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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff / Appellee, v. Steven Shoup, Defendant / Appellant.	Supreme Court No. 20110005 McKenzie County Crim. No. 27-10-K-52

Appeal from Criminal Judgment and Commitment

Dated December 21, 2010

District Court, Northwest Judicial District

McKenzie County, North Dakota

The Honorable Judge Gerald Rustad, Presiding

BRIEF OF APPELLEE

Dennis Edward Johnson #03671
McKenzie County State's Attorney
P.O. Box 1260
Watford City, ND 58854
dej@ruggedwest.com

Attorney for Appellee

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STATEMENT OF THE CASE

[1] This is an appeal from a jury verdict, finding beyond a reasonable doubt that the defendant, Steven Shoup, was guilty of the criminal offense of assault. The jury's verdict was reached after a two-day trial on December 17, 2010, stemming from a charge that, on January 16, 2010, Shoup assaulted one Bruce Reichert by striking him on the back of the head with a Maglite® or similar flashlight, causing a laceration through all layers of the scalp approximately seven inches in length. Shoup testified at trial that the victim had him in a headlock and he believed that he had to strike him with a flashlight in order to reach safety, but Mr. Reichert's testimony was that the altercation between Shoup and himself had ended and he was picking up his glasses when Shoup resumed the violence by striking him on the back of his head with the metal flashlight.

[2] Shoup now appeals, presenting only one issue for review: Whether his conviction should be reversed because the evidence is insufficient to sustain the guilty verdict. (Appellant Br., ¶ 20.) Because competent evidence upon which a reasonable jury could conclude beyond a reasonable doubt that the defendant was guilty was presented at trial, his conviction must be affirmed on appeal.

LEGAL ARGUMENT

A. Standard of review

[3] Shoup correctly states but incorrectly applies the standard of review applicable to this case. This Court has held that, on a challenge of the sufficiency of evidence supporting a criminal conviction, the "defendant bears the burden of showing the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt." State v. Igou, 2005 ND 16, ¶ 5, 691 N.W.2d 213 (citing State v. Wilson, 2004 ND 51, ¶ 6, 676 N.W.2d 98) (emphasis supplied). "A conviction rests upon insufficient evidence only when no rational factfinder 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. Ibid. (citing State v. Knowels, 2003 ND 180, ¶ 6, 671 N.W.2d 816) (emphasis supplied). As more recently explained by this Court:

> Appellate review of the sufficiency of the evidence for a jury verdict is very limited. 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… When considering insufficiency of the evidence, we will not reweigh conflicting evidence or judge the credibility of witnesses… A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty.

State v. Wanner, 2010 ND 121, ¶ 9, 784 N.W.2d 143 (quoting State v. Dahl, 2009 ND 204, ¶ 6, 776 N.W.2d 37) (emphasis supplied).

[4] It is settled law that the jurors are the final judges of the weight and credibility of evidence. State v. His Chase, 531 N.W.2d 271, 274 (N.D. 1995). See also Weight and

Credibility, N.D.J.I. § K-5.04 (1998). The jury is entitled to believe or not believe any evidence before it. It is not the place of counsel or the courts to invade the province of the jury and argue on appeal that it should have assigned more weight or credibility to certain evidence than it did in reaching its verdict. Instead, if there was any evidence to support the jury's verdict then it must not be disturbed on appeal.

B. Elements of assault

[5] "No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt." N.D.C.C. § 12.1-01-03(1). The non-existence of a defense is an element of the offense when the evidence gives rise to a reasonable doubt on the issue. Ibid. However, any defense that is specifically designated an affirmative defense is not an element of the offense but rather must be proved by the defendant by a preponderance of the evidence. N.D.C.C. § 12.1-01-03(3). Self-defense is a defense, not specifically designated an affirmative defense, and therefore its nonexistence is an element of the offense when the evidence gives rise to a reasonable doubt on the issue. State v. Olander, 1998 ND 50, ¶ 20, 575 N.W.2d 658 (citing State v. White, 390 N.W.2d 43, 45 at n. 1 (N.D. 1986)).

[6] This Court's task on appeal in this matter is to determine whether competent evidence supported each element of the crime of assault, including the nonexistence of the justification of self-defense if evidence giving rise to it was presented at trial. A person commits the class A misdemeanor offense of assault when he "[w]illfully causes substantial bodily injury to another human being." N.D.C.C. § 12.1-17-01.1. The elements of the offense are (1) that the defendant acted willfully and (2) thereby caused (3) substantial bodily injury (4) to another human being. Competent evidence was

presented on each of these elements at trial, and the defendant does not argue that any of these elements was not supported by sufficient evidence.

[7] The only issue that the defendant identifies regarding insufficiency of the evidence is whether the nonexistence of self-defense was supported by sufficient evidence to sustain the jury guilty verdict. As discussed infra, it was and the verdict as a whole must be affirmed.

