

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff and Appellee,)	Supreme Court No. 20120015
vs.)	District Ct. No. 09-2011-CR-00937
)	
Alois Vetter,)	
)	
Defendant and Appellant.)	

Appeal from the Criminal Judgment and Commitment dated January 10, 2012,
East Central Judicial District
the Honorable Steven E. McCullough, Presiding

APPELLEE’S BRIEF

Cherie L. Clark, NDID #06306
Reid A. Brady, NDID #05696
Assistant State’s Attorneys
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorneys for Plaintiff/Appellee

[¶1] TABLE OF CONTENTS

Paragraph No.

TABLE OF CONTENTS	¶ 1
TABLE OF AUTHORITIES.....	¶ 2
STATEMENT OF ISSUE	¶ 3
STATEMENT OF CASE.....	¶ 5
STATEMENT OF FACTS.....	¶ 9
STANDARD OF REVIEW.....	¶ 32
LAW AND ARGUMENT.....	¶ 35
Sufficient evidence allowed the jury to reasonably infer the Defendant – in his humvee – overpowered and trampled the victim and, accordingly, used a dangerous weapon in committing aggravated assault.	¶ 36
CONCLUSION	¶ 50
CERTIFICATE OF SERVICE.....	¶ 52

[¶2] **TABLE OF AUTHORITIES**

Paragraph No.

STATE CASES:

City of Jamestown v. Neumiller, 2000 ND 11, 604 N.W.2d 441 ¶ 44

State v. Bauer, 2010 ND 109, 783 N.W.2d 21 ¶ Passim

State v. Bitz, 2008 ND 202, 757 N.W.2d 565..... ¶ 39

State v. Clinkscales, 536 N.W.2d 661 (N.D. 1995) ¶ 33

State v. O’Toole, 2009 ND 174, 773 N.W.2d 201 ¶ 34, 40

State v. Schweitzer, 510 N.W.2d 612 (N.D. 1994) ¶ 33

State v. Sheldon, 312 N.W.2d 367 (N.D.1981)..... ¶ 33

STATUTES:

N.D.C.C. § 12.1-01-04 ¶ Passim

N.D.C.C. § 12.1-32-02.1 ¶ 6, 37

OTHER AUTHORITIES:

Webster’s Encyclopedic Unabridged Dictionary (2d 1996) ¶ 40, 41

[¶3] STATEMENT OF ISSUE

[¶4] Whether sufficient evidence allowed the jury to reasonably infer the Defendant – in his humvee – overpowered and trampled the victim and, accordingly, used a dangerous weapon in committing aggravated assault.

[¶5] STATEMENT OF CASE

[¶6] On October 20, 2011, a jury found the Defendant guilty of aggravated assault and reckless endangerment. (R. at Doc. ID# 110.) Because the State had alleged that the Defendant's humvee was a dangerous weapon used in the aggravated assault, the jury made a special finding that the Defendant used a dangerous weapon in committing the offense. (App. at 7; R. at Doc. ID# 110.) The district court imposed a sentence that included the minimum mandatory two year's incarceration under N.D.C.C. § 12.1-32-02.1(1)(b), which applies to when a class C felony offender inflicts injury using a dangerous weapon. (App. at 9.)

[¶7] The Defendant appeals to this Court. (App. at 15.) Challenging the jury's special finding of a dangerous weapon, he contends his humvee should not have been considered a dangerous weapon. (Defendant's Brief at ¶¶ 3, 14.)

[¶8] The State argues that sufficient evidence allowed the jury to reasonably infer the Defendant used his humvee to overpower and trample the victim and, accordingly, used a dangerous weapon in committing aggravated assault. The State requests this Court affirm the district court's judgment.

[¶9] STATEMENT OF FACTS

[¶10] A. The Circumstances

[¶11] On the evening of February 18, 2011, the Defendant was driving his “toy” – a 6,534 pound, 6.5 foot tall humvee – checking on one of the many rental properties he owned in West Fargo. (Tr. 407:6-7; 189:25-190:8; 190:23-191:2; 370:13-371:8; 402:6-403:8; 264:18-20; 167:4-14.) The Defendant drove onto Second Avenue West – a street lined with multiple units he owned. (Tr. 264:18-20; 167:4-14.) It was at least the third time that day that the Defendant had travelled by his properties. (Tr. 402:6-403:21; 410:1-4.)

