

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,)	
)	Supreme Court No. 20110005
Plaintiff/Appellee,)	
)	
v.)	
)	McKenzie Co. No. 10-K-52
Steven Shoup,)	
)	
Defendant/Appellant.)	

APPEAL FROM THE CRIMINAL JUDGMENT AND COMMITMENT ENTERED BY
THE DISTRICT COURT FOR THE NORTHWEST JUDICIAL DISTRICT THE
HONORABLE GERALD RUSTAD PRESIDING ON DECEMBER 21, 2010

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

¶1 Steven Shoup's conviction should be reversed because the evidence is insufficient to sustain the guilty verdict.

STATEMENT OF THE CASE

¶2 Nature of the case, course of the proceedings, and disposition in the trial court.

¶3 This is an appeal from the McKenzie County Criminal Judgment and Commitment entered by the Honorable Gerald Rustad on December 21, 2010. (Appendix ("A") 2, Docket ("D") 45, A. 12-18).

¶4 A Complaint was filed February 10, 2010, charging Steven Shoup ("Shoup") with Aggravated Assault, a Class C Felony, in violation of N.D.C.C. 12.1-17-02. (A. 1, D. 1, A. 3). The Complaint was followed by the filing of a Criminal Information on July 21, 2010 (A. 1, D. 16, A. 4). A motion to amend information to correct a clerical error, and an Order granting the motion was filed December 21, 2010. (A. 1, D. 30, A. 5-7). A jury trial was held on December 16-17, 2010. (Trial Transcript, hereinafter "TT" Day 1 and Day 2). At the close of the State's case, Shoup made a Rule 29 Motion for Acquittal (TT. Day 1, p. 119, l. 9-12) and the Motion was denied (Id, l. 5-7).

¶5 The jury returned a guilty verdict to "the crime of assault as an included offense" (TT. Day 2, p. 93, l. 8-16), a class A misdemeanor in violation of N.D.C.C. § 12.1-17-01.1. Shoup was sentenced, in part, to serve one year incarceration. (Sentencing Transcript ("ST"), p. 10, l. 21). A Criminal Judgment was filed on December 21, 2010. (A. 2, D. 45, A. 8). A Notice of Appeal was timely filed on January 4, 2011. (A. 2, D. 47; A. 9). The Court assigned an attorney to represent Shoup on his appeal. (A. 2, D. 49)

FACTS OF CASE

¶6 At approximately 8:00 a.m., January 16, 2010, Deputy Sheriff Christian Jones (“Jones”) was dispatched to the McKenzie Health Center Hospital after receiving a report that an individual who had been assaulted was there. (Trial Transcript December 16, 2010 (“TT Day 1, p. 97, l. 19 – p. 98, l. 9). Upon arriving he met with Bruce Reichert (“Reichert”), the individual who reported being assaulted. (Id. p. 5 – 6). At the time, Reichert was a truck driver working for Power Fuels (Id., p. 36, l. 18 – 24) and was transferring water from the Mathistad well to the Kummer well. (Id. p. 40, l. 16 – 18).

¶7 Reichert informed Jones that “he went to a site and the way the vehicles were parked there that he – he couldn’t get in to unload his – his truck. So then he – one – one vehicle pulled out – out of the way, but there were still hoses laying across so he went and turned the pump off on the truck or reversed it so he could unhook the hose and move it out of the way so he could pull his truck forward, and then he was going to go back and hook it up”. (Id. p. 101, l. 20 – p. 102, l. 3). Reichert then informed Jones that “[A]t that time, he was approached and they [he and Shoup] got into a fight and they went out different ways, I mean they had ‘em in bear hugs and back and forth and – and then they ended the fight, which supposedly they agreed on that part of it, and he went to go pick up his glasses or his helmet and at that time he felt him – getting struck on the head from behind...” and that he had been struck with a Mag flashlight. (Id. l. 4 – 13). Initially, Reichert told Jones that “he doesn’t know what hit him in his nose” (Id. p. 101, l. 11 – 12) but that it was Steve Shoup who had struck him with the Maglite on the head. (Id. l. 18-12). Reichert was not rendered unconscious. (Id. p. 110, l. 7 – 9).