C. Self-defense

[8] Shoup suggests that, "[o]nce [he] 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 [he] was not acting in self defense." (Appellant Br., ¶ 25.) He concedes that the jury instructions given by the district court were appropriate. Ibid. No argument has been made that evidence was improperly admitted or withheld from the jury, nor has there been any argument that the defendant was denied a fair trial. The ultimate, deciding question in this appeal, then, is whether some competent evidence that was presented at trial tends to support the non-existence of the justification of self-defense.

[9] Shoup's brief retells his own testimony at trial, that the victim was the initial aggressor and had Shoup in a headlock, from which he "believed it was necessary to strike Reichert with the flashlight." (Appellant Br., ¶ 26.) He argues that this belief was reasonable and reached in good faith. Ibid. He concludes that "[t]he State failed to provide evidence beyond a reasonable doubt of the nonexistence of that defense." Ibid.

[10] The defendant's argument misses the mark. The State bears the burden to prove the elements of the offense beyond a reasonable doubt, including the nonexistence

of the legal defense. See Proof Beyond a Reasonable Doubt, N.D.J.I. § K-1.1 (2004).; Olander, 1998 ND 50 at ¶ 20. However, the phrase "evidence beyond a reasonable doubt" does not refer to any legal standard. Rather, the jury judges the credibility and weight of the evidence in reaching its verdict. His Chase, 531 N.W.2d at 274; Weight and Credibility, N.D.J.I. § K-5.04. When a jury reaches a verdict of guilty upon appropriate jury instructions and admissible evidence, as it did here, that verdict stands to mean that the State has proved its case beyond a reasonable doubt. N.D.J.I. § K-1.1 ("[I]f you have a reasonable doubt that the Defendant committed the crime, then you must find the Defendant not guilty.") (emphasis supplied). The question of sufficiency of evidence does not ask whether a reasonable doubt exists, as the existence of reasonable doubt is purely a jury decision.

[11] As explained supra, this Court's task is not to reweigh the credibility of the witnesses. Wanner, 2010 ND 121 at ¶ 9. Even if evidence—such as Shoup's testimony as discussed in his brief—exists which, if the jury believed it, would have enabled the jury to find reasonable doubt and reach a not guilty verdict, that does not affect the outcome on appeal. Instead, if there was any competent evidence presented at trial that supports the jury's verdict, then the same must be affirmed. Wanner, 2010 ND 121 at ¶ 9.

[12] Shoup does correctly state that "[his] testimony sufficiently raised[] and supports the defense of self-defense." (Appellant Br., ¶ 27.) However, this statement in no way supports his conclusion that "the State's evidence was insufficient to support the conviction." Ibid. It should not be surprising that a criminal defendant would offer testimony that, if the jury believes it, would earn an acquittal rather than a conviction.

Other evidence was presented at trial, however, and the jury's verdict indicates that not all of Shoup's testimony was believed. The jury's guilty verdict reflects one of two things: Either it did not believe that Shoup reasonably believed that his use of force was necessary or it believed the victim's version of the events leading up to Shoup striking him with the flashlight. The jury was entitled to believe and weigh the evidence as its members deemed fit. His Chase, 531 N.W.2d at 274; Weight and Credibility, N.D.J.I. § K-5.04. Its verdict cannot be overturned simply because there is a conflict of evidence. Wanner, 2010 ND 121 at ¶ 9.

[13] Shoup concedes in his brief that he hit Mr. Reichert, the victim in this case, with a flashlight. (Appellant Br., ¶ 26.) The testimony at trial reflects a physical altercation in which both Shoup and Mr. Reichert participated. However, Mr. Reichert testified that "he thought the fight was done. Id., ¶ 14 (citing Trial Tr., Day 1, 54:24-25). He further testified that he was looking for his glasses when "Shoup struck him in the back of the head with a flashlight." Ibid. (citing Trial Tr., Day 1, 55:21-56:1).

[14] Mr. Reichert's testimony during the prosecution's case-in-chief was as follows: He arrived at an oilfield location and needed to get Shoup's attention to disconnect a hose from Shoup's truck so that he could unload the water he was delivering and make another run. (Trial Tr., Day 1, 48:4-49:4.) He was unable to get Shoup's attention, so he personally reversed the pump on Shoup's truck and then disconnected the hose from the tank it was connected to. Id. at 49:7-50:5. It was necessary to disconnect the hose so that Mr. Reichert could get to the tanks that he needed to unload into. Id. at 50:19-22. The next thing he knew after setting the hose down was that he had been

