which the defendant was acquitted." Id. at ¶ 10 (quoting from State v. Swanson, 225 N.W.2d 283, 284-85 (N.D.1974)).

[¶ 38] "Verdicts are legally inconsistent when proof of the elements of one offense negates a necessary element of another offense." State v. Coppage, 2008 ND 134, ¶ 17, 751 N.W.2d 254 (citing State v. Cole, 542 N.W.2d 43, 50 (Minn.1996)). "A jury is presumed to follow instructions given by the trial court." McClary at ¶ 17 (citing State v. Ellis, 2001 ND 84, ¶ 23, 625 N.W.2d 544).

[¶ 39] The trial court instructed the jury:

> Multiple Counts
>
> … Each count charges a distinct crime. You must decide each count separately. The Defendant may be found guilty or not guilty of any or all of the crimes charged in Counts 1 through 3. In other words, the mere fact that you find the Defendant guilty or not guilty on one charge has no bearing on whether the Defendant is guilty or not guilty on the other charges….

(SA. at 11.)

[¶ 40] The elements of Attempted Theft by Deception required that the Appellant "…knowingly attempted to deprive Daniel Flyinghawk, by deception, certain property, namely money and/or title to an automobile…." (SA. at 13.)

Since Mr. Flyinghawk was tied to his seat in the car and did not have the resources to purchase his own freedom, any money or property that was given to the Appellant could only have come from Mr. Flyinghawk's family. This element was difficult for the State to prove and the undersigned prosecutor unsuccessfully attempted to amend the language to include Mr. Flyinghawk's family as victims prior to closing arguments. (Tr. at 390-391.)

[¶ 41] The charge of Kidnapping, on the other hand, required only that the Appellant "…intend[ed] to hold Daniel Flyinghawk for ransom or reward." (SA. at 12.) Intending to hold one for ransom is clearly distinguishable from the above requirement of attempting to deprive Daniel Flyinghawk of his own money or property.

[¶ 42] In addition, the charge of Attempted Theft also requires the Appellant's conduct constitute, "…a substantial step toward depriving the owner of the subject automobile." (A. at 28.) As the trial court noted, "[t]he Kidnapping charge only requires an intent to hold Daniel Flyinghawk for ransom or reward. There is no requirement that there be a substantial step toward payment of the ransom or reward." (Appellant's Appendix [hereinafter "A"] at 31.) As such, the jury may have found the Appellant had the intent to hold Mr. Flyinghawk for ransom but did not take a substantial step to deprive as required by the Theft charge.

[¶ 43] Furthermore, several witnesses testified that negotiations were for money and/or drugs, not "depriving the owner of the subject automobile" as

required by the instruction given for Attempted Theft. (SA. at 13.) Mr. Flyinghawk qualified this issue during his testimony by stating that the title to his vehicle was offered to the Appellant as collateral for money he would later try to get for his release. (Tr. at 328 & 358.) As such, the jury likely concluded that the Appellant did not take a substantial step towards depriving Mr. Flyinghawk of his vehicle. The title was only collateral for the money and/or drugs that would be owed the Appellant upon Mr. Flyinghawk's release.

[¶ 44] The acquittal of Attempted Theft did not negate any elements of the crime of Kidnapping. The State may simply have been unable to meet its burden on all the required elements given in the jury instructions. The jury clearly followed the trial court's instruction to consider each charge separately and its verdict can be rationally reconciled.

[¶ 45] **CONCLUSION**

[¶ 46] WHEREFORE, the State respectfully requests that this Honorable Court affirm the verdicts in this case and deny Appellant's request for relief.

Respectfully submitted this 16th day of April, 2010.

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[¶ 47] **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on 16th day of April, 2010, to: Benjamin C. Pulkrabek at

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