¶8 Jones then met with Steve Shoup who admitted that he had struck Reichert with a Mag flashlight. (Id. p. 103, l. 3 – 5). Jones testified that when he met with Shoup, “he had some scuff marks and bruises on his face” (Id. l. 10 – 11) and “cuts and scrapes on his face”. (Id. p. 111, l. 2). Jones testimony was that Shoup informed “he was up on top of the tanks, cause they’re up there to watch what’s going in the tanks...and then he heard his – his truck stop – or his pump stop and so then he went to the – he was in the front of the tanks so he went around the side and he could see that somebody was down by his truck and at that time they had unhooked – or switched his pump to reverse and then unhooked a hose and was moving the hose out of the way.” (Id. p. 107, l. 7 – 18). Shoup informed Jones that he had the flashlight because he was using it to see what was going on in the tanks. (Id. l. 20 – 21). Shoup told Jones that Reichert “attacked him punching and then they got into the same punching, kicking match and then he had – Mr. Reichert had Steven Shoup in a headlock and he used the flashlight to free himself”. (Id. l. 22 – 25). Jones retrieved the flashlight which had blood on it (Id. p. 105, l. 9 - 24), however there was no examination to determine whose blood it was. (Id. p. 111, l. 5 – 7).

¶9 Jones testified that Shoup had informed him that Reichert was using his right arm to hold him in a headlock and that Reichert was on Shoup’s left at the time. (Id. p. 115, l. 11 – p. 116, l. 9). Reichert told Jones that Shoup attacked him first while Shoup informed Jones that Reichert had attacked him first. (Id. p. 112, l. 6 – 12). There were no other witnesses to the incident. (Id. l. 15 – 17).

¶10 Dr. Gary Ramage (“Ramage”) was the emergency room physician who treated Reichert on January 16, 2010. (Id. p. 87, l. 18 – 22). Ramage testified that Reichert had an approximately seven inch laceration to the back of his head that was through all layers

of the scalp. (Id. p. 89, l. 12 – 24) that took a minimum of fourteen sutures to close. (Id. p. 90, l. 19). Ramage also testified that Reichert had a “non-displaced fracture of the nasal bone”. (Id. p. 91, l. 15 – 16). Ramage was not present at the altercation between Reichert and Shoup and did not observe who initiated the fight. (Id. p. 95, l. 18 – 23).

¶11 At trial, Reichert testified that approximately two weeks prior to the alleged assault, Shoup had backed into his truck, words were exchanged, and Shoup had blamed Reichert. (Id. p. 38, l. 2 – 21). Reichert testified he reported the incident to management. (Id. l. 22 – 24). Reichert testified that at a later date when someone had asked what he was going to do if Shoup should give him a hard time, he stated “I’d defend myself. He’d probably run out of – the cigarettes and the whiskey would probably get to him before I run out of air”. (Id. p. 39, l. 9 – 24).

¶12 Thomas Cheney (“Cheney”), a Power Fuels employee, testified that the morning of January 16, 2010, he heard Reichert say that “if he got in his way, he would choke the last Marlboro out of him and leave him in a pool of blood”. (TT Day 2, p. 12, l. 7 – p. 13, l. 1). Cheney further testified that Reichert was “agitated”, “was speaking loudly, mad that he had to work with [Shoup] that day”. (Id. p. 13, l. 8 – 16). Cheney also saw Shoup and described him that day as “timid” and “mellow”. (Id. p. 14, l. 13 – 15). Reichert later testified that “I was harassed by a man by the name of – of – he’s from Minnesota. And he was haranguing me that day about me and Mr. Shoup, and he kept haranguing me and I said keep him away from me. If he attacks me, I will whip the shit out of him. I said his cigarettes and his whiskey will get to him before my oxygen does”. (Id. p. 45, l. 16 – 22).

¶13 Reichert's testimony of the January 16, 2010 incident was that he was going to try to get Shoup to unhook the hose from his truck in order for Reichert to pull his truck up and then both could unload [water]. (Id. p. 47, l. 5 – 8). Reichert testified that he saw Shoup and waived his arms and yelled at him to get him to unhook his truck but he doesn't know if Shoup saw him. (Id. p. 48, l. 7 – 17). Reichert was in a hurry so he "went over to [Shoup's] truck and reversed the pump and pumped the water back into his truck" and then "went over and unhooked his hose". (Id. p. 48, l. 18 – p. 20, l. 2).