[¶12] Brian Hemphill meanwhile was visiting one of the Defendant’s rental properties – 611 Second Avenue West. Hemphill had recently moved out of 613 Second Avenue West, after several landlord-tenant disputes with the Defendant. (Tr. 262:13-16; 255:13-22; Defendant’s Exhibit 1.) The Defendant and Hemphill did not like each other. (Tr. 255:13-22; Tr. 358:16-23.) The Defendant thought Hemphill “was just a real asshole.” (Plaintiff’s Exhibit 24 at 55:36-55:41.) On this evening, Hemphill, who had been drinking, learned that the Defendant had been repeatedly driving by the residence. (Tr. 154:8-14; 263:15-264:24.) Hemphill went out to confront the Defendant about the Defendant’s driving. (Tr. 263:15-264:24.)

[¶13] B. The Defendant in his Humvee vs. Hemphill on foot

[¶14] Once outside, Hemphill saw the Defendant driving toward 611 Second Avenue West. (Tr. 264:18-20.) Hemphill walked out into the street. (Tr.

265:16-19.) The Defendant stopped his humvee right in front of Hemphill and yelled at Hemphill. (Tr. 121:7-12; 265:18-19; 267:4-7.)

[¶15] The Defendant then drove forward, forcing Hemphill to backpedal. (Tr. 268:23-24; 298:25-299:2; 121:23-122:3.) At some point, Hemphill could not get out of the Defendant's humvee's path. (Tr. 269:2-18; 122:4-7.) Nor could Hemphill keep up. (Tr. 269:2-18; 300:9-37; 122:4-7.) Yet the Defendant continued driving, and Hemphill fell. (Tr. 300:9-37; 122:4-7.)

[¶16] Aaron Knutson and Jennifer McFarling heard the Defendant accelerate his humvee and drive over Hemphill. (Tr. 300:18-22; 122:19-123:7.) The Defendant screamed an obscenity as he was driving over Hemphill. (Tr. 312:20-23; 123:2-3.) Both a front tire and a rear tire of the Defendant's humvee trampled Hemphill. (Tr. 123:5-6; 300:23-301:4.) Knutson immediately called 911; the time was approximately 7:17 p.m. (Tr. 123:9-10; 135:2-5.)

[¶17] Hemphill was rushed to a local hospital. (Tr. 151:23-152:10.) Hemphill suffered a chest injury; Blood was pooling in his chest cavity. (Tr. 155:24-156:6.) A doctor described the chest injury as one involving high impact and consistent with a high velocity impact or a crushing force. (Tr. 158:10-13.) In addition to the chest injury, Hemphill suffered multiple broken ribs, a broken facial bone, a lacerated ear, and abrasions. (Tr. 157:3-17.)

[¶18] West Fargo Police obtained from hospital staff the clothes that Hemphill had been wearing when the Defendant drove over Hemphill. (Tr. 179:13-23.) The clothes had a tire track imprinted on them. (Tr. 187:4-20.)

[¶19] C. The Defendant's Stories

[¶20] While Hemphill was being taken to the hospital, the Defendant meanwhile drove home. (Tr. 375:2-4.) At approximately 7:32 p.m. – about fifteen minutes after Knutson's 911 call - the Defendant called police dispatch. (Tr. 135:23-25.) During the recorded call, the Defendant claimed “a bunch of guys attacked” his humvee from the “front, and the side, [and] the back” (Plaintiff's Exhibit 3 at 0:40-0:58); one of the attackers went down to tamper with a tire on the humvee (Plaintiff's Exhibit 3 at 1:58-2:04); and the Defendant did not know whether the Defendant had struck someone with his humvee (Plaintiff's Exhibit 3 at 2:10-2:18).

[¶21] Just a few minutes after the Defendant's call, West Fargo Police Officer Ryan Denis arrived at the Defendant's residence. (Tr. 136:1-21.) Officer Denis spoke with the Defendant who claimed a group of persons – four, the Defendant believed – had attacked his humvee (Tr. 138:13-139:5); the attackers “bang[ed]” on the humvee (Tr. 139:10-15); at one point, the Defendant lost sight of one of the attackers and suspected the attacker was trying to damage a tire on the humvee (Tr. 139:21-23); and the Defendant did not back up because he did not know if anyone was behind his humvee (Tr. 140:4-8). Officer Denis inspected the Defendant's humvee and saw no damage. (Tr. 137:6-23.)