struck. Id. at 51:1-8. He believes he was struck across the bridge of his nose with a flashlight, breaking his glasses. Id. at 51:25-52:7. Shoup then yelled at Mr. Reichert while his nose was bleeding severely from the blow, provoking him to fisticuffs. Id. at 53:8-54:7. Eventually, the altercation came to an end and neither Shoup nor Mr. Reichert was continuing to attack the other. Id. at 54:24-55:18. Mr. Reichert then started looking on the ground for his glasses. Id. at 55:19-21. As he was looking for his glasses on the ground, Shoup struck him on the back of his head with the flashlight. Id. at 55:22-56:1. After striking Mr. Reichert, Shoup said to him, "There you go, you son of a bitch." Id. at 56:2-3. After exchanging more words, Shoup left the scene and Mr. Reichert contacted the dispatchers at his employer to request law enforcement be contacted and charges of assault and battery filed. Id. at 56:22-57:10.

[15] Viewing Mr. Reichert's trial testimony in the light most favorable to the jury verdict leads to only one conclusion: Shoup was not justified in his use of force. Force is not justified by self-defense if the defendant "has entered into a mutual combat with another person … unless he is resisting force which is clearly excessive in the circumstances." N.D.C.C. § 12.1-05-03(2)(b). Similarly, force is not justified by self-defense if the conflict has ended and the defendant nevertheless pursues his victim as a "persistent aggressor." State v. Lehman, 175 N.W. 736, 740-741 (N.D. 1919) (holding that self-defense was not applicable when the victim initially attacked the defendant but later retreated into his house, followed by the defendant who entered by force and shot the victim to death). If the defendant was out of danger at the time he used force, his privileged use of self-defense had terminated. Id. at 740. In this case, the victim testified

both that Shoup initiated the physical violence and that, after the altercation had ended, Shoup struck him in the back of the head with a flashlight while he was searching for his glasses on the ground.

[16] In deciding whether Shoup acted in self-defense, the jury must view the circumstances from his standpoint to determine if they are sufficient to create in his mind an honest and reasonable belief that the use of force is necessary to protect himself from imminent harm. State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983) (citing State v. Hazlett, 113 N.W. 374, 380-381 (N.D. 1907); State v. Wanrow, 559 P.2d 548, 558-559 (Wash. 1977); State v. Painter, 620 P.2d 1001, 1003-1004 (Wash.App. 1980); People v. Robinson, 261 N.W.2d 544, 552 (Mich.App. 1977). The reasonableness of Shoup's conduct is solely a jury question. State v. Cox, 532 N.W.2d 384, 388 (N.D. 1995). When the sufficiency of evidence relating to self-defense is questioned on appeal, this Court has long respected that the applicability of the defense is a jury question. A "jury may [] completely reject[] the possible inference … that [the defendant] acted in self-defense, and this is within the province of the jury." State v. Jensen, 282 N.W.2d 55, 62 (N.D. 1979).

[17] The jury's guilty verdict stands unequivocally for the jury's having found that Shoup's use of force in striking Mr. Reichert with a flashlight was not justified and that his belief it was justified was either not reasonable or not honest. The jury was entitled to reject the defendant's testimony if it did not find it credible or assign weight to it and, in this case, the jury did reject at least some of Shoup's testimony and the inference that he acted in self-defense. From the jury's verdict, it is clear that the jury

believed, as Mr. Reichert testified, that Shoup was the initial aggressor and his use of self-defense was not privileged in the circumstances or, instead, that the combat had ended and Shoup unexpectedly attacked Mr. Reichert from behind while he was searching for his glasses, without any privilege of self-defense. The jury alone has the authority to judge the weight and credibility of the evidence without its judgment being second-guessed on appeal. The jury has spoken in this case and its verdict is supported by the victim's testimony, to which no objection was offered at trial. (Trial Tr., Day 1, 48:4-57:10.)

CONCLUSION

[18] When a fight has ended and one's opponent is in the process of picking up his belongings, it is not legally justified to strike him in the back of the head with a metal flashlight. There is competent evidence that that is exactly what Shoup did and, therefore, the jury's verdict was based upon sufficient evidence. There is no error and the verdict should not be disturbed on appeal. The district court's criminal judgment and conviction should be affirmed.

Dated this 21st day of April, 2011.

_/s/ Dennis Edward Johnson_____
Dennis Edward Johnson #03671
McKenzie County State's Attorney
P.O. Box 1260
Watford City, ND 58854-1260
(701) 444-2211
(701) 444-2847 fax
dej@ruggedwest.com

CERTIFICATE OF SERVICE

[19] I hereby certify that on the 21st day of April, 2011, I served the foregoing document on the following by electronic mail transmission, per N.D. Sup. Ct. Admin. Order 14(D):

Mark T. Blumer
mark_myhrelaw@qwestoffice.net

Dated this 21st day of April, 2011.

_/s/ Dennis Edward Johnson_____
Denis Edward Johnson
dej@ruggedwest.com