¶14 After unhooking Shoup's hose, Reichert testified he was struck across the bridge of the nose with a flashlight. (Id. p. 51, l. 2 – p. 52, l. 5). Reichert further testified that he did not hear anything before being struck (Id. p. 51, l. 18 – 20) but heard "something like don't touch my truck you son of a bitch" after being struck (Id. p. 52, l. 14 – 16), Shoup was standing there and "I retaliated" (Id. l. 24). Reichert's testimony was that he "reached out and grabbed Mr. Shoup by the head, got him under my arm – my left arm and I proceeded to pummel him with my right fist" (Id. p. 54, l. 2 – 4) with about "nine or ten" blows (Id. l. 5 – 7). Reichert described the fight as "we both were down and up and finally got up and he got away from me". (Id. l. 10 – 11). Reichert testified he thought the fight was done (Id. l. 24 – 25), he bent down to look for his glasses and Shoup struck him in the back of the head with a flashlight. (Id. p. 55, l. 21 – p. 56, l. 1). Reichert told Shoup he was going to file assault with a deadly weapon. (Id. l. 9 – 10), Shoup hung his hoses up and drove off (Id. l. 24 – 25).

¶15 Shoup testified that his problems with Reichert started about two weeks prior to the January 16, 2010 incident (Id. p. 19, l. 20 – 23) when he was helping another individual and Reichert backed into [Shoup's] truck. (Id. p. 20, l. 5 – 7). Shoup took a photograph

and telephoned dispatch informing them that “this guy just come on the job site and he started yelling and screaming...” (Id. l. 8 – 10). Shoup testified that dispatch told him to stay away from [Reichert] because “he was threatening me then”. (Id. l. 17 – 18).

Dispatch made it a point to send Shoup and Reichert to different job sites to keep them away from each other. (Id. p. 21, l. 5 – 7). Shoup testified that after the dispatcher was replaced, he and Reichert were “back together again”. (Id. l. 13 – 15).

¶16 Shoup testified that on January 16, 2010, there was no hurry to unload as Reichert had previously testified. (Id. p. 25, l. 9 – p. 26, l. 5). Shoup further testified that he was watching his water fill up in the tank...when [Reichert] shut it off and I went down to find out why he shut off my tank”. (Id. p. 36, l. 7 – 11). Reichert then initiated contact with Shoup by hitting him in the face. (Id. p. 28, l. 15 – 18). Shoup did not attack Reichert. (Id. p. 36, l. 14 – 15). After hitting Shoup in the face, Shoup testified that he “grabbed me and threw me on the ground, and put me in a head lock”, that Shoup could not escape or retreat, and that Reichert hit him. (Id. p. 29, l. 3 – 19). As a result of Reichert hitting him in the face, Shoup had cuts and was bleeding. (Id. p. 30, l. 5 – 13).

¶17 Shoup had his flashlight during the time Reichert had him in a head lock and was hitting him, and the blood on the flashlight could have been Shoup’s. (Id. p. 31, l. 11 – 16). Shoup testified that when Reichert had him in the head lock he was also hitting Shoup in the stomach. (Id. p. 33, l. 20). Shoup was striking back at Reichert “trying to get him to let go, so I just took the flashlight ... and started swinging over the top of my head ...” (Id. p. 34, l. 23 – p. 35, l. 1). Shoup did not know exactly where he hit Reichert with the flashlight. (Id. p. 35, l. 4 – 15). Shoup could not escape, tried to use other

means, and hit him with the flashlight because he “had to get him off of me”. (Id. p. 35, l. 25 – p. 36, l. 4). Once he was able to free himself, Shoup left the scene. (Id. l. 6 – 9).

¶18 Shoup was found guilty of assault as an included offense. (Id. p. 93, l. 8 – 15).

Shoup appealed the guilty verdict.

LAW AND ARGUMENT

¶19 Jurisdiction. 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 provides 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.

¶20 ISSUE: Steven Shoup’s conviction should be reversed because the evidence is insufficient to sustain the guilty verdict.

¶21 The appellate standard of review regarding a claim of insufficiency of evidence is well-established. In State v. Schmeets, 2007 ND 197, ¶8, 742 N.W.2d 513, the court stated: “When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction.” State v. Igou, 2005 ND 16, ¶5, 691 N.W.2d 213. The defendant bears the

burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. Id. "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. Knowels, 2003 ND 180, ¶6, 671 N.W.2d 816.