[¶22] A few hours later, the Defendant called West Fargo Police Sergeant Jason Dura. (Tr. 314:15-24.) During the recorded call, the Defendant said a man walked in front of the Defendant's humvee and pointed his thumbs down

(Plaintiff's Exhibit 22 at 2:33-2:37); the Defendant drove slowly and "pushed him back, pushed him back, [and] pushed him back" (Plaintiff's Exhibit 22 at 2:45-2:51); after the Defendant looked to the right to go around the man, the Defendant realized the Defendant had put the humvee in neutral (Plaintiff's Exhibit 22 at 3:00-3:08); the humvee stopped (Plaintiff's Exhibit 22 at 3:08-3:10); the Defendant shifted back into gear and did not see the man anymore (Plaintiff's Exhibit 22 at 3:10-3:14); and the Defendant did not know whether the man tried to go around the Humvee when it went into neutral (Plaintiff's Exhibit 22 at 3:15-3:23).

[¶23] When Sgt. Dura said that the Defendant would be considered an aggravated assault suspect, the Defendant stated if that was all he would be charged with, "it's not the worst." (Plaintiff's Exhibit 22 at 1:25-1:40.) The Defendant added that if the Defendant drove over the man, the Defendant would be surprised if the man lived. (Plaintiff's Exhibit 22 at 4:05-4:18.)

[¶24] Three days later, West Fargo Police Detective Derek Cruff interviewed the Defendant. (Tr. 327:15-22.) During the recorded interview, the Defendant claimed a man walked up to the Defendant's humvee, slapped the humvee, and, with his chest, bumped the humvee (Plaintiff's Exhibit 24 at 4:25-4:37); a second man came out about three steps ahead of the man who walked up to the humvee (Plaintiff's Exhibit 24 at 12:59-13:07); the second man crossed the street and, "in the [Defendant's] mind," was behind the humvee (Plaintiff's Exhibit 24 at 13:07-13:20); the Defendant drove forward, forcing the first man to

backpedal (Plaintiff's Exhibit 24 at 21:06-21:19); the Defendant used his humvee to push the first man back for a ways and the man was "kind of" on the humvee's hood¹ (Plaintiff's Exhibit 24 at 37:20-37:40); the Defendant thought he could drive around the first man, turned, and inadvertently shifted the humvee out of gear (Plaintiff's Exhibit 24 at 29:37-29:45); the Defendant had his hand on the humvee's shifter because if the man would have fallen, the Defendant would have had to immediately stopped (Plaintiff's Exhibit 24 at 35:33-35:44); the Defendant "panicked a little bit" (Plaintiff's Exhibit 24 at 5:17-5:19) but also did not panic and never panics (Plaintiff's Exhibit 24 at 58:52-59:04); the Defendant looked up after shifting and did not see the first man (Plaintiff's Exhibit 24 at 5:27-5:31); the Defendant thought that the first man was tampering with a tire on the humvee (Plaintiff's Exhibit 24 at 5:32-5:38); and the Defendant sped away (Plaintiff's Exhibit 24 at 5:33-5:43).

[¶25] During the interview, the Defendant also asserted the Defendant was not afraid of Garner Gallant – the tenant at 611 Second Avenue West (Plaintiff's Exhibit 24 at 1:00:00-1:00:20; Tr. 358:10-15); the incident did not stem from a landlord-tenant dispute and occurred because the man tried to stop the Defendant in a drug area (Plaintiff's Exhibit 24 at 8:24-8:40); the Defendant had no idea who the man in front of the Defendant's humvee was (Plaintiff's Exhibit 24 at 4:15-4:23); the Defendant had been told in early February that Hemphill had left the

¹ Det. Cruff recited what witnesses reported the Defendant did, and the Defendant confirmed, answering, "Okay, yup." (Plaintiff's Exhibit 24 at 37:20-37:40);

area (Plaintiff's Exhibit 24 at 7:36-7:50); and now that the Defendant knew "it was [Hemphill] that [the Defendant] hit," the Defendant was more relieved because Hemphill was a bully (Plaintiff's Exhibit 24 at 33:30-33:42).

[¶26] D. Charges and Trial

[¶27] The State charged the Defendant with aggravated assault and reckless endangerment. (App. 7.) The State alleged, in the aggravated assault charge, that the Defendant used a dangerous weapon: his humvee. (App. 7.)

[¶28] A jury trial began in October of 2011. During trial, the State presented testimony from numerous witnesses – including Hemphill, Knutson, McFarling, Officer Denis, Sgt. Dura, and Det. Cruff. The State also offered numerous exhibits – including the multiple recorded statements of the Defendant.

[¶29] During the defense case, the Defendant testified. He claimed he was afraid of the Second Avenue West neighborhood because it was a "drug area." (Tr. 371:17-19; 395:6-7.) He admitted, though, that he regularly went and checked on his properties on Second Avenue West and that on February 18, 2011, he travelled by 611 Second Avenue West three times – including two times during the evening. (Tr. 402:6-403:21; 410:1-4.)

[¶30] The Defendant claimed the incident began when one man came and stood "in front of the road" (Tr. 370:10-19); a second man – with what appeared to be a red toolbox - came out and stood next to the first man (Tr. 370:19-21); the two men faced each other and talked (Tr. 371:14-15); the man with the toolbox then quickly walked back to behind the humvee, while the first man remained

approximately thirty to forty feet in front of the humvee (Tr. 371:6-15); the Defendant kept driving, and the first man started walking toward the humvee (Tr. 371:19-21); the first man dropped his hands on the hood of the humvee and laid his shoulder into the humvee (Tr. 371:24-25); the Defendant kept driving forward (Tr. 372:1); the Defendant inadvertently shifted the humvee out of gear (Tr. 373:12); after shifting back into gear, the Defendant looked up and no longer saw the first man (Tr. 373:21-24); the Defendant thought the first man was tampering with a tire (Tr. 374:1-13); and the Defendant drove off (Tr. 374:16-19). The Defendant also testified he did not believe he drove over Hemphill. (Tr. 411:3-7.)

[¶31] The jury returned verdicts of guilty on both charges. (R. at Doc. ID# 110.) The jury also made a finding that the Defendant used a dangerous weapon in committing aggravated assault. (R. at Doc. ID# 110.)

[¶32] STANDARD OF REVIEW

[¶33] The Defendant's sole argument is that "[a] vehicle should not be considered a 'dangerous weapon' within the meaning laid out in N.D.C.C. § 12.1-01-04(6)." (Defendant's Brief at ¶¶ 3, 14.) The Defendant's argument is a challenge to the jury's finding that the Defendant used a dangerous weapon while committing aggravated assault. Despite the Defendant's attempt to characterize his argument as one involving a legal issue, this Court has repeatedly explained it involves a factual issue: "Whether the defendant was in possession of a dangerous weapon while committing the offense charged is a question for the trier of fact." State v. Bauer, 2010 ND 109, ¶ 7, 783 N.W.2d 21; State v. Clinkscales, 536 N.W.2d 661, 665-66 (N.D. 1995); State v. Schweitzer, 510 N.W.2d 612, 614 (N.D. 1994); State v. Sheldon, 312 N.W.2d 367, 371 (N.D.1981).

[¶34] Thus when a defendant appeals challenging a jury's dangerous weapon finding, the sufficiency of evidence standard applies. State v. Bauer, 2010 ND 109, ¶ 9, 783 N.W.2d 21. Under that standard, this Court determines whether competent evidence existed allowing the jury to draw an inference reasonably tending to prove guilt. Id. at ¶ 7 (citations omitted). The evidence must be viewed in the light most favorable to the prosecution, and the prosecution must be given the benefit of all inferences reasonably to be drawn in its favor. State v. O'Toole, 2009 ND 174, ¶ 8, 773 N.W.2d 201 (citation omitted). The Court neither reweighs the credibility of witnesses nor resolves conflicts in evidence. Id. (citation omitted).

[¶35] LAW AND ARGUMENT

[¶36] Sufficient evidence allowed the jury to reasonably infer the Defendant – in his humvee – overpowered and trampled the victim and, accordingly, used a dangerous weapon in committing aggravated assault.