¶22 In the case at hand, in order to convict Shoup for the crime of Assault, it is necessary that the State prove beyond a reasonable doubt all essential elements of the offense as well as the non-existence of a defense, an issue raised by Shoup at trial. The evidence presented at trial is insufficient to sustain a conviction of Assault.

¶23 N.D.C.C. § 12.1-17-01.1, Assault, provides:

"A person is guilty of a class A misdemeanor, except if the victim is under the age of twelve years in which case the offense is a class C felony, if that person:

1. Willfully causes substantial bodily injury to another human being; or
2. Negligently causes substantial bodily injury to another human being by means of a firearm, destructive device, or other weapon, the use of which against a human being is likely to cause death or serious bodily injury."

N.D.C.C. § 12.1-17-01.1.

¶24 At trial, Shoup admitted that he had struck Reichert in the side of the head with a flashlight. (TT. p. 423, l. 22-23) however, Shoup argued the affirmative defense that he did so in self-defense. N.D.C.C. §12.1-05-03 provides:

"Self-defense.

A person is justified in using force upon another person to defend himself against danger of imminent unlawful bodily injury, sexual assault, or detention by such other person, except that:

1. A person is not justified in using force for the purpose of resisting arrest, execution of process, or other performance of duty by a public servant under color of law, but excessive force may be resisted.

2. A person is not justified in using force if:

a. He intentionally provokes unlawful action by another person to cause bodily injury or death to such other person; or

b. He has entered into a mutual combat with another person or is the initial aggressor unless he is resisting force which is clearly excessive in the circumstances. A person's use of defensive force after he withdraws from an encounter and indicates to the other person that he has done so is justified if the latter nevertheless continues or menaces unlawful action."

N.D.C.C. §12.1-05-03.

¶25 Once Shoup presented evidence that he acted in self-defense, the state was required to prove, beyond a reasonable doubt, as an additional element of the offense charged, that Shoup was not acting in self defense and Shoup did not have the burden of proof as to this defense. "Under Section 12.1-01-03, N.D.C.C., the State must prove beyond a reasonable doubt each element of the charged offense, which includes proof of 'the nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue.' N.D.C.C. §12.1-01-03(1)(e). A defendant is entitled to a jury instruction on a legal defense if there is evidence to support it." State v. McIntyre, 488 N.W.2d 612 (N.D. 1992) citing State v. Thiel, 411 N.W.2d 66 (N.D. 1987). In the case at hand, the trial court gave the appropriate jury instruction on Deng's legal defense. (T. Day 2, p. 55, l. 24 – p. 58, l. 5).

¶26 These instructions to the jury included that "[O]ne is not justified in using force if one has entered into a mutual conduct – or combat with another person or is the initial aggressor, unless resisting force that is clearly excessive in the circumstances". (Id. p.

56, l. 10 -13). In the case at hand Shoup's testimony was that Reichert was the initial aggressor, that Reichert had attacked Shoup when he had gone down to find out why Reichert had shut off and disconnected his hose. Shoup further testified that Reichert had him in a headlock and was hitting him in the head and stomach resulting in cuts and scrapes to Shoup's face. Reichert testified that he had Shoup in a headlock and had hit him in the head nine or ten times. Shoup was unable to free himself and he was unable to escape or retreat. In order to free himself and avoid a further beating from Reichert, and avoid imminent unlawful bodily injury, Shoup believed it was necessary to strike Reichert with the flashlight. The trial court instructed the jury "[R]eason – reasonableness of the accused's belief. The Defendant's conduct is to be judged by what the Defendant in good faith honestly believed and had reasonable grounds to believe was necessary to avoid apprehended death or great bodily injury". (Id. p. 56, l. 14-18). Shoup's testimony shows that his belief that he needed to strike back at Reichert to free himself to avoid further bodily injury was reasonable a belief. Shoup provided sufficient evidence that he was acting in self-defense and that the force he used was reasonable and justified under the circumstances. The State failed to provide evidence beyond a reasonable doubt of the nonexistence of that defense.

¶27 In this case, Shoup's testimony sufficiently raised, and supports the defense of self-defense and the State's evidence was insufficient to support the conviction.

CONCLUSION

¶28 The evidence presented at trial was insufficient to support the verdict of guilty and the verdict should be reversed.

Respectfully submitted this 28th day of March, 2011.



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