[¶37] The Defendant challenges the jury’s finding that the Defendant used a dangerous weapon while committing aggravated assault. The jury’s finding triggered the minimum mandatory two years’ imprisonment under N.D.C.C. § 12.1-32-02.1(1)(b), which applies when an offender who commits a class C felony “inflicts ... bodily injury upon another ... with a dangerous weapon.”

[¶38] The Defendant correctly notes N.D.C.C. § 12.1-01-04(6) is the starting point for the definition of “dangerous weapon”:

‘Dangerous weapon’ means, but is not limited to, any switchblade or gravity knife, machete, scimitar, stiletto, sword, or dagger; any billy, blackjack, sap, bludgeon, cudgel, metal knuckles, or sand club; any slingshot; any bow and arrow, crossbow, or spear; any weapon which will expel, or is readily capable of expelling, a projectile by the action of a spring, compressed air, or compressed gas including any such weapon, loaded or unloaded, commonly referred to as a BB gun, air rifle, or CO2 gun; and any projector of a bomb or any object containing or capable of producing and emitting any noxious liquid, gas, or substance.

[¶39] Although the list of items under N.D.C.C. § 12.1-01-04(6) does not include a “humvee,” the list is not exhaustive: The statute provides that a dangerous weapon “is not limited to” the listed items. So a factfinder must use common knowledge and experience in determining if an item not listed in the

statute was, in fact, used as a dangerous weapon. See generally State v. Bauer, 2010 ND 109, ¶ 9, 783 N.W.2d 21 (noting “[t]here was testimony from which the jury could draw an inference reasonably tending to show that [the buckknife or folding knife] was ‘a dangerous weapon or other weapon’”); State v. Bitz, 2008 ND 202, ¶ 10, 757 N.W.2d 565 (recognizing “the desirability of the jury’s employment of common knowledge and reason in reaching a verdict”).

[¶40] Common knowledge and reason allowed the jury to “use any reasonable definition[s]” of “dangerous” and “weapon.” See State v. O’Toole, 2009 ND 174, ¶ 12, 773 N.W.2d 201 (indicating – in reviewing the sufficiency of evidence of a reckless endangerment conviction - the jury could use “any reasonable definition of the word ‘create’”). A reasonable definition of “dangerous” thus would include “able or likely to cause physical injury.” Webster’s Encyclopedic Unabridged Dictionary 505 (2d 1996). And a reasonable definition of “weapon” would include “anything used against an opponent, adversary, or victim.” Webster’s Encyclopedic Unabridged Dictionary 2153 (2d 1996).

[¶41] Combining the two reasonable definitions allowed the jury to use, as a definition of “dangerous weapon,” “anything, able or likely to cause physical injury, used against ... a victim.” Further, using the combined definition, allowed the jury to consider whether an item, depending on how it was “used,” “became a weapon.” See Webster’s Encyclopedic Unabridged Dictionary 2153 (2d 1996); see also State v. Bauer, 2010 ND 109, ¶ 9, 783 N.W.2d 2 (noting the defendant

acknowledged the [buckknife or folding knife] – an item not listed in N.D.C.C. § 12.1-01-04(6) - “became a weapon” and upholding the sufficiency of the jury’s determination the knife was a dangerous weapon or other weapon).

[¶42] The Defendant’s actions show the jury reasonably found the Defendant’s humvee became a dangerous weapon because of how the Defendant used it. The Defendant used his humvee to toy with and overpower Hemphill, forcing Hemphill to backpedal to a point where Hemphill could not escape. (Tr. 268:23-269:18; 298:25-299:2; 121:23-122:7; 300:9-37.) The Defendant then used his Humvee to crush Hemphill, with a front and a back tire. (Tr. 123:5-6; 300:23-301:4.) The Defendant even screamed an obscenity as his humvee trampled Hemphill. (Tr. 312:20-23; 123:2-3.) These actions supported a reasonable inference the Defendant used his humvee as a dangerous weapon.

[¶43] The characteristics of the humvee further supported the jury’s finding that the Defendant used the humvee as a dangerous weapon. The Defendant’s humvee – standing about 6.5 feet tall and weighing more than 6,500 pounds - was a massive, powerful machine. (Tr. 189:25-190:8; 190:23-191:2.) And the Defendant knew that. Indeed, he called it his “toy” and said that he would be surprised if a person would survive after being run over by it. (Tr. 407:6-7; Plaintiff’s Exhibit 22 at 4:05-4:18.) When considered with the Defendant’s actions (using the humvee to overpower and trample Hemphill), the humvee’s characteristics bolstered the reasonable inference the Defendant used his humvee as a dangerous weapon.

[¶44] Although the Defendant testified he did not use his humvee as a dangerous weapon, the jury did not have to accept the Defendant's testimony. See City of Jamestown v. Neumiller, 2000 ND 11, ¶ 12, 604 N.W.2d 441. Indeed, the Defendant made incredible claims both before and during trial.

[¶45] First, the Defendant gave at least three conflicting stories about what had happened: (1) a bunch of guys, up to four, attacked and banged on the Defendant's humvee and the Defendant did not know whether anyone was behind his humvee (Tr. 138:13-139:15); (2) two men walked out and one man crossed the street and was possibly behind the humvee (Plaintiff's Exhibit 24 at 4:25-4:37; 12:59-13:20); and (3) two men stood and conferred in front of the Defendant's humvee and then one of the men, carrying a toolbox, rushed behind the Defendant's humvee (Tr. 370:10-371:15). The Defendant's stories thus varied greatly. And the jury reasonably rejected his claims about what had happened.

[¶46] Second, the Defendant claimed he did not recognize Hemphill. (Plaintiff's Exhibit 24 at 4:15-4:23.) But Hemphill was directly in front of the Defendant's humvee. (Tr. 121:7-12; Tr. 265:18-19; Tr. 267:4-7; Plaintiff's Exhibit 24 at 4:25-4:37.) And the Defendant used his humvee to push Hemphill back a considerable distance. (Tr. 268:23-24; Tr. 298:25-299:2; Tr. 121:23-122:3; Plaintiff's Exhibit 22 at 2:45-2:51.) Further, Hemphill just happened to be a person the Defendant despised. (Plaintiff's Exhibit 24 at 55:36-55:41.) The jury thus reasonably rejected the Defendant's claim he did not recognize Hemphill.

[¶47] Third, the Defendant claimed he was afraid and was just trying to

escape a drug-infested neighborhood. (Tr. 371:17-19; 395:6-7.) Yet the Defendant not only owned multiple units in the neighborhood, but he regularly checked on them and drove by them twice the evening of the incident. (Tr. 167:4-14; 402:6-403:21; 410:1-4.) Plus the Defendant said that he was not afraid of the tenant at 611 Second Avenue West and alleged that he thought Hemphill had left the area. (Plaintiff's Exhibit 24 at 1:00:00-1:00:20; Tr. 358:10-15; Plaintiff's Exhibit 24 at 7:36-7:50.) The jury, accordingly, reasonably rejected the Defendant's claim about being afraid.

[¶48] Fourth, the Defendant claimed that he did not drive over Hemphill. (Tr. 411:3-7.) But the Defendant admitted that he used his humvee to force a man back (Plaintiff's Exhibit 22 at 2:45-2:51); multiple witnesses saw the Defendant drive over Hemphill (Tr. 300:18-22; 122:19-123:7); a physician described Hemphill's chest injury as consistent with a crushing force (Tr. 158:10-13); and a tire track was imprinted on Hemphill's clothes (Tr. 187:4-20). The jury thus reasonably rejected the Defendant's claim he did not drive over Hemphill.

[¶49] In short, the jury reasonably rejected the Defendant's claims and reasonably found that the Defendant used his humvee as a dangerous weapon in committing aggravated assault.

[¶50] CONCLUSION

[¶51] Sufficient evidence supports the jury's finding the Defendant used a dangerous weapon in committing aggravated assault. The State requests this Court affirm the district court judgment.

Dated this 24th day of July, 2012.

Cherie L. Clark, NDID #6306
Reid A. Brady, NDID # 5696
Assistant State's Attorneys
Attorneys for Plaintiff-Appellee

[¶52] CERTIFICATE OF SERVICE

[¶53] A true and correct copy of the foregoing document was sent by email on the 24th day of July, 2012, to: Daniel E. Gast at Dan@redriverlaw.com.

Cherie L. Clark, NDID